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November 12, 2015

The Honorable Robert Bishop
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, DC 20510

Re: Opposition to H.R. 3764 (Bishop)

Dear Chairman Bishop:

Your bill, H.R. 3764, the Tribal Recognition Act of 2015, seeks to reform the process by which Indian tribes are recognized by repealing regulations recently adopted by the Bureau of Indian Affairs (the "BIA"), adopting criteria for recognition, and making recognition dependent on an act of Congress. We agree that the recognition process is broken, and we fully support a Congressional fix. However, we think H.R. 3764 misses the mark. The problem is confusion of two unrelated purposes of recognition–determination of eligibility for federal benefits and determination of sovereign powers–and conflation of these under the single concept of "recognition." We believe that any fix needs to separate these two purposes and establish appropriate criteria for each.

Currently, federal statutes say little about tribal recognition. In 1994, Congress passed the List Act, which requires the BIA to maintain a list of tribes "recognize[d] to be eligible for" tribal benefits. 25 U.S.C. §479a-1. The federal government provides certain services and financial benefits to Indian tribes, and the BIA, in administering these programs, needs to determine which tribes are eligible for these services and benefits. Thus, on the surface this statute concerns a federal benefit program and has nothing to do with a determination of sovereignty over land.

However, once the BIA lists a tribe as eligible to receive federal benefits, the BIA treats the tribe as a sovereign entity. This is true even if the tribe does not own any lands. Further, if the BIA later takes lands into trust for that tribe, the BIA will claim that the tribe has gained sovereignty over the newly purchased lands displacing the long-standing sovereignty of the state. Thus, the BIA has conflated

the process of determination of eligibility for federal benefits with the process of determining sovereignty over lands. However, that is not the law and has never been the law.

A state has jurisdiction over all lands within its borders except those lands over which the federal government reserved jurisdiction when it admitted the state into the Union and those lands over which the state has since ceded its jurisdiction back to the federal government. See *Fort Leavenworth Railway Co. v. Lowe*, 114 U.S. 525 (1885).

When the federal government acquires lands within a state, all it acquires is title to the land, not sovereignty over the land. As a recent government issued summary of the law states, "Acquisition of land and acquisition of federal jurisdiction over that land are two different things." GAO, Office of the General Counsel, Principles of Federal Appropriations Law, 3rd Ed. 2008, Vol. III, p. 13-101. The federal government has no power to divest a state of territorial jurisdiction. *Fort Leavenworth* expressly negates the claim that the federal government can strip states of jurisdiction, calling such an act of "disseisin." Id. at 538.

This law applies to Indian lands as well as to non-Indian lands. See, for example, *Silas Mason Co. v. Tax Comm.*, 302 U.S. 186 (1937); and *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930). Also compare *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) [Alaska could enforce anti-fish-trap law on Indian reservation over which federal government did not reserve jurisdiction on state's admission] and *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) [Alaska lacked jurisdiction to enforce anti-fish-trap laws on Indian reservation over which the federal government did reserve jurisdiction at time of state's admission.] As in *Metlakatla Indian Community*, most Indian reservations were established before admission of the state in which they sit, and thus fit the first exception as lands over which the federal government reserved jurisdiction upon admission of the state into the Union.

Under these well-established laws, lands newly acquired by a tribe after a state is formed have a very different status than do historical Indian lands. Most Indian reservations were established before admission of the state, and the state took sovereignty subject to the already recognized sovereignty of the Indian government. That is not the case with lands procured by a tribe after the state was admitted to the Union. When a tribe acquires title to land that has been under state jurisdiction, the tribe takes title subject to the pre-existing sovereignty of the

state. Similarly, when the Federal government accepts title in trust for an Indian tribe, the federal government takes title subject to the state's sovereignty.

Thus, recognition of a tribe's eligibility for benefits never serves to divest a state of sovereignty over lands within the state's borders. Nor can acceptance of lands in trust. And the BIA's conflation of the two purposes of recognition has resulted in *illegal* actions.

Statutory reform is needed to halt these illegal actions. Determination that a tribe has sovereignty over certain lands has to be based on historical events, and is not subject to administrative discretion. Sovereignty is based on (1) either (a) reservation of Indian sovereignty at the time of admission of a state or (b) later cession by the state of its sovereignty over a certain parcel of land and (2) continuous exercise of that sovereignty over the land by the Indian tribe. If the tribe abandoned the land, jurisdiction would retrocede to the state. These well-established jurisdictional concepts need to be codified in order to put a stop to illegal and improper actions of the BIA.

That said, a tribe should not need to establish current sovereignty over land to qualify as eligible to receive federal benefits. The problem is that qualification cannot be based on race. However, we believe that a body of Indians in a particular area with a sufficient historical presence in that area should be able to qualify to receive federal benefits even if they no longer retain sovereignty over any particular parcel of land without such a grant of benefits violating equal protection. We further believe that the BIA has sufficient expertise to develop those qualifications and make that determination. However, such a determination should no longer be mistakenly interpreted as a "recognition" of the tribe's sovereignty.

We appreciate your consideration of these comments.

Sincerely,

Alan Titus

cc. The Honorable Dianne Feinstein
The Honorable Barbara Boxer
The Honorable Raúl Grijalva

The Honorable Don Young
The Honorable Raul Ruiz
The Honorable John Barrasso
The Honorable Jon Tester