

**S. 279, S. 790, AND S. 832**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON INDIAN AFFAIRS**  
**UNITED STATES SENATE**  
ONE HUNDRED SIXTEENTH CONGRESS  
FIRST SESSION

—————  
MAY 1, 2019  
—————

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## **S. 279, S. 790, AND S. 832**

WEDNESDAY, MAY 1, 2019

U.S. SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:30 p.m. in room 628, Dirksen Senate Office Building, Hon. John Hoeven, Chairman of the Committee, presiding.

### **OPENING STATEMENT OF HON. JOHN HOEVEN, U.S. SENATOR FROM NORTH DAKOTA**

The CHAIRMAN. We will call this hearing to order. Good afternoon. Thanks to all of our witnesses for being here.

Today the Committee will receive testimony from our witnesses on the following bills: S. 279, the Tribal School Federal Insurance Parity Act; S. 790, a Bill to Clarify Certain Provisions of Public Law 103–116, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 and for other purposes; and S. 832, a Bill to Nullify the Supplemental Treaty Between the United States of America and the Confederated Tribes and Bands of Indians of Indians of Middle Oregon, Concluded on November 15th, 1865.

On January 30, 2019, Senators Thune and Rounds introduced S. 279, the Tribal School Federal Insurance Parity Act. Senators Udall, Heinrich, Barrasso, and Tester are co-sponsors.

S. 279 amends Section 498 of the Indian Health Care Improvement Act and allows for tribal grant schools operating grants under the Tribally Controlled Schools Act of 1988 to be eligible for participation in a Federal employee health benefits and Federal employees group life insurance programs. According to the Office of Personnel Management, consultation with the Departments of Interior and Health and Human Services, tribal grant schools are ineligible to receive coverage from the Federal employee health benefits and the Federal employee group life insurance programs without a change to the Indian Health Care Improvement Act that explicitly includes schools operating grants under the Tribally Controlled Schools Act of 1988.

However, BIE-operated and BIE contract schools are eligible to receive coverage from the Federal Employee Health Benefits and the Federal Employees Group Life Insurance programs, thus creating a disparity. Currently, there are 128 tribal grant schools in 23 States across the Country. Staff from these schools cannot re-

ceive benefits from the Federal employee health benefits and the Federal employee group life insurance group programs.

By not being able to access these programs, tribal grant schools are using education dollars to provide health insurance coverage to its employees. Allowing participation in these Federal insurance programs will allow tribal grant schools to use education funds for recruiting and retaining educators and providing supplies and other needed resources.

On March 13th, 2019, Senator Graham introduced S. 790. Senators Burr and Tillis have joined as co-sponsors. Twenty-six years ago, Congress passed the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993. Under this law, the Catawba Tribe, in exchange for reservation lands, Federal and State money payments, and other Federal services, agreed to drop a land claims suit it had filed in Federal court. This settlement act provided that the tribe would be subject to the laws of the State of South Carolina in regard to conducting gaming within the State.

Through a series of court challenges, the State of South Carolina successfully asserted its rights under the settlement act to prohibit the tribe from conducting any gaming within its borders. S. 790 will provide authority for the Secretary of the Interior to take land into trust on behalf of the tribe for the purpose of gaming in the bordering State of North Carolina. The bill explicitly details the parcel of land where gaming will take place and requires that the tribe conduct their gaming activities within the Federal regulatory framework of the Indian Gaming Regulatory Act.

Finally, the Committee will hear testimony on S. 832, a Bill to Nullify the Supplemental Treaty Between the United States of America and the Confederated Tribes and Bands of Indians of Middle Oregon, Concluded on November 15th, 1865. On March 14th, 2019, Senator Merkley introduced S. 832. Senator Wyden joined as a co-sponsor.

In 1855, the Warm Springs Tribe entered into a treaty with the Federal Government that ceded the tribe's territorial interests in the State of Oregon in exchange for consideration. It included a reservation and monetary compensation. In 1865, the Superintendent of Indian Affairs for Oregon drafted a supplemental treaty which provides the tribes rights under the original 1855 treaty. The supplemental treaty prohibited the rights of tribal members to hunt and fish on their own lands, as well as required tribal members to seek permission from the superintendent when they chose to leave the reservation.

S. 832 will nullify this supplemental 1865 treaty and leave the 1855 as the only recognized and legal treaty between the United States and the Confederated Tribes and Bands of Indians of Middle Oregon.

With that, I will turn to Vice Chairman Udall for his opening statement.

**STATEMENT OF HON. TOM UDALL,  
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you very much, Chairman Hoeven, for calling today's legislative hearing.

The bills before us work to uphold the Federal Government's trust and treaty responsibilities by providing tribal communities with access to tools and resources they need to thrive. S. 279, the Tribal School Federal Insurance Parity Act, that I co-sponsored with Senator Thune, would ensure that all three types of Bureau of Indian Education schools have equal access to much-needed Federal tools and resources to recruit and retain teachers.

Employees working at federally-operated BIE schools and BIE schools operated by tribes through 638 contracts are already eligible to pay into and use the Federal Employee Health Benefits and Federal Employees Group Life Insurance programs. But under current law, BIA 297 grant schools aren't eligible. Access to these Federal programs allows direct service and 638 BIE schools to offer teachers low-cost, high value benefit packages, a hiring incentive that can be a major factor in convincing educators to choose BIE over other school systems.

This will make sure 297 grant schools have those same incentives in their recruitment tool kits. S. 297 would also free up funding at these grant schools for other critical resource needs, like updated text books, healthier food services and gifted and talented programs. All add value, improve Native student outcomes and further increase the appeal of working at BIE schools for new educators looking to start careers and families. Recruitment and retention of qualified teachers in schools serving Native communities is one of my top priorities.

Last month, Senator Tester and I reintroduced the Native Educator Support and Training Act, or the NEST Act. This bill would establish scholarships, loan forgiveness plans and professional development programs for educators who commit to teaching in Native communities. Both S. 279 and the NEST Act represent important steps to improve Native educational outcomes and address the teacher shortages impacting Native communities across Indian Country. I hope we can move them swiftly to markup.

Turning briefly to Senator Graham's bill, S. 790, and Senator Merkley's bill, S. 832, both bills address issues specific to their tribal constituents. Our hearing today will allow the Committee to gather feedback on these bills. I look forward to learning more about the issues they propose to address.

Thank you, again, Mr. Chairman, for calling this hearing.

The CHAIRMAN. Senator Graham, rumor has it you have something else going on today. So I'm going to turn to you for your statement.

**STATEMENT OF HON. LINDSEY GRAHAM,  
U.S. SENATOR FROM SOUTH CAROLINA**

Senator GRAHAM. Well, compared to where I've been, this is a real pleasure. We had a little contentious hearing in Judiciary. I'm honored to be here and thank you both for allowing me to make a brief introduction.

I want to introduce Chief Bill Harris from the Catawba Indian Nation in Rock Hill, along the South Carolina and North Carolina border. He was elected chief in 2011. He was involved in tribal governance long before that, fighting for the individual rights of the Catawba people in tribal government for years. He serves on boards and commissions including the Indian Health Services Direct Service Tribes Advisory Committee, the United South and Eastern Tribes Board of Directors, and the South Carolina Native American Advisory Committee.

He comes from a long tradition of service and is deeply rooted in the Catawba culture. His grandfather was a Catawba chief and his grandmother was a legendary Catawba potter who taught Chief Harris the traditional Catawba art form which he continues to practice to this day.

S. 790 is a bill I've introduced with Senators Tillis and Burr from North Carolina. As I said, the Catawba Nation covers both South Carolina and North Carolina. In 1993, Congress passed the Catawba Indian Land Claims Settlement Act, to settle the Catawba land claims for the restoration of their recognition as a tribe, working out terms of the settlement with South Carolina and different terms with North Carolina.

It authorized, on a mandatory basis, the establishment of a reservation of up to 4,200 acres. Under that legislation, the Federal Government's trust relationship with the tribe was restored, but the effect of that legislation was to leave the tribe impoverished, without claim to their Native land and without a means to financially support themselves.

More than 25 years later, the tribe's reservation is only 1,000 acres, the tribe is locked in poverty and the tribe's understanding that it had negotiated the right to acquire land within its congressionally-established service area in North Carolina has been disputed, largely due to poor drafting of the act. I am from South Carolina. Nobody, nobody, objects to the Catawbas having land in North Carolina and establishing a gaming operation, as long as it consistent with the law.

All the key negotiators, including members of Congress, the Interior Secretary, North Carolina tribal officials involved in negotiating the Catawba Settlement Act, understand that the tribe could make mandatory acquisitions in its North Carolina service area, and have signed written statements to that effect. That is what was intended.

However, the language of the Act has been deemed ambiguous on the Tribe's right to make limited land acquisitions in that State. Senators Bird, Tillis and myself have introduced legislation to right that wrong. The bill specifically gives the Secretary this authority to make that decision. In a sense, this legislation is a technical correction to allow the tribe to do what Congress envisioned, nothing more, nothing less. This legislation alone will not correct the long history of the Catawba Indians being taken for granted; however, it will be a giant step forward to empower them.

Our government has promised a bright future for the Catawba people, but they have been deprived of that future through a tortured legal process that has left them with little to show for giving up their land claims and treaty rights. And they did, they gave it



up. They did not get what was promised in return. S. 790 will right that wrong.

So to both of you, I have never seen anything as difficult as land issues involving Native Americans. This is really a complex area of the law. I just appreciate both the Democrats and Republicans on this Committee listening to Chief Harris about trying to right a wrong that was created 25 years ago.

Thank you all very much.

The CHAIRMAN. Thank you, Senator Graham.

Senator Merkley, likewise I would offer you an opportunity to give a statement concerning your bill today.

**STATEMENT OF HON. JEFF MERKLEY,  
U.S. SENATOR FROM OREGON**

Senator MERKLEY. Thank you so much, Mr. Chairman and Vice Chairman Udall. I am so pleased you have included this bill to right a historic wrong regarding the fraudulent 1865 treaty. Senator Wyden is a full partner in this, a co-sponsor, and Congressman Greg Walden. The Warm Springs Reservation is within his district in Oregon. He is introducing a companion bill on the House side.

A big welcome to Council Member Ron Suppah of the Confederated Tribes of the Warm Springs Reservation, who has come here to testify in support of this bill. He has served more than a decade on the council, he has served as the chairman. He has worked to expand communications with the neighboring tribes and with his membership. He is of the Tyghpum band of the Itcheeskin speaking band that signed the 1855 treaty, the legitimate treaty. He also serves as a keeper of longhouse songs. Welcome, great to have you here.

Over 150 years ago, the Tribes of Middle Oregon negotiated and signed a treaty, the 1855 treaty, ratified in 1859, that served as the bedrock of the trust relationship between the Warm Springs Tribes and the U.S. Government. It established what is today known as the Warm Springs Reservation and required that the remaining lands held by the tribes be ceded to the U.S.

As part of negotiations, the tribes insisted upon retaining their off-reservation hunting, fishing and gathering rights, which they have continued to exercise to this day. Ten years after the initial treaty, J.W. Perit Huntington, an unscrupulous superintendent of Indian Affairs for Oregon, drew up a supplemental treaty that would have forced the tribes on the Warm Springs Reservation to give up their off-reservation rights and agree to a hall pass system to even leave the reservation. This is now known as the 1865 treaty.

Huntington secured signatories to the treaty through fraud and deception. Despite ample historical records that conclusively show the 1865 treaty was a fraud, it still was on the books.

Senator Hatfield, as his last piece of legislation, when he was wrapping up his 30 years of Senate service, attempted to disallow this treaty, to cancel this treaty. But that work now falls to us today. So this bill, S. 832, will nullify the fraudulent 1865 treaty and correct this historic wrong.

I would like to note that the Oregon Attorney General's office has issued a legal opinion stating unequivocally that the treaty is unenforceable. I have a letter to enter for the record from her. I also have a statement from the Oregon Governor that notes that it is the declared policy of the Office of the Governor of the State of Oregon that the fraudulent Huntington treaty is to be regarded as a nullity with no effect whatsoever. It is past time to get this done.

The CHAIRMAN. Without objection.

Senator MERKLEY. There is bipartisan support from Oregon, and I appreciate the Committee considering this legislation. Thank you.

The CHAIRMAN. Thank you, Senator Merkley. Senator Cortez Masto, any opening statements before we proceed to our witnesses?

All right. With that, we will turn to our witnesses. First, we will hear from Mr. John Tahsuda, who is Principal Deputy Assistant Secretary for Indian Affairs, Department of Interior; then from the Honorable William Harris, Chief of the Catawba Indian Nation, Rock Hill, South Carolina; then the Honorable Ron Suppah, Council Member, Confederated Tribes of Warm Springs, Oregon, welcome. And then from Ms. Cecelia Fire Thunder, President, Oglala Lakota Nation Education Coalition, from Martin, South Dakota. Thank you for being here.

With that, we will turn to Assistant Secretary Tahsuda.

**STATEMENT OF JOHN TAHSUDA, III, PRINCIPAL DEPUTY ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR**

Mr. TAHSUDA. Good afternoon, Chairman Hoeven, Vice Chairman Udall, members of the Committee. My name is John Tahsuda, I am the Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior. Thank you for the opportunity to present this statement on behalf of the Department regarding the following bills: S. 279, the Tribal School Federal Insurance Parity Act; S. 832, a bill to nullify the Supplemental Treaty between the United States of America and the Confederated Tribes and Bands of Indians of Middle Oregon, concluded on November 15, 1865, and S. 790 a bill to clarify certain provisions of Public Law 103-116, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993.

First, I would like to address S. 279, the Tribal School Federal Insurance Parity Act. This would amend the Indian Health Care Improvement Act to allow tribal grant schools operating under the Tribally Controlled Grant Schools Act, to participate in the Federal Employees Health Benefits Program. Presently, Public Law 100-297 prohibits the vast majority of tribally controlled schools from participating in the FEHB program which can create significant financial strains on schools and disadvantaged school leaders in recruiting talented educators.

Prior to 2010, tribal employers in general lacked access to FEHB benefits for their employees. With the passage of 25 U.S.C. 1647(b), under the Indian Health Care Improvement Act, tribal employers and urban Indian organizations carrying out programs pursuant to Title V of the Indian Health Care Improvement Act, or under the Indian Self-Determination and Education Assistance Act, became eligible to participate in the FEHB program. Participation in the

FEHB program reduced costs associated with providing employees benefits, as well as aided these organizations in their recruitment and retention efforts.

Currently, all BIE-operated schools participate in the FEHB. Additionally, four BIE-funded tribally-operated schools also participate in the FEHB program, because these schools are pursuant to the Indian Self-Determination and Education Assistance Act. Under 25 U.S.C. 1647(b), tribal employers operating under the Indian Self-Determination and Education Assistance Act self-determination contracts and Title V contracts are eligible to purchase FEHB coverage for their employees. However, that does not extend eligibility to the tribally controlled schools under the Tribally Controlled Grant School Act. Therefore, 126 of the Bureau of Indian Education's tribally controlled schools that operate under the Grant School act may not purchase FEHB coverage under 25 U.S.C. 1647(b).

The Department understands and supports the efforts of its tribal partners in seeking a legislative fix that will allow parity for schools operating under the Tribally Controlled Schools Act. The continued inability of these schools to access FEHB creates unfair budgetary constraints and exacerbates an already difficult task in recruiting highly-qualified teachers in often geographically isolated schools.

As such, the Department supports S. 279, the Tribal School Federal Insurance Parity Act, and looks forward to increasing parity for tribally controlled grant schools. I would also like to add personally a thank you to Cecelia Fire Thunder for her tireless efforts in trying to resolve this problem on behalf of tribal schools.

Next, I would like to address S. 832, the Confederated Tribes and Bands of Middle Oregon, today known as the Confederated Tribes of the Warm Springs Reservation. They signed a treaty on June 25th of 1855, ceding most of their aboriginal territory to the United States. This area now makes up most of what we know as Central Oregon. On November 15th, 1865, they were forced into signing a supplemental treaty which purported to restrict them from leaving the reservation without written permission from the agency superintendent. These restrictions are unreasonable restrictions on the rights of the Warm Springs people. We are aware of no other tribe that is currently subject to such a restrictive treaty. As such, the Department has no objection to S. 832.

Finally, S. 790, a bill to clarify certain provisions of Public Law 103-116, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993. This provides congressional authorization for the Secretary of the Interior to take certain land into trust on behalf of the Catawba Indian Nation for the purpose of conducting a gaming facility. Generally, the bill authorizes the tribe to own and operate a gaming facility on land identified in the bill and requires that gaming facility to operate in accordance with the Indian Gaming Regulatory Act.

Currently, Section 14 of the Catawba Settlement Act states that the Indian Gaming Regulatory Act shall not apply to the Tribe, and with regard to gaming, gives the Tribe only those rights and responsibilities set forth in the settlement agreement with the State of South Carolina. The bill is intended to make the IGRA applica-

ble to the Tribe, including the important protections and authorities that it provides for tribes generally, such as the option of entering into a tribal-State Class III gaming compact with the State, enactment of tribal gaming ordinances and the use of net gaming revenues.

However, we have several technical suggestions to offer. First, the language in Section 1(b) focuses on IGRA's application to gaming facility, but does not address the application of IGRA's provisions to the Tribe. As indicated previously, the exclusion provision at Section 14 of the underlying Settlement Act specifically applies to the Tribe. To address this, the bill could be amended to clarify that IGRA is applicable to the Tribe, that only land identified in S. 790 would be gaming-eligible for the tribe, and that the land acquired under the bill's provisions would qualify as Indian lands under IGRA.

In addition, the Settlement Act at Section 12(m) exempts the Tribe from the provisions of 25 C.F.R. Part 151. This is the Department's fee-to-trust regulation which we rely on for making discretionary trust acquisitions. The language of Section 1(c) of S. 790 implies that the acquisition of land for trust purposes by the Secretary would be discretionary, rather than a mandatory acquisition. The bill could be amended to indicate whether, if this is a discretionary acquisition, the Secretary should apply 25 C.F.R. Part 151, including provisions of the National Environmental Policy Act, or the bill could clarify whether the land to be acquired will be designated as on-reservation or off-reservation. On-reservation would be processed under 25 C.F.R., Section 151.10, or if it is deemed off-reservation, would be processed under 25 C.F.R. Section 151.11. This change would create more clarity regarding the administrative process for placing the land into trust.

We are happy to work with the bill's sponsors and the Committee on these changes. Thank you for the opportunity to testify before the Committee. I look forward to answering any questions you may have.

[The prepared statement of Mr. Tahsuda follows:]

PREPARED STATEMENT OF JOHN TAHSUDA, III, PRINCIPAL DEPUTY ASSISTANT  
SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Good afternoon Chairman Hoeven, Vice Chairman Udall, and Members of the Committee. My name is John Tahsuda and I am the Principal Deputy Assistant Secretary for Indian Affairs at the Department of the Interior.

Thank you for the opportunity to present this statement on behalf of the Department regarding the following bills: S. 279, the Tribal School Federal Insurance Parity Act; S. 790, A bill to clarify certain provisions of Public Law 103-116, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993; and S. 832, A bill to nullify the Supplemental Treaty Between the United States of America and the Confederated Tribes and Bands of Indians of Middle Oregon, concluded on November 15, 1865. Each of these bills is discussed below.

**S. 279**

S. 279, the Tribal School Federal Insurance Parity Act, would amend the Indian Health Care Improvement Act (25 U.S.C. 1647b) to allow tribal grant schools operating under the Tribally Controlled Grant Schools Act (TCGSA) to participate in the Federal Employees Health Benefits (FEHB) Program. Presently, Public Law 100-297 prohibits the vast majority of tribally controlled grant schools from participating in the FEHB Program, which can create significant financial strains on schools and disadvantage school leaders in recruiting talented educators. The Department supports S. 279.

The mission of the Bureau of Indian Education (BIE) is to provide quality education opportunities from early childhood through life in accordance with a tribe's needs for cultural and economic well-being, in keeping with the wide diversity of Federally recognized Indian tribes and Alaska Native villages as distinct cultural and governmental entities. The BIE manages a school system with 169 elementary and secondary schools and 14 dormitories providing educational services to 47,000 individual students, with an Average Daily Membership of 41,000 students in 23 States. The BIE also operates two post-secondary schools and administers grants for 29 tribally controlled colleges and universities and two tribal technical colleges.

Prior to 2010, tribal employers, in general, lacked access to FEHB benefits for their employees. With the passage of 25 U.S.C. 1647b under the Indian Healthcare Improvement Act (IHCA), tribes, tribal employers, and urban Indian organizations carrying out programs pursuant to Title V of the IHCA or under the Indian Self Determination and Education Assistance Act became eligible to participate in the FEHB Program. Participation in the FEHB Program reduced costs associated with providing employee benefits as well as aided organizations in their recruitment and retention efforts.

Currently, all BIE-operated schools participate in FEHB. Additionally, four BIE-funded tribally operated schools also participate in FEHB Program. These tribally controlled schools operate pursuant to the ISDEAA. Under 25 U.S.C. 1647b, tribal employers operating ISDEAA self-determination contracts and Title V contracts are eligible to purchase FEHB coverage. However, 25 U.S.C. 1647b does not extend eligibility to tribally-controlled schools under the TCGSA. Therefore, 126 of BIE's tribally-controlled schools that operate pursuant to the TCGSA may not purchase FEHB coverage under 25 U.S.C. 1647b.

In April 2012, the U.S. Office of Personnel Management sent a letter to the Department's Office of the Solicitor seeking the Solicitor's opinion regarding OPM's legal conclusion regarding the ineligibility of schools operating under TCGSA for FEHB as the TCGSA schools are not within the scope of eligible tribal employers under 25 U.S.C. 1647b. In June 2012, the Solicitor issued an opinion confirming OPM's conclusion that schools operating under TCGSA are ineligible for FEHB. In October 2017, a tribal grant school representative requested the Solicitor to reconsider their position. However, the Solicitor stated its legal determination would stand.

The Department understands and supports the efforts of its tribal partners in seeking a legislative fix that would allow parity for schools operating under the TCGSA. The continued inability of these schools to access FEHB creates unfair budgetary constraints and exacerbates an already difficult task of recruiting highly-qualified teachers in often geographically-isolated schools. As such, the Department supports S. 279, the Tribal School Federal Insurance Parity Act, and looks forward to increasing parity for tribally controlled grant schools.

#### **S. 832**

The Confederated Tribes and Bands of Middle Oregon, today known as the Confederated Tribes of the Warm Springs Reservation, signed a treaty on June 25, 1855 ceding most of their aboriginal territory to the United States. That area makes up most of what we now know as north central Oregon.

On November 15, 1865, the Tribes were forced into signing a "Supplemental" treaty, which is the subject of this legislation and further restricted the rights of tribal members to the extent that, among other things, they could not leave the reservation without written permission from the Agency Superintendent. These restrictions are unreasonable restrictions on the rights of the Warm Springs people. We are aware of no other tribe that is currently subject to such a restrictive treaty.

S. 832, "A bill to nullify the Supplemental Treaty Between the United States of America and the Confederated Tribes and Bands of Middle Oregon, concluded on November 15, 1865," would provide that the Supplemental Treaty shall have no force or effect. As such, the Bureau of Indian Affairs has no objection to S. 832.

#### **S. 790**

S. 790, "A bill to clarify certain provisions of Public Law 103-116, The Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, and for other purposes," provides Congressional authorization for the Secretary of the Interior to take certain land into trust on behalf of the Catawba Indian Nation (Tribe) for the purpose of conducting a gaming facility.

Generally, the bill authorizes the Tribe to own and operate a gaming facility on land identified in the bill, and requires the gaming facility to "operate in accordance with the Indian Gaming Regulatory Act" (IGRA). Currently, section 14 of the Catawba Settlement Act states "[t]he Indian Gaming Regulatory Act (25 U.S.C. 2701

et seq.) shall not apply to the *Tribe*" (emphasis added) and, with regard to gaming, gives the Tribe the rights and responsibilities set forth in the settlement agreement and State (of South Carolina) law.

The bill is intended to make the IGRA applicable to the Tribe, including the important protections and authorities that it provides for tribes generally, such as the option of entering into a Tribal-State class III gaming compact with a state, enactment of tribal gaming ordinances, and the use and net gaming revenue.

We have several technical concerns with the language. First, the language in Section 1(b) focuses on the IGRA's application to the gaming facility, but does not address application of the IGRA's provisions to the Tribe. As indicated previously, the exclusion provision at section 14 of the underlying Settlement Act specifically applies to the Tribe. To address this, the bill could be amended to clarify that IGRA is applicable to the Tribe, that only land identified in S. 790 would be gaming eligible for the Tribe; and that land acquired under the bill's provisions qualifies as "Indian lands" under the IGRA. Indian lands under IGRA include all lands within the limits of any Indian reservation; and any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

In addition, the Settlement Act, at section 12(m), exempts the Tribe from the provisions of 25 C.F.R. Part 151, the Department's Fee-to-Trust regulations, which the Department relies on for making discretionary trust acquisitions. The language at section 1(c) of S. 790 implies that the acquisition of land for trust purposes by the Secretary would be a discretionary, rather than a mandatory acquisition. The bill could be amended to indicate whether, if this is a discretionary acquisition, the Secretary will apply 25 C.F.R. Part 151, including provisions of the National Environmental Policy Act (NEPA), to this acquisition. Similarly, the Bill could clarify whether the land to be acquired will be designated as an on-reservation application, which would be processed under 25 C.F.R. § 151.10, or as an off-reservation application processed under 25 C.F.R. § 151.11. This change would create more clarity regarding the administrative process for placing the land into trust.

The Department would be happy to work with the bill's sponsors and the Committee on these technical changes.

Thank you for the opportunity to testify today before the committee. I look forward to answering any questions the Committee may have.

The CHAIRMAN. Thank you, Secretary Tahsuda.  
Chief Harris.

**STATEMENT OF HON. WILLIAM HARRIS, CHIEF, CATAWBA  
INDIAN NATION**

Mr. HARRIS. Thank you, Chairman Hoeven, thank you, members of the Committee, for this opportunity to testify on S. 790, legislation that would bring a measure of justice to the Catawba people and lift a whole region of the Carolinas out of an economic hardship by creating up to 4,000 jobs.

My name is William Harris. I serve as Chief of the Catawba Indian Nation. When I was a child, only 60 years ago, the Catawba Indian Nation was fully recognized by the Federal Government and exercised the level of sovereignty held by virtually every tribe in the United States. Since then, we have traveled a difficult path that brings us to this moment.

In 1959, we became the only tribe in the eastern portion of the United States to be terminated by act of Congress. In 1980, we filed a lawsuit to regain our original reservations, whose boundaries are approximately 20 miles from the land that is subject to S. 790. This boundary also serves as the boundary between North and South Carolina, the two States where the vast bulk of our aboriginal lands lie.

In 1993, we reached a settlement agreement with the State of South Carolina, which was implemented by act of Congress. In

South Carolina, as I will describe briefly below, we are subject to many restrictions. However, in North Carolina, we understood, as did North Carolina and Federal officials, that we would have the status of a fully-restored tribe and be able to take land into trust that would not be restricted by our agreement with South Carolina. In South Carolina, we were promised IGRA-like gaming opportunities, as well as mandatory rights to reassemble our 4,000-acre reservation, and affirmation of the rights of our children to go to public schools.

So why do we not have gaming? Why are we only able to add 300 acres to our existing reservation? And why did we transfer our last remaining commercial lands to the local public school system, where our children have a 60 percent graduation rate? In other words, why we were deprived of the most important things we bargained for in return for giving up our lands?

In brief, South Carolina taxed our gaming out of existence while recouping most of their contribution to our settlement. South Carolina denied us the right to game on our reservation, even though the State authorized casino cruises and our settlement agreement said, if the State authorizes gaming, we can do it as well.

We were limited to acquiring new lands in certain zones, where it turned out that landowners would not sell, or they drastically increased prices to unreasonable levels. And finally, South Carolina charged us to send our kids to the local public school, putting the Tribe millions of dollars into debt, which we paid off last year, transferring our last remaining commercial properties to the school district.

Obviously, we never would have agreed to this settlement with South Carolina if we had understood that it meant federally-enforced poverty for the Tribe. Our children at inter-tribal events and ceremonies meet and befriend children of other tribes, and the question is asked: Why can't we have education scholarships? Why don't we have community facilities, cultural programs and health care like they do? Why don't our children have jobs like them? Why are we in poverty while they prosper?

S. 790 clarifies the original intent of the 1993 Act that the tribe could take land into trust in North Carolina without the restrictions of the Tribe's agreement with South Carolina. It would also apply the strict regulations of IGRA to the North Carolina facility, with one exception, Section 20. Even that exception can be eliminated, so long as Congress is clear that we can establish gaming operations on the proposed lands.

It is important to note that the proposed location is within our aboriginal lands, our congressionally-established service area, our historical treaty-based hunting grounds and it is not off-reservation gaming, a term that is used to describe tribes that seek to go hundreds of miles from their aboriginal lands. We are staying within our heartland.

We are happy to work with this Committee and the Department of Interior to address any technical concerns you may have. What I have just described to you all happened within my lifetime. This Committee has a chance to right a historical wrong, and I urge your support for S. 790.

[The prepared statement of Mr. Harris follows:]

## PREPARED STATEMENT OF HON. WILLIAM HARRIS, CHIEF, CATAWBA INDIAN NATION

Chairman Hoeven, Vice Chairman Udall and Members of the Committee, thank you for this opportunity to provide testimony regarding S. 790. I am here to express the full support of the Catawba Indian Nation ("Tribe") for S. 790, which will clarify the rights restored to the Tribe in the Catawba Land Claims Settlement Act of 1993 ("Catawba Federal Settlement Act"), which itself reversed the 1959 termination of the Tribe's status.<sup>1</sup> In doing so, it will bring justice to the Catawba and assure that Catawba gaming operations are subject to the same strict regulation as other tribal gaming operations. As we note below, S. 790 does not create any concerning precedent. Rather, it restores the original intent of the Catawba Federal Settlement Act, while limiting the Tribe's land acquisition to its congressionally established service area, which was deemed in the Act to be the equivalent of "on or near reservation" for certain purposes, reflecting its historic significance to the Tribe. In this letter, I would like to provide some additional background on the need for the legislation and dispel some significant misstatements made by a project opponent. As an attachment, I have included a Myth/Fact sheet which directly addresses various questions that have been raised in our discussions with Committee staff.

**Purpose of S. 790.** By authorizing the acquisition of a 17-acre site in Kings Mountain, Cleveland County, North Carolina, S. 790 will fulfill the understanding of the Tribe, as well as Congressional and North Carolina leaders, that the Tribe could have land taken into trust in the Tribe's congressionally established service area in North Carolina, where it would not be subject to the restrictions the Tribe had negotiated in its settlement with South Carolina. Additionally, S. 790 will apply the strict requirements of the Indian Gaming Regulatory Act (IGRA) to the Tribe's activities at the Kings Mountain site, bringing Catawba gaming into the center of Federal Indian gaming policy by addressing an ambiguity in the Catawba Federal Settlement Act, which provides that the Tribe is not subject to IGRA.

**Working with our North Carolina friends to create 4,000 jobs and support economic development.** Before advancing on this initiative to take land into trust in Kings Mountain, Cleveland County, the Tribe approached both the Kings Mountain and Cleveland County leadership, who welcomed the Tribe's proposal with open arms. See Attachment 1.\* Letters from Local Officials. This project will spark extraordinary economic development, providing critically needed employment in a hard hit area of North Carolina and South Carolina (the project is only one mile from the state border), in addition to allowing the Catawba to become economically self-sufficient. It will immediately create thousands of construction jobs, and up to 4,000 permanent jobs. Notably, the Tribe and Cleveland County have reached a detailed inter-governmental agreement to address public safety, taxation, jurisdiction, and other issues associated with the establishment of a casino/resort operation at the proposed location.

**Confirming the understanding of all parties that the Tribe could have land taken into trust in North Carolina.** Regrettably, the Catawba Federal Settlement Act, whereby the Catawba gave up claims in both North and South Carolina, is widely regarded as one of the worst land claim settlements for a Tribe in modern Federal Indian policy. Of course, the Catawba negotiated its settlement agreement with South Carolina at a time when the Tribe was at its weakest and therefore least able to resist the demands of South Carolina. The Act, which among other things implements the South Carolina agreement, was so troubling that this very Committee, in the accompanying Senate Report, emphasized:

Therefore, beyond furtherance of the general federal policies of encouraging consensual settlements, fostering Indian self-determination, and restoring terminated Indian tribes, the Catawba Land Claim Settlement Act has no general Indian policy implications. The Committee expressly intends that it not serve as precedent or a model for any other settlement and that it shall neither set forth nor impact in any way federal Indian policy.

Senate Report 103-124 at 27 (August 5, 1993). Notwithstanding its many flaws, the Tribe thought it had secured certain important rights through its enactment. The central, but not exclusive, purpose of the Catawba Federal Settlement Act was to settle the litigation brought by the Tribe in South Carolina over the dispossession of its former 15-mile square reservation ("Original Reservation") established in trea-

<sup>1</sup> Catawba Tribe of South Carolina Division of Assets Act, Pub. L. 86-322, 73. Stat. 592 (Sept. 21, 1959) (formerly codified at 25 U.S.C. §§ 931-938).

\* The information referred to has been retained in the Committee files.



ties with the British Crown.<sup>2</sup> As a result, the majority of the Catawba Federal Settlement Act's provisions address the Tribe's relationship with South Carolina, which has received all the benefits it secured under the Act, while the commitments made to the Tribe have largely been thwarted. However, the Tribe also gave up its land claims in North Carolina and understood, as did Congressional and North Carolina leadership, that it had secured the right to take land into trust in North Carolina within its congressionally established service area.

In support of the Tribe's understanding, the following have submitted signed statements: President Reagan's Secretary of the Interior, Manuel Lujan (who approved the original settlement agreement); former Congressman Bill Richardson, the chairman of the House subcommittee with jurisdiction over the original legislation; both House and Senate congressional staff (including Chairman Inouye's) directly responsible for the legislation; the Chair of the North Carolina Commission on Indian Affairs and the North Carolina Governor's general counsel at the time of passage of the Act; and other relevant Federal and Tribal officials. See Attachment 2,\* Statements of Key Leaders Regarding Tribal Rights in North Carolina and excerpts immediately below.

**Interior:** Key Interior officials involved in the negotiation of the Catawba Land Claim Settlement Act support the Catawba's understanding regarding the application of the Act to the Tribe's Federal service area in North Carolina, including Manuel Lujan, who served as Secretary of the Interior during the negotiation of the Act, and Bill Ott, who was the Interior witness and representative at the Senate hearing on the Act and also the Eastern Region Director for the Bureau of Indian Affairs at that time.

- **Secretary Manuel Lujan:**

"With the Eastern Cherokee within its borders, North Carolina was familiar with federally recognized tribes and a tribe's right to acquire land into trust. This was not a controversial issue at the time. For that reason, whether the Tribe could take land into trust in North Carolina did not require lengthy discussion. It was already understood that a mandatory land into trust acquisition by the Catawba would be an inevitable outcome of the Act."

"At the time, those of us reviewing the Act knew that the creation of a service area in North Carolina meant that the Tribe could fully exercise its sovereignty by acquiring land into trust in North Carolina. It was our mutual understanding that the Catawba could apply for mandatory trust status for its North Carolina lands."

"Your support for expeditious processing of the Catawba's mandatory application would be greatly appreciated and would bring a measure of justice to a Native people who have suffered repeated wrongs."

- **Bill Ott, Eastern Region Director:**

"I was directed to represent Indian Affairs at a Congressional Hearing regarding proposed language for the Act which also incorporated Federal Recognition of the Catawba Tribe and provided for a Service Area which included adjacent counties in the State of North Carolina. It was the understanding of Indian Affairs that the delineation of the Tribal Service Area outside of the State of South Carolina relative to the Federal Recognition Process was not an issue since the South Carolina Strictures would not apply there.

"[B]ased on my understanding of the Act, I suggested [to the Tribe] that taking land into trust pursuant to the Act's land acquisition provisions and establishing a gaming facility within the Tribe's delineated Service Area outside of the State of South Carolina (i.e., within one of the six counties in North Carolina) would be more feasible and compatible with their federal recognition status under the Act."

**Tribe.** The two principal tribal officials responsible for negotiating the terms of the Act were Chief Gilbert Blue and Executive Director Wanda George Warren. Both have very strong recollections regarding the negotiation of acquisition rights throughout the Tribe's service area, including the North Carolina portion.

<sup>2</sup>The Original Reservation was in the Province of Carolina. When the Province of Carolina was divided into two states, the state boundary line was set to trace the northern boundary of the Original Reservation placing it entirely in South Carolina while making a triangular indent into North Carolina. Of course, the Original Reservation was only a small portion of the aboriginal territory of the Catawba. As previously stated, the Kings Mountain site is less than 20 miles from the boundary of the Original Reservation.

\*The information referred to has been retained in the Committee files.

- **Gilbert Blue, Catawba Chief:**

“It was our understanding that the Tribe would have full tribal rights within the six counties of North Carolina that we reserved under the Settlement Act. Rights that included taking land into trust in North Carolina for economic development.”

“With economic development in mind we did extensive research with Pat Clark into the fee-to-trust process and fully expected that we could use lands in the North Carolina service area as part of our mandatory takings “as on or near the reservation.” To the best of my knowledge, the other parties we negotiated with understood this as well.”

“Our willingness to sign the Settlement Act was premised on inclusion of the six- county service area. That portion of the Act was added at the insistence of the Tribe and we would not have signed without it. We had hoped for similar rights in South Carolina but agreed to the limitations in the Act pertaining to South Carolina to address our neighbors concerns about environmental issues.”

“I understood, as did the other Tribal leaders working on the Act, that the Tribe would be able to take land into trust in North Carolina pursuant to the mandatory provisions in the Act that authorize the Secretary to take land into trust that is not contiguous to the Tribe’s current reservation and not within the Act’s expansion zones.”

- **Wanda George Warren, Catawba Executive Director:**

“We knew that the creation of a service area in North Carolina meant that the Tribe could fully exercise its sovereignty by acquiring land into trust in North Carolina.”

“The State of North Carolina did not have the same concerns regarding tribal sovereignty and jurisdiction because of its experience with the Eastern Cherokee.”

“I understood, as did Pat [Patrick Clark, Chairperson, North Carolina Commission of Indian Affairs] and those of us working on the Act, that the Tribe would be able to take land into trust in North Carolina pursuant to the Act, and therefore on a mandatory basis, so long as the land was within the Tribe’s service area.”

**Congress.** The Tribe has spoken with key Congressional staff involved in the development of the Act, including Patricia Zell, Staff Director of the Senate Committee on Indian Affairs under the chairmanship of the late-Daniel Inouye (himself a great friend of the Tribe) and Marie Howard Fabrizio, a senior staffer on the House Natural Resources Committee. Both support the Tribe’s right to acquire land in the North Carolina service area under the Act.

- **Marie Howard Fabrizio and Patricia Zell:**

“We are writing to provide a personal perspective on the Catawba Indian Land Claims Settlement Act in support of the Catawba Indian Nation’s request to take land into trust on a mandatory basis within the Tribe’s Federal service area in North Carolina.”

“The land-into-trust applications for the establishment of this reservation were mandatory in nature, not discretionary.”

“Additionally, the Federal service area in North Carolina would not be subject to those restrictions imposed by the Catawba Settlement Act that only reference South Carolina.”

“The scope of the Tribe’s rights in the Federal service area, including the North Carolina counties, was elaborated upon in the Senate report. This language should be broadly read consistent with the intent of Congress to aid the Catawbas and consistent [with] the Indian canon of construction that ambiguities are to be read in favor of Tribes. In the case of the Catawba, the Tribe has mandatory acquisition rights.”

“We urge you to support the mandatory and expedited taking of land into trust for the Tribe.”

**North Carolina.** The key participants involved in the negotiation of the North Carolina service area, including the North Carolina officials, confirm that the premise and promise of the Act included that the Tribe would have the right to take land into trust in North Carolina pursuant to the Act and that this was the official position of the State of North Carolina and that the South Carolina restrictions would not apply in North Carolina. Set forth below are excerpts from a statement of the Chairperson of the North Carolina Commission of Indian Affairs, as well as

from a statement of the general counsel to then-North Carolina Governor Martin confirming the Commission's authority to represent North Carolina in the Catawba Settlement Act negotiations.

- **Patrick Clark:**

"I served as the Chairperson of the North Carolina Commission of Indian Affairs ('Commission'), from 1990–1993 and in that capacity was centrally involved in shaping North Carolina policy relevant to the Catawba Indian Nation and negotiating the Catawba Indian Land Claims Settlement Act of 1993 ('Act')."

"I, and Chief Blue, agreed that inclusion of a service area in North Carolina was essential to ensuring that Catawba tribal members residing in North Carolina would retain benefits similar to those preserved for Catawba in South Carolina, including the benefit of pursuing economic development projects to benefit the Catawba Indian Nation."

"I understood, as did Chief Blue and Catawba representatives working on the Act, that the Tribe would be able to take land into trust in North Carolina pursuant to the Act, and therefore on a mandatory basis, so long as the land was within the Tribe's service area. This was a clear understanding during the drafting and negotiating of the Act."

"The state was aware that the Catawba could mandatorily acquire land into trust under the Act's provisions."

"It was always my understanding that the Catawba could apply for mandatory trust status for its North Carolina lands."

- **James R. Trotter, General Counsel, North Carolina Governor James Martin:**

"Based on both the law and my personal experience, the NCSCIA is the lead agency representing the State in all matters pertaining to Indian Affairs."

"I have reviewed the affidavit provided by Patrick Clark, who was the Chairperson of the NCSCIA during negotiation and passage of the Catawba Indian Land Claims Settlement Act of 1993, and I have no objections to its content, nor any reason to dispute her testimony."

"Then-NCSCIA Chairperson Patrick Clark has affirmed that it was the position of the State of North Carolina as represented by the NCSCIA that the Catawba Indian Nation, pursuant to the mandatory land acquisition provisions in its settlement act would be able to take land into trust in North Carolina, but limited to that portion of the Catawba's service area that falls within North Carolina. *As such, this represents the official position of the State of North Carolina during those negotiations.*" (Emphasis added.)

By expressly authorizing the acquisition of the Kings Mountain site, the Congress would be fulfilling this original understanding of the drafters of the Catawba Federal Settlement Act.

**Staying inside the Catawba's congressionally established service area and aboriginal lands.** It was important to the Tribe to identify a site within the Tribe's congressionally established federal service area and aboriginal lands.

The Catawba Federal Settlement Act treats the Tribe's entire federal service area, including the location that the Tribe now proposes to have taken into trust, for certain purposes as "on or near the reservation", specifically stating at § 4(b) that "[f]or the purpose of eligibility for Federal services made available to members of federally recognized Indian tribes because of their status as Indian tribal members, Members of the Tribe in the Tribe's service area shall be deemed to be residing on or near a reservation." In the exact same paragraph, the Catawba Federal Settlement Act states that "the Tribe and the Members shall be eligible for all benefits and services [not just health services as some allege] furnished to federally recognized Indian tribes and their members because of their status as Indians." (emphasis added). This same paragraph in the Catawba Federal Settlement Act reinforces that: "the Tribe shall be eligible to the special services performed by the United States for tribes because of their status as Indian tribes." The taking of land into trust for tribes and their members is one of the most important services offered by the Department of the Interior (hence, the BIA Office of Trust Services, which handles tribal trust land issues). As the letters of support demonstrate (see Attachment 2), the Tribal leadership negotiated for these rights in return for the major cessions made by the Tribe.

**The Tribe's Use and Occupancy of the King's Mountain Area is well established.** The Catawba Federal Settlement Act was intended to settle a land claim brought by the Nation for its previous 144,000 acre, 15-mile square reservation

(“Original Reservation”), which had been established pursuant to two treaties with the British Crown. In the Senate Report accompanying the Catawba Federal Settlement Act, this Committee noted:

The Catawba Indian Tribe signed two treaties with King George III in 1760 and 1763. The Catawbas gained recognized title to 144,000 acres under the Treaty of Pine Tree Hill made in 1760, which was confirmed with the Treaty of Augusta was made in 1763 with the King’s Superintendent of Indian Affairs and the Governors of the Southern Provinces [a term which encompassed both present day North and South Carolina].<sup>3</sup> In those two treaties the Tribe ceded its aboriginal territory and reserved a 144,000-acre tract comprising much of the present states of North and South Carolina.

Senate Report 103–124 at 15–16. The border of the Original Reservation, located in the heart of the Catawba’s aboriginal lands, and well within the Tribe’s congressionally established service area, is less than 20 miles from the site identified in S. 790. Indeed, as the Tribe has often reminded the United States, Catawba scouts were instrumental in the victory of the American revolutionaries at Kings Mountain<sup>4</sup> over British forces, setting the stage for victory in the South. Further, the Kings Mountain area is identified as Catawba hunting grounds in more than one document, including the Treaty of Augusta (1763). For a more detailed description of the Catawba Nation’s ties to the Kings Mountain area, see Attachment 3,\* Catawba Historical Nexus to the Congressionally Established Service Area in North Carolina and <http://www.native-languages.org/ncarolina.htm>, providing a historical map of the aboriginal territory in the State, a copy of which is attached.<sup>5</sup>

**There is no crossing of state lines, nor is an extraordinary precedent being set by the Kings Mountain site.** First, the Catawba are just as much a North Carolina tribe as they are a South Carolina tribe. This is evident from the historical record, as well as from the Catawba Federal Settlement Act, which states that “[i]n treaties with the Crown in 1760 and 1763, the Tribe ceded vast portions of its aboriginal territory in the present States of North and South Carolina in return for guarantees of being quietly settled on a 144,000-acre reservation.” See § 2(a)(4)(A). The Catawba Federal Settlement Act also provided for the Tribe to give up all subsequent land claims in North Carolina and established a service area that expressly included the North Carolina counties adjacent to York County, the location of the Tribe’s current trust lands.

Although the Tribe is not crossing state lines that issue is irrelevant in any case as the Department of the Interior has looked at and rejected prohibitions on so-called off-reservation acquisitions of “out of state” lands *where a tribe is near a border or where the land is within a tribe’s service area.*<sup>6</sup>

<sup>3</sup>The Southern Provinces within British America consisted of the Province of Maryland, the Colony of Virginia, the Province of Carolina (in 1712 split into North and South Carolina) and the Province of Georgia. See Charter of Carolina (March 24, 1663), Lillian Goldman Law Library, Yale Law School, available at [http://avalon.law.yale.edu/17th\\_century/nc01.asp](http://avalon.law.yale.edu/17th_century/nc01.asp).

<sup>4</sup>The Kings Mountain battlefield is just south of the state border, but the movements of the forces were throughout both North and South Carolina in that vicinity.

<sup>5</sup>The Eastern Band in its letter of opposition cites the Treaty of July 20, 1777 (also known as the Treaty of Long Island of Holston) assert that they ceded this specific land away and so it must be theirs. However, the Eastern Band does not reveal that this treaty was not between the Cherokee Nation as a whole with the United States, but rather was “between the Commissioners from the State of North Carolina in Behalf of the said State of the One Part and the Subscribing Chiefs of That Part of the Cherokee Nation Called the Overhill Indians of the Other Part.” The “Overhill Cherokee” is the term for the Cherokee people located in their historic settlements in what is now Tennessee on the west side of the Appalachian Mountains. See <https://tennesseeoverhill.com/overhill-cherokee-heritage/>. The “treaty” itself is not specific to Cleveland County, but is a broad disavowal of any Overhill Cherokee claims to a broad swath of land stretching from the northern border of North Carolina to its southern border. As described in footnote 7 below, the U.S. Indian Claims Commission found that treaties of land cession did not indicate aboriginal title.

<sup>6</sup>The information referred to has been retained in the Committee files.

<sup>7</sup> During the same period that the Catawba Federal Settlement Act was under consideration the Department of the Interior was considering revisions to its own fee-to-trust regulations at 25 C.F.R. Part 151. On July 15, 1991, the Department of the Interior proposed amendments to its existing regulations governing the fee-to-trust process. See 56 Fed. Reg. 32278 (July 15, 1991). The Department’s proposed amendments to 25 C.F.R. Part 151 included a new section governing the acquisition of lands “located outside of and noncontiguous to an Indian reservation,” as well as a new section titled, “Considerations in evaluating requests when the land is located outside of and noncontiguous to an Indian reservation and will be used for gaming purposes.” Id. As proposed, 25 C.F.R. § 151.11(b) would have established a general rule preventing tribes from acquiring trust lands located in other states:—(b) The land to be acquired in trust should, in general, be located within the state(s) in which the tribe’s reservation or trust lands are currently located. Exception to this requirement may be made for tribes which have lands

**The Tribe welcomes the strict imposition of IGRA's regulatory scheme on its gaming operations.** The Catawba Federal Settlement Act set forth the Tribe's gaming rights in South Carolina, but it also broadly provides that IGRA does not apply to the Tribe. See Federal Settlement Act at § 14(a) ("The Indian Gaming Regulatory Act shall not apply to the Tribe.") (internal citation omitted). This creates uncertainty regarding the regulation of Catawba gaming operations in North Carolina. For a host of reasons, including legal, financial, public safety and more, the Tribe will operate gaming at the Kings Mountain site in accordance with standards no less stringent than IGRA, whether or not IGRA is applied to the Tribe. Nonetheless, the Tribe supports Congress applying IGRA to the Tribe so that there are no lingering questions about the strictness of the Tribe's regulatory scheme, including the character of the Tribe's business partners.

**The Tribe is working with industry leaders to provide comprehensive, highly regulated casino/resort operations.** Without supporting evidence, the Eastern Band of Cherokee Indians has suggested that the Nation is under the sway of unscrupulous developers and that this legislation would lead to an undermining of the Indian gaming regulatory framework nationwide. To the contrary, the Tribe has partnered with Delaware North, a 103-year old global food service and hospitality company, which operates in the lodging, sporting, airport, gaming, and entertainment industries. Delaware North employs approximately 60,000 people worldwide and has over \$3.2 billion in annual revenues.

The Eastern Band's assertions are an irrational distraction from the fundamental goal of this legislation—which is to bring justice to the Catawba and to allow the Catawba to have the same gaming rights as other Tribes, subject to the same strict regulation that other tribes are subject to. No one will manage or be associated in any way with Catawba gaming operations who cannot meet IGRA or higher standards. The Tribe's support for the application of IGRA to the Tribe's gaming operation in S. 790 is proof positive that the Tribe will not tolerate suspect parties in the management of its gaming operations.

**Our Eastern Band brothers and sisters.** In historic times, the Catawba and the Cherokee were bitter enemies. However, over the last 100 years we have been closely allied on many important issues of tribal sovereignty and tribal rights. There has also been significant inter-marriage between the two tribes and we consider the Cherokee to be our relatives. We have nothing but admiration for their success, not just in building a gaming empire consisting of two highly successful casinos, but more crucially in succeeding at lifting their people out of poverty. The Catawba aspire to a similar success for our own people. Because the Eastern Band has the experience, funding, and proven record of accomplishment in gaming, the Tribe has approached them on several occasions about partnering on the Kings Mountain project, but the Eastern Band leadership has not been interested. Nonetheless, as described immediately below, the Tribe has sought to be respectful of Eastern Band interests, without sacrificing Catawba rights.

**Staying outside of the Eastern Band's agreed upon "Exclusive Gaming Zone."** One very important consideration in identifying the Kings Mountain site was to stay outside of the Eastern Band's exclusive gaming zone. The Eastern Band, in its compact with the State of North Carolina, secured the exclusive right to live

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in one state but are located near the border of another state, or tribes which have no trust lands. In situations where the land to be acquired is in a state in which the tribe is not located, the Secretary will give greater weight to the considerations concerning the effect of the land acquisitions on state and local governments. However, all other things being equal, the greater the distance of the land proposed to be taken in trust from the tribe's current or former reservation or trust land, the greater the justification required to take the land in trust. As warranted and relevant to the proposal under consideration, the justification could address such factors as the cost and ability to administer the land to be acquired in trust. In addition, applications for trust land located within an urbanized and primarily non-Indian community must demonstrate that trust status is essential for the planned use of the property and the economic benefits to be realized from said property.—*Id.* at 32279 (emphasis added). The Department published the final rule amending 25 C.F.R. Part 151 on June 23, 1995, after Congress had enacted the Catawba Federal Settlement Act. See 60 Fed. Reg. Vol. 32874-79 (June 23, 1995). Importantly, the final rule did not include the general restriction against acquiring "out of state" land in trust on behalf of a tribe.—The Department ultimately rejected the proposal, stating, "The provisions which prohibit off-reservation acquisitions of 'out-of-state' lands have been deleted." *Id.* at 32,876. In doing so, it cited tribal comments on its proposed regulation:—Section 151.11(b) Geographic Limitations Comment: Those provisions which prohibit off-reservation acquisitions of "out-of-state" lands (i.e., lands in a state other than that in which the acquiring tribe's "reservation or trust lands" are located) were opposed on the grounds that out-of-state lands may be historically significant, vital to tribal economic self-sufficiency, or within a designated tribal consolidation area or tribal service area.—60 Fed. Reg. 32875-76 (June 23, 1995)(emphasis added).

table gaming in all lands west of I-26 (“Eastern Band Exclusive Gaming Zone”), a line that roughly follows the generally agreed upon eastern edge of Cherokee lands. See Attachment 4,\* Excerpt EBCI-NC Compact. The Kings Mountain site is approximately 55 miles east of I-26. Notably, it is only about 20 miles from the boundary of the Original Catawba Reservation, which was in the center of Catawba aboriginal lands and which was the basis for the Catawba’s land claim. The site is about 34 miles from the Tribe’s current reservation lands.

**Staying outside of the Eastern Band’s Judicially Established Aboriginal Lands.** The Cherokee Nation brought a successful claim for compensation for loss of aboriginal lands before the Indian Claims Commission. The Eastern Band joined into settlement of that claim. Before those claims could go forward there was a rigorous judicial process to determine the aboriginal lands of the Cherokee Nation. Attached is the map,\* published by the Indian Claims Commission as part of its final report, showing not only the great size of the judicially established Cherokee aboriginal lands, but also that the Cherokee aboriginal lands do not include Cleveland County.<sup>7</sup> See Attachment 5.\* As the face of the map itself states, “This map portrays the results of cases before the U.S. Indian Claims Commission or U.S. Court of Claims in which an American Indian tribe proved its original tribal occupancy of a tract within the continental United States.” The Cherokee, for reasons well known to the Catawba, could not prove aboriginal title to Cleveland County.

On behalf of the Catawba people, I thank this Committee for its consideration of this important legislation. With the passage of S. 790, the Committee will restore justice to the Catawba and enable us to lift all of our people out of poverty while rejuvenating an entire region of North and South Carolina.

#### **Attachment**

#### SUPPLEMENTAL WRITTEN TESTIMONY

**Why Section 20 of the Indian Gaming Regulatory Act should not be applied to the Tribe.** The Section 20 exception in S. 790 was intended to make clear that the prohibition in IGRA on taking land into trust for gaming purposes after 1988 would not apply to this particular acquisition in North Carolina. This was to prevent confusion and conflict between the part of the bill where Congress authorizes gaming at this location, with the part where Congress applies IGRA. At the May 1, 2019 hearing, one senator objected to this exception, principally arguing (1) that it would circumvent IGRA’s consultation requirements with state and local officials and (2) that the Tribe should not be granted a new exception to Section 20, but fit into an existing exception, most notably the two-part determination.

With regard to consultation, there likely is no more open or thorough process for consultation than the Congressional process (introducing a bill, holding a hearing, taking testimony, having a markup and doing this in both the Senate and the House), so official consultation is not being shorted in any way. Of course, in addition to the Congressional process, the Tribe has been in extensive consultation in North Carolina, leading to the full support of the two U.S. Senators from North Carolina, as well as strong local support. This is not a situation where legislation is being passed through the Senate without a hearing.

With regard to whether the Tribe should fit into an existing Section 20 exception, from a policy perspective it is important to note that there are a number of exceptions to the 1988 restriction, with the one for land acquired through settlement of a land claim more relevant on the facts than the two-part. S. 790 is expressly intended to be a clarification of the Catawba Land Claims Settlement Act. As both Chief Harris and Principal Deputy Assistant Secretary Tahsuda testified, the Tribe did not receive the promised benefits of the original settlement; S. 790 is effectively an amendment to that act and the land claim settlement, cleared by the two NC Senators, to right an historic wrong. If the Tribe was required to go through the

\*The information referred to has been retained in the Committee files.

<sup>7</sup>A digitized version of the Indian Claims Commission’s final map can be found here: <https://www.loc.gov/item/80695449/>. This definitive map should be contrasted with that of Charles C. Royce, which shows the territorial limits of the Cherokee and just reaches, at the boundary, Cleveland County. Royce did important map work, but with significant limitations. The Indian Claims Commission praises Royce’s maps, but found that his maps show “cessions” but that “often the cession did not match the true ownership of the land.” United States Indian Claims Commission, Final Report, September 30, 1978, p. 127, fn. 1. This is because non-Indian negotiators were always asking Tribal leaders to cede land far beyond the holdings of their own tribe. In contrast to the Royce maps, the Indian Claims Commission goes on to state that “This map [meaning the Indian Claims Commission’s final map] is a positive expression of land determined [in a rigorous process] to have been owned, without special reference to the cession or extinguishment processes.”

two-part determination it would have the effect of moving the decision to authorize the Secretary to take the land into trust from Congress/Interior to the state governor, essentially defeating the purpose of the bill which is for Congress to review how the Catawba were shorted and to provide an amendment that would restore the original intent of the land claim settlement.

**Why the Catawba Site is Not “Off-Reservation Gaming”.** The term “off-reservation gaming” has been thrown around very loosely in the discussions regarding S. 790. It is worth noting that the American Gaming Association (AGA) supports tribal gaming in locations where a tribe has historical connections and that is also in reasonable proximity to a Tribe’s existing land base and does not consider such gaming to be “off-reservation”:

AGA fully supports tribal gaming that is located on or near tribal lands that are within the historical and current territory of the tribe operating such gaming and is operated in accordance with all applicable laws.

However, locating tribal gaming facilities “off-reservation” in areas where a tribe has limited, or no, historical connections and is not in reasonable geographic proximity a tribe’s existing land or population base alters the characteristics and intent of tribal government gaming. Therefore, AGA supports the incorporation of more transparency and additional bright-line standards into the U.S. Department of Interior Bureau of Indian Affairs’ approval processes. Such standards should require a tribe to have both historical and geographic connections to the land they are seeking to acquire for off-reservation gaming.

<https://www.americangaming.org/policies/off-reservation-gaming/> Of course, the point of the AGA standards is to ensure that tribes do not go far afield from their current locations. By staying within its congressional established service area, near to their current lands and within 25 miles of their reservation as of 1988, the Catawba site meets both the spirit and the letter of the AGA’s standards.

In a position paper titled “AGA’s Modernized Position On Off-Reservation Tribal Gaming,” the AGA provides definitions for both “historic connection” and “geographic connection”. See Attachment A. As described below, the Catawba site falls within both definitions.

**The Catawba Site meets the AGA requirement of a “historic connection.”**

With regard to a “historic connection,” the AGA states that it “must be demonstrated [that a site is]. . . Part of a tribe’s historic territory, in which there is historical documentation of a tribe’s villages and occupancy, subsistence use in vicinity and/or exercised governance.” The Catawba site easily meets this qualification (more detailed historic documentation can be found at Attachment B):

- Site area is within Tribe’s Congressionally established service area (which by statute is to be treated as “on or near reservation” for the purposes of Federal services and benefits);
- Site area is within the area covered by tribe’s treaty with Great Britain, to which the United States acceded (providing for the preservation of hunting rights in this area);
- Site area is identified as Catawba hunting grounds, not only in the treaty, but in subsequent colonial records;
- Site area is in Catawba River Valley, traditional waterway of the Catawba (See Attachment C, Letter of Dr. David G. Moore, “In other words, decades of archaeological research provide evidence of a long history of Catawba Indian occupation in the Catawba River valley region of North Carolina.”; See Attachment D, Letter of Professor James H. Merrell, Vassar, regarding Catawba in North Carolina, “. . .the Catawbas have long called the Piedmont region of what would become North and South Carolina ‘home.’. . . After the English arrived, the Catawbas continued to hunt and farm in the Piedmont over a wide area that straddled the state line.”);
- Site area has been identified by local historians as one of active Catawba use and occupancy (See Attachment E, Letter of Martin Mongiello, Executive Director, Presidential Service Center, “I have been studying and writing about the Catawba Nation for a long time. . .It is a pleasure to certify that the Catawba Indian Nation rightfully resided in . Cleveland County, NC.”).

**The Catawba Site meets the AGA requirement of a geographic connection.**

The AGA emphasizes that any land developed should be in geographic proximity to a tribe and expressly provides “that in no event shall the land exceed a 25-mile radius from the tribe’s Indian lands held as of the adoption date of

IGRA. . .” See Attachment A. As defined in IGRA, “Indian lands” refers to “all lands within the limits of any Indian reservation. . .” 25 USC 2704(4)(A).

Tribal reservations cannot be disestablished except by Act of Congress.<sup>1</sup> On the adoption date of IGRA, the Tribe was pressing a land claim based on its original reservation. The Tribe’s case was stronger than that of other Eastern tribes, which pressed for recovery of aboriginal lands, as the Catawba were seeking recovery of actual reservation lands (known as recognized title), as acknowledged by Interior:

We conclude that the Tribe can establish a prima facie case under the Non-Intercourse Act, that the 1840 Treaty was void, and that the Tribe is therefore entitled to recovery of its reservation. . . When the United States succeeded to Great Britain’s sovereignty in 1783, our new government did not abrogate the 1763 Catawba Treaty. Therefore, according to settled rules of international law, which are acknowledged by the U.S. Supreme Court, the Catawba retained a vested right in their reservation as sacred as the fee simple of a non-Indian, which the United States Government was bound to respect. See *Mitchel v. United States*, 9 Pet. (34 U.S.) 711, 733 (1835).

Department of the Interior, Litigation Report Regarding the Catawba Land Claim at 3 (1977).

As of 1988, the adoption date of IGRA and the date that the AGA considers critical, Congress had not extinguished the Catawba reservation; therefore, it was still in place. The boundary of this reservation is approximately 22 miles from the proposed site, so within the 25-mile limit in the AGA’s definition of off-reservation gaming.

**Attachment**

MAY 10, 2019

Chairman John Hoeven,  
Vice Chairman Tom Udall,  
Senate Committee on Indian Affairs,  
Hart Senate Office Building,  
Washington, DC.

RE: CATAWBA INDIAN EXCAVATION SITES IN MORGANTON, NC AND THE WORK  
OF THE EXPLORING JOARA FOUNDATION

Dear Chairman John Hoeven and Vice Chairman Tom Udall:

My name is David Moore. I have conducted archaeological research in the Catawba River valley in North Carolina for more than 30 years. I received my MA and PhD in Anthropology from the University of North Carolina at Chapel Hill and I am a professor of Anthropology at Warren Wilson College in Asheville, North Carolina. I also serve as the Senior Archaeologist with the Exploring Joara Foundation in Morganton, North Carolina. The Exploring Joara Foundation engages the public in archaeology in the Carolinas with the discovery of the Native American town of Joara and the Spanish Fort San Juan. In their educational activities, the Foundation emphasizes the history of Catawba Indian ancestors at Joara and in the upper Catawba River valley.

Since, 2001, I have been engaged with Dr. Robin Beck from the University of Michigan, Dr. Christopher Rodning from Tulane University, and Dr. Rachel Briggs from the University of North Carolina at Chapel Hill in a major study of the 15th-16th century Native Americans of the Catawba River valley. Our research has focused on the Berry site, located just north of Morganton in Burke County, North Carolina. We have determined that the Berry site is the location of the Native American town of Joara visited by the Spanish Captain, Juan Pardo, with an army of 125 men in December, 1566. Pardo subsequently built Fort San Juan at Joara. This Spanish settlement lasted for 18 months until May, 1568, and constitutes the earliest European settlement in the interior of the United States, predating Roanoke by nearly 20 years and Jamestown by 40 years.

Based on our extensive research throughout the valley, we identify the sixteenth-century Native people of Joara as ancestors of today’s Catawba and Cheraw Indians. Also in the sixteenth century, the Catawba valley south of Joara was home to many

<sup>1</sup>As the Senate Committee on Indian Affairs noted in its report accompanying the Catawba Settlement Act, as far back as the 1940’s, Interior acknowledged that the land claim for the original reservation was probably valid: “The Solicitor acknowledged that the land claim was probably valid and potentially worth more than \$75,000; but for the next 16 years, while the Catawbas were under federal supervision, the U.S. Department of the Interior did nothing to help the Catawbas develop the basis of their claim or prosecute the claim.” Senate Report 103-124, p. 18. That reservation was legally intact until the Tribe ceded it away in the land claim settlement in 1993, five years after adoption of the IGRA.



other Native American settlements and a relatively large population. This region suffered a major depopulation in the seventeenth century most likely due to the various disruptions brought by the Indian slave trade and the changing economy and politics of the early Colonial frontier. It is clear that one strategy Native peoples of this region employed was to reform their villages in another area or take refuge with other groups.

Many Catawba valley townspeople retreated south from these destabilizing forces and were identified in the early eighteenth century as towns of the Catawba Nation. In other words, decades of archaeological research provide evidence of a long history of Catawba Indian occupation in the Catawba River valley region of North Carolina.

I have attached a selected bibliography of works related to the archaeological research described above.

Sincerely,

DAVID G. MOORE, PH.D.

*Department of Sociology and Anthropology, Warren Wilson College*

**Publications related to the sixteenth-century archaeology of the Catawba River valley.**

Beck, Robin A., Jr.—2013 *Chieftoms, Collapse, and Coalescence in the Early American South*. Cambridge University Press, New York.

Beck, Robin A., Jr., David G. Moore, Christopher B. Rodning, Timothy Horsley, and Sarah C. Sherwood—2018 A Road to Zacatecas: Fort San Juan and the Defenses of Spanish *La Florida*. *American Antiquity*. Vol. 83, No. 4 (577–597).

Beck, Robin A., Lee A. Newsom, Christopher B. Rodning, and David G. Moore—2017 Spaces of Entanglement: Labor and Construction Practice at Fort San Juan de Joara. *Historical Archaeology* 51(2):167–193.

Beck, Robin A. Jr., Christopher B. Rodning, and David G. Moore.—2016 *The Limits of Empire: Colonialism and Household Practice at the Berry Site, 1566–1568*. The University Press of Florida, Gainesville.

Beck, Robin A., Jr., David G. Moore, and Christopher B. Rodning—2011 Limiting Resistance: Juan Pardo and the Shrinking of Spanish La Florida, 1566–1568. In *Enduring Conquests: Rethinking the Archaeology of Resistance to Spanish Colonialism in the Americas*, edited by Matthew Liebmann and Melissa S. Murphy, pp. 19–39. School for Advanced Research Press, Santa Fe, NM.

Beck, Robin A. Jr., Christopher B. Rodning, and David G. Moore—2010 Limiting Resistance: Juan Pardo and the Shrinking of La Florida, 1566–1568. In *Enduring Conquests: Rethinking the Archaeology of Resistance to Spanish Colonialism in the Americas*, edited by Matthew Liebman and Melissa S. Murphy, pp. 19–39. School for Advanced Research Press, Santa Fe, New Mexico.

Beck, Robin A., Jr., David G. Moore and Christopher Rodning—2006 Identifying Fort San Juan: a Sixteenth-Century Spanish Occupation at the Berry Site, North Carolina. *Southeastern Archaeology* 25(1):65–77.

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2002 *Catawba Valley Mississippian: Ceramics, Chronology, and Catawba Indians*. The University of Alabama Press, Tuscaloosa.

Moore, David G., Christopher B. Rodning, and Robin A. Beck—2017 Joara, Cuenca, and Fort San Juan: The Construction of Colonial Identities at the Berry Site. In *Forging Southeastern Identities: Social Archaeology, Ethnohistory, and Folklore of the Mississippian to Early Historic South*, edited by Gregory A. Waselkov and Marvin T. Smith, pp. 99–116. University of Alabama Press, Tuscaloosa.

Moore, David G., Robin A. Beck, Jr., and Christopher B. Rodning.—2005 Afterward: Pardo, Joara, and Fort San Juan Revisited. In reissue of *The Juan Pardo Expeditions: Exploration of the Carolinas and Tennessee, 1566–1568*, by Charles M. Hudson. University of Alabama Press, Tuscaloosa.

2004 Joara and Fort San Juan: Culture Contact at the Edge of the World. *Antiquity* Vol. 78, No. 299: March 2004 Project Gallery (on-line Project Gallery: to view go to <http://antiquity.ac.uk/ProjGall/moore/>).

Oberg, Michael Leroy and David Moore—2017 Europeans in the Indians' Old World. In *New Voyages to Carolina: Reinterpreting North Carolina History*, edited by Larry Tice and Jeffrey Crow, pp. 41–59. The University of North Carolina Press, Chapel Hill.

Rodning, Christopher B., Robin A. Beck, Jr., and David G. Moore—2013 Conflict, Violence, and Warfare in *La Florida*. In *Native and Spanish New Worlds: Sixteenth-Century Entradas in the American Southwest and Southeast*, edited by Clay Mathers, Jeffrey M. Mitchem, and Charles M. Haecker. University of Arizona Press, Tucson.

Rodning, Christopher B. and David G. Moore—2010 South Appalachian Mississippian and Protohistoric Mortuary Practices in Southwestern North Carolina. In *Papers in Honor of Bennie C. Keel*, edited by Edmond A. Boudreaux, III, Christopher B. Rodning, and Jane Eastman. *Southeastern Archaeology* 29(1):80–100.

\*The remaining attachments have been retained in the Committee files.\*

The CHAIRMAN. Thank you, Chief.  
Councilman Suppah.

**STATEMENT OF HON. RON SUPPAH, COUNCIL MEMBER,  
CONFEDERATED TRIBES OF WARM SPRINGS**

Mr. SUPPAH. Good afternoon, Chairman Hoeven and other Committee members. I am Ron Suppah, Tribal Council Member for the Confederated Tribes of Warm Springs.

Today, the Committee is making history. This is the first hearing that legislation to nullify a fraudulent treaty that sought to deprive my Tribe of rights reserved in its original treaty with the United States. I am personally honored to be here, asking you to correct a historic wrong perpetuated against the Warm Springs people.

In 1855, a treaty was negotiated and signed between my ancestors and the Federal Government. Under the original treaty, the Warm Springs and Wasco Tribes relinquished approximately 10 million acres but reserved the Warm Springs Reservation for their exclusive use. In the treaty, the Tribes retained their rights to harvest fish, game and other foods off the reservation at all places they had gone to since time immemorial.

After 1855, the Tribes maintained their traditional practice of traveling regularly to the Columbia River to harvest salmon. The continued Indian presence at their usual and accustomed fishing sites, however, irritated the non-Indian settlers. This prompted then-Superintendent of Indian Affairs for Oregon, J.S. Perit Huntington, to keep the Tribes away from the settlers. In 1865, Huntington drew up a supplemental treaty and convinced a handful of tribal members to sign it. Accordingly to its terms, the treaty prohibits the Indians from leaving the Warm Springs Reservation without the written permission of the Government. The 1865 treaty also relinquished all of the off-reservation rights so carefully negotiated by the tribes 10 years earlier.

Yet, the historical records prove that the Indians of the Warm Springs Reservation did not comply with the 1865 treaty and did not understand its provisions. In fact, Government records from the era show that Warm Springs people understood that latter treaty as merely providing a pass system for Indians, distinguishing them from hostile Indians, for their own protection. The next Indian agent for the government wrote to D.C. and reported that the 1865 treaty was not properly interpreted to the Indians, and that they were led to believe that their right to take fish hunt off-reservation was protected in this second treaty supplement.

In 1884, the Warm Springs agent wrote that the supplement treaty was “beyond a doubt a forgery” and that the Warm Springs people were “willfully and wickedly deceived by the government.”

In 1886, another Federal Warm Springs agent described the treaty this way: “If ever a fraud was villainously perpetuated on any set of people, red or white this was one of the most glaring.”

In 1887, the Commissioner of Indian Affairs reported to the Secretary of the Interior that the Warm Springs people were cheated and swindled out of their right to fish by a cunning and unprincipled U.S. official. These are the words of representatives of American government assessing the fraud perpetuated upon the Warm Springs Indians. My Tribe has never recognized it, and the Federal Government never sought to enforce it. Yet, as I testify here today, the 1865 treaty remains on the books.

I believe that Senator Merkley had outlined a lot of some of the other comments that I wished to make. But I think we’ve been witnessing and watching this thing for 154 years. And all that time, we have never relinquished our off-reservation reserve rights. Today, I ask that the Committee support S. 832, because I think it would right a wrong perpetuated by the United States Government and it would be good for the Warm Springs people to live under the correct treaty.

Thank you for the time, and I offer that if you guys have any questions, I would answer those. Thank you.

[The prepared statement of Mr. Suppah follows:]

PREPARED STATEMENT OF HON. RON SUPPAH, COUNCIL MEMBER, CONFEDERATED  
TRIBES OF WARM SPRINGS

Mr. Chairman and members of the Committee, thank you for holding today’s hearing and inviting me to testify. Today the Committee is making history—this is the first hearing on legislation to nullify a fraudulent treaty that sought to deprive my tribe of rights it reserved in its original treaty with the United States. I want to thank Senators Merkley and Wyden, and Congressman Greg Walden for introducing this legislation. I also recognize the late Senator Mark Hatfield and his staff for their efforts to pass identical legislation in 1996.

I am personally honored to be here asking you to correct a historic wrong perpetrated against the Warm Springs people.

**Historical Background**

On June 25, 1855 a treaty was negotiated and signed between my tribe’s Warm Springs and Wasco ancestors and the federal government, who sought to clear the land of Indians for settlement. Under the treaty, the Warm Springs and Wasco tribes relinquished approximately ten million acres of land, but reserved the Warm Springs Reservation for their exclusive use. Our land cession was one-sixth the current size of the State of Oregon. In the treaty the tribes retained their rights to harvest fish, game and other foods off the reservation in their usual and accustomed places.

The 1855 treaty was ratified by the U.S. Senate on March 8, 1859—just three weeks after Oregon entered the Union. Since that time the 1855 treaty has served as the primary agreement between the Warm Springs Tribes and the U.S. government.

After the treaty signing, the tribes maintained their accustomed practice of traveling regularly to the Columbia River to harvest salmon. The continued presence of Indian people fishing along the Columbia at their usual and accustomed fishing sites, however, irritated the non-Indian settlers and prompted the then-Superintendent of Indian Affairs for Oregon, J.W. Perit Huntington, to pursue efforts to keep the Tribes away from the settlers.

To that end, Superintendent Huntington drew up a supplemental treaty and, on November 15, 1865, convinced the tribes of the Warm Springs Reservation to sign it. This treaty, called the Treaty with the Middle Oregon Tribes of November 15, 1865, was ratified by the U.S. Senate on March 2, 1867. According to its terms, the treaty prohibits the Indians from leaving the Warm Springs Reservation without the written permission of the Government and relinquishes all of the off-reservation rights so carefully negotiated by the tribes as part of the 1855 treaty.

Yet, the historical record demonstrates that the Indians of the Warm Springs Reservation neither complied with the 1865 treaty nor understood its provisions. In fact, U.S. Department of Justice affidavits taken from Warm Springs Indians present at both the 1855 and 1865 treaty signings show they understood the later treaty simply to provide a pass system for Indians leaving the reservation to exercise their off-reservation rights. They thought this merely distinguished them from hostile Indians that were raiding the area at the time.

Almost immediately following the signing of the 1865 treaty, the Indians from the Warm Springs Reservation continued to travel to the Columbia River to fish from their historic fishing sites. Warm Springs Agency agent John Smith wrote in his June 26, 1867, report to Superintendent Huntington that “as early as the 16th of May, 1866, the Indians began to visit the salmon fisheries in large numbers.” Reports by Agent Smith in subsequent years further document continued fishing on a substantial scale, and in a July 1, 1869, letter from Agent Smith to Superintendent A.B. Meacham—who replaced Huntington on May 15, 1869—Smith noted “the Indians said they did not understand the terms of the [1865] treaty”, that “they claim that it was not properly interpreted to them”, and that “they were led to believe the right of taking fish, hunting game, etc., would still be given them because salmon was such an essential part of their subsistence.” That same year, in a September 18, 1869 report regarding the Warm Springs Reservation to Superintendent Meacham, U.S. Army Captain W.M. Mitchell wrote:

“I also have to report, for the consideration of the proper authorities, that the Indians unanimously disclaim any knowledge whatever of having sold their right to the fishery at The Dalles of the Columbia, as stated in the amended treaty of 1865, and express a desire to have a small delegation of their head men visit their Great White Father in Washington, and to him present their cause of complaint.”

Official U.S. Government reports in subsequent years continue to note the Warm Springs Reservation Indian’s strong objection to the 1865 treaty, their continued and uninterrupted reliance on their fisheries on the Columbia River, and the fraudulent nature of the 1865 treaty signing. In the annual report, dated August 15, 1884, Warm Springs Agent Alonzo Gesner finds:

“on record what purports to be a supplementary treaty which is beyond a doubt a forgery on the part of the Government in so far as it relates to the Indians ever relinquishing their right to the fisheries on the Columbia River; and as a matter of justice to the Indians, as well as to the Government, the matter should be made right and satisfactory to the Indians as soon as possible. . . . All the Indians say emphatically that when the treaty was read to them no mention was made of their giving up the right to fish. All that was said was that they were to agree not to leave the reservation without getting passes. . . . The fact is they were willfully and wickedly deceived.”

In 1886, Warm Springs Agent Jason Wheeler reported to the Commissioner of the Indian Affairs in Washington, DC, regarding the 1865 treaty that “if ever a fraud was villainously perpetrated on any set of people, red or white, this was, in my opinion, certainly one of the most glaring.” In 1887, Commissioner of Indian Affairs J.D.C. Atkins, in his annual report to the Secretary of the Interior, cited a recent War Department report by Gen. John Gibbons that:

“called attention to the oft-repeated, and I may say very generally credited, story of fraud in the treaty of 1865, whereby the Warm Springs Indians were, it is claimed, cheated out of their fishery by the Huntington treaty. . . . Salmon, is material and of grave importance to them. It is their principal source of subsistence, and they never intended to part with it, but were cheated and swindled out of it by a cunning and unprincipled U.S. official. I would recommend your early attention to the matter upon the convening of Congress.”

These are the words of representatives of the American Government assessing this kind of a fraud perpetrated upon the Warm Spring Indians in the 1870’s and 1880’s. Yet as I testify here today, the 1865 treaty remains on the books. My tribe has never recognized it and the federal government has never sought to enforce it.

#### **Executive Branch support for original 1855 treaty rights**

The Federal Government has vigorously pursued federal court litigation affirming and enforcing the Tribe’s original 1855 off-reservation treaty rights. In *United States v. Oregon*, for example, the U.S. Department of Justice prevailed in restraining agents of the State of Oregon from restricting Warm Spring’s off-reservation fishing rights.

In a May 17, 1989 letter to then Oregon Congressman, Bob Smith, the Acting Deputy Assistant Secretary of Interior for Indian Affairs wrote that “In the view of the federal court decisions confirming the validity of the Warm Springs Tribe’s 1855 Treaty rights, the 1865 agreement must be regarded as an historic anomaly which has no practical or legal effects on the nature and extent of the Tribe’s 1855 treaty.”

In addition, a November 25, 1997, letter from the U.S. Forest Service Regional Director to the Warm Springs Tribal Council, affirmed that the agency it would deal with the Tribe only on the basis of the 1855 Treaty’s off-reservation rights and not the 1865 treaty. The Forest Service letter enclosed an analysis it had performed, stating in part: “As a matter of policy, the Forest Service recognizes only the Treaty With The Tribes Of Middle Oregon, 1855.”

No Federal Government agency has ever asserted that the 1865 treaty was enforceable or had any legal effect.

#### **State of Oregon rejection of 1865 treaty**

The State of Oregon, like the Federal Government, has never attempted to enforce the 1865 agreement despite the State’s adverse position to the Tribe in off-reservation treaty fishing rights litigation. See, *United States v. Oregon, supra.* . In 2019, Oregon’s Governor issued a policy statement disavowing the 1865 agreement and affirming the 1855 Treaty’s off-reservation rights, stating “it is the policy of the Office of the Governor of the State of Oregon that the fraudulent Huntington Treaty of 1865 is to be regarded as a nullity with no effect whatsoever.”

Oregon’s Attorney General has also issued a formal legal opinion<sup>1</sup> concluding that the 1865 treaty is unenforceable as a matter of law.

#### **Effect of Nullification of the 1865 Treaty**

Because the 1865 treaty has never been enforced, its nullification would have no impact on the State of Oregon’s rights or that of its citizens. Instead, the legislation before you would at long last correct a historic travesty. It would allow the Warm Springs Tribes to continue to exercise their 1855 off-reservation fishing, hunting, gathering and grazing rights without future fear of litigation or extortion.

As the late Senator Mark Hatfield said on the Senate floor in 1996, this legislation will “help the honor of the United States and dignity of a long-wronged people.”

Thank you for allowing me to testify before the Committee today and for your support of this historic legislation.

The CHAIRMAN. Thank you, Councilman.

We will turn to President Fire Thunder, of the Oglala Lakota Nation Education Coalition.

#### **STATEMENT OF CECELIA FIRE THUNDER, PRESIDENT, OGLALA LAKOTA NATION EDUCATION COALITION**

Ms. FIRE THUNDER. Good afternoon, Chairman Hoeven, Vice Chairman Udall and members of the Committee. My name is Cecelia Fire Thunder. I am a member of the Oglala Lakota Nation and President of the Oglala Lakota Nation Education Coalition, which represents six tribally controlled grant schools on the Pine Ridge Reservation in South Dakota.

I am here to speak on S. 279, the Tribal School Federal Insurance Parity Act. I also serve as a board member for Little Wound School in Kyle, South Dakota.

The Federal Employee Health Benefits program is an employer health insurance program administered by the Office of Personnel Management. Federal employees have had a high level of choice in finding a plan that fits their needs and budgets. Premiums vary by plan, with up to 75 percent of the cost covered by the Federal Government, and the remainder by the employee.

We fully support S. 279 for immediate benefits and savings for our schools. S. 279 would amend the Indian Health Care Improvement Act to authorize tribal entities operating under the Tribally

<sup>1</sup>February 20, 2019 Oregon Attorney General Opinion No. 8295.

Controlled Schools Act of 1988 to access Federal employee health benefits.

This simple and clean legislative fix would directly benefit our schools by allowing them to access lower health insurance cost options as significant overall savings, savings already provided by all other BIE system schools.

Six of the 13 schools located on the Pine Ridge Indian Reservation are tribally controlled grant schools. Since their founding in the 1970s, our tribal grant schools have provided health insurance to all of our employees. Many of our schools, however, struggle to cover the cost of health care insurance premiums and deductibles. We also have trouble recruiting highly qualified staff due to the cost of their benefits, which is a really important component as a school to bring in more highly qualified teachers.

Schools make up for the funding shortfall through the diversion of Indian School Equalization Program, known as ISEP. We use ISEP to cover health insurance and other program costs. We reduce the amount of money available for teachers in classrooms. This in turn directly affects education services our children receive.

In 2012, our six schools applied to participate in FEHB. Title IV of the Indian Health Care Improvement Act authorizes tribal entities operating under ISDEAA to access FEHB. We understood that we were able to join based on this description of the law. However, the Interior Solicitor recommended to Office of Personnel Management that we were ineligible, because we have the authority to administer ISDEAA contracts or compacts. However, we operate under the Tribally Controlled Schools Act of 1988.

I want to remind the Committee and people in the audience that even though we have two BIA schools, the BIA, administered by the government, has access to all these programs, and we don't, because we are under 694-437. For example, Little Wound School, and in our presentation, we gave you graphs of costs, premiums and deductibles. So Little Wound School today pays \$954.58 for single coverage with a \$5,000 deductible. Doing the research, under FEHB, Little Wound School will pay \$464 and \$500 deductible. In our analysis of savings, Little Wound School would save over \$1 million just in reduced costs under FEHB.

In conclusion, I would like to also point out that it is a really good local economy benefit to have health insurance. So in the last 48 seconds, I just want to share with you, I am deaf. I have cochlear implants. In 2005, I underwent bilateral surgery at the University of Iowa. Only because I have private health insurance was I able to get into a top-notch clinic in the United States to get a top-notch surgeon to drill into my head and put implants in my cochlea so I could hear. That is the benefit of private health insurance.

Our employees are also seeing how important it is, even though we live on an Indian reservation and we have Indian Health Service, private health insurance can also benefit families that do not have the services, that our IHS does not have the services that it can provide.

We appreciate your support in this bill. Thank you so much.  
[The prepared statement of Ms. Fire Thunder follows:]

PREPARED STATEMENT OF CECELIA FIRE THUNDER, PRESIDENT, OGLALA LAKOTA  
NATION EDUCATION COALITION

**Introduction.** Chairman Hoeven, Vice Chairman Udall and honorable Members of the Senate Committee on Indian Affairs. My name is Cecelia Firethunder, a member of the Oglala Lakota Nation and President of the Oglala Lakota Nation Education Coalition (OLNEC). Thank you for this opportunity to provide testimony on behalf of OLNEC, which represents the six tribally controlled grant schools of the Oglala Sioux Tribe located on the Pine Ridge Indian Reservation in South Dakota. The Oglala Sioux Tribe and United States entered in the 1868 Treaty of Fort Laramie that established the Federal Government's responsibilities to provide for the education of our tribal youth. Our six tribally controlled grant schools operate pursuant to the Tribally Controlled Schools Act of 1988, Pub. L. 100-297 (TCSA), and the Indian Self Determination and Education Assistance Act of 1975 (ISDEAA), as amended, and are funded by the Bureau of Indian Education (BIE). Our Tribal Council has authorized us to be responsible for the administration and operation of tribal school functions. Members of individual school boards are elected from the communities they serve.

**Background on the FEHB Program.** Federal Employee Health Benefits (FEHB) is an employersponsored group health insurance program administered by the Office of Personnel Management. Due to the competitive nature of the FEHB program structure, employees have a high level of choice in finding the plan that is appropriate for their needs. Available features under different plans include health savings accounts, family coverage, and catastrophic risk protection, among others. Premiums vary depending on the plan type, with up to 75 percent of the costs covered by the Federal Government and the remainder by the employee.

**OLNEC Fully Supports S. 279 for Immediate Benefits and Cost-Savings for Our Schools.** S. 279 would amend one line of the Indian Health Care Improvement Act to specifically authorize Indian tribes and tribal organizations operating under the Tribally Controlled Schools Act of 1988 to access FEHB. This simple and clean legislative fix would directly benefit our schools by allowing them to access lower cost insurance options for their employees at significant overall savings—a benefit that is already provided at all other BIE system schools. S. 279's simple change to the law would provide tribally controlled grant schools with an equal opportunity to access this critical program.

**Demonstrated Need for FEHB Access at Tribally Controlled Grant Schools.** Six of the thirteen schools located on the Pine Ridge Indian Reservation are tribally controlled grant schools: American Horse School, Wounded Knee District School, Loneman Day School, Porcupine Day School, Little Wound School, and Crazy Horse School. All of our schools strive to provide high quality educational and support services to our students. That effort, however, is severely complicated by years of underfunding and under-resourcing within the BIE system.

All of our schools have provided health insurance for our employees since the schools were established in the 1970s. Many of our schools, however, struggle to cover the costs of high health insurance premiums and deductibles. We also have trouble recruiting highly qualified staff due to the costs of their benefits. Some schools are not able to shoulder the financial burden. Others try to find ways to make up for the shortfall, including through the diversion of Indian School Equalization Program (ISEP) dollars. ISEP formula funds support instructional services at BIE-funded elementary and secondary schools, including tribally controlled grant schools. When we use ISEP funds to cover the costs of health insurance and other programs, we reduce the amount of available funds for teachers and curriculum needs in the classroom. This, in turn, directly and adversely affects the consistency and quality of the educational services our students receive.

In 2012, our six tribally controlled grant schools applied to participate in the FEHB program. Pursuant to Title IV of the Indian Health Care Improvement Act, Indian tribes and tribal organizations operating under the ISDEAA are entitled to purchase health insurance coverage for their employees through the FEHB program. 25 U.S.C. § 1647b. We understood that we were able to join based on this provision. The Interior Solicitor and Office of Personnel Management, however, determined that we were ineligible because though we have the authority to administer ISDEAA contracts or compacts, we operate under the Tribally Controlled Schools Act of 1988. We responded to the decision with countervailing arguments that the TCSA specifically incorporated several ISDEAA provisions that had the effect of enabling tribally controlled grant schools to access FEHB. *See* 25 U.S.C. § 2508(a). Nonetheless, our reapplication was once again denied based on Interior's and OPM's aforementioned position. Legislative action is urgently needed to remedy this situation.

BIE-operated schools do not shoulder the same financial burdens as tribally operated grant schools. Rather, BIE-operated schools are able to fully participate in the FEHB program, with expanded benefits packages for their employees and lower overall costs and deductibles. BIE-operated and tribally controlled grant schools share the mission of providing quality education opportunities for Native students to assist them on the path of life-long learning and personal achievement. Both serve the same Native student populations, recruit qualified academic and administrative staff, and advance the interests of tribal sovereignty and self-determination in education—all pursuant to the authorization and funding of the Federal Government. Yet, only BIE-operated schools are able to access the FEHB program with its multifaceted benefits for employees and the schools alike. The result is a shocking divergence in the amount of money that these two school systems must invest to provide health insurance coverage for their employees, as the following example illustrates:

**Example:** For a single employee, Little Wound School, one of our tribally controlled grant schools, is able to offer a healthcare package through Blue Cross Blue Shield of South Dakota for a monthly cost to the school of \$954 with a \$5,000 deductible (Little Wound currently pays 100 percent of the total costs). For an employee at a BIE-operated school such as Pine Ridge School, the monthly cost to the school through the FEHB program would be \$348 with a \$500 deductible (the total monthly cost is \$464 but the school covers 75 percent of that expense at \$348 per month). Access to FEHB would result in annual savings of over \$1,000,000 for Little Wound School—money that could be used for educational services for students.

As the charts attached demonstrate, all six of our tribally controlled grant schools are currently burdened with high premium and deductible obligations. The substantial savings highlighted in the example above would be replicated to varying degrees at all of our schools if they had access to the FEHB program. These savings represent funding for additional teachers, instruction materials, and classroom aids to enhance our students' learning environment and experiences. Critically, they also translate into additional money being available per student without the need to appropriate new federal funds. Access to FEHB would, thus, enable tribally controlled grant schools to alleviate pressure on ISEP funding and diversify their insurance options without tying up federal funds—a win-win situation. S. 279 provides this crucial access to FEHB.

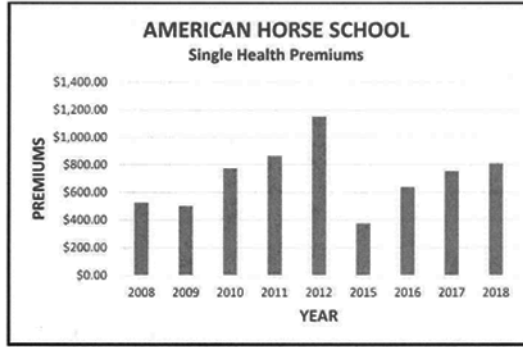
**Community Support for S. 279 FEHB Expansion.** S. 279 would have benefits not just for our OLNEC members, but for the over 100 tribally controlled grant schools that operate across the country. We have received copies of letters and resolutions of support from numerous intertribal organizations and individual entities, including the National Congress of American Indians; National Indian Health Board; Great Plains Tribal Chairmen's Health Board; United Tribes of North Dakota; Saint Stephens Indian School Education Association, Inc.; and the Standing Rock Sioux Tribe. Copies of these letters are attached for the record.

**Conclusion.** The Oglala Lakota Nation Education Coalition greatly appreciates this opportunity to provide testimony in support of S. 279. This simple, no cost legislative fix would effectuate manifold employee and budgetary benefits for tribally controlled grant schools nationwide. We ask that you swiftly consider and enact this important bill. Wopila tanka; thank you.

**Attachments**



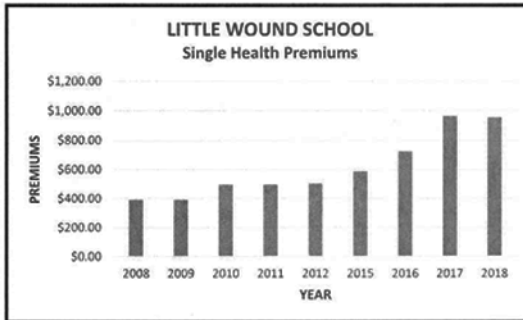
Single Health		
Year	Premium	Deductible
2008	\$526.38	
2009	\$501.38	
2010	\$774.20	
2011	\$865.57	
2012	\$1,152.00	
2015	\$375.40	\$2,000
2016	\$637.24	\$2,500
2017	\$755.60	\$2,500
2018	\$811.16	\$2,500



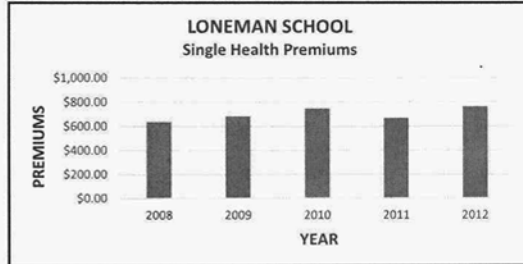
Single Health		
Year	Premium	Deductible
2008	\$440.89	
2009	\$387.68	
2010	\$496.76	
2011	\$545.45	
2012	\$556.53	
2016	\$515.73	\$2,500
2017	\$566.86	\$2,500
2018	\$696.00	\$5,000



Single Health		
Year	Premium	Deductible
2008	\$392.55	
2009	\$392.55	
2010	\$496.77	
2011	\$497.02	
2012	\$505.02	
2015	\$588.55	\$2,000
2016	\$724.62	\$3,000
2017	\$963.44	\$3,000
2018	\$954.58	\$5,000



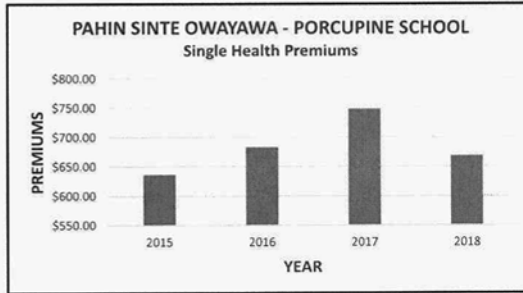
Single Health	
Year	Premium
2008	\$637.10
2009	\$683.19
2010	\$748.18
2011	\$668.56
2012	\$764.81



Single Health		
Year	Premium	Deductible
2008	\$959.61	
2009	\$1,142.11	
2010	\$685.42	
2011	\$703.63	
2012	\$674.44	
2015	\$418.23	\$2,000
2016	\$401.01	\$2,000
2017	\$541.53	\$2,250
2018	\$590.26	\$2,800



Single Health		
Year	Premium	Deductible
2015	\$637.10	\$2,000
2016	\$683.19	\$2,000
2017	\$748.18	\$2,250
2018	\$668.56	\$2,800



NATIONAL CONGRESS OF AMERICAN INDIANS  
*April 29, 2019*

Hon. John Hoeven,  
 Chairman,  
 Hon. Tom Udall,  
 Vice-Chairman,  
 U.S. Senate Committee on Indian Affairs,  
 Hart Senate Office Building,  
 Washington, DC.

RE: SUPPORT FOR S. 279, THE TRIBAL SCHOOL FEDERAL INSURANCE PARITY  
 ACT OF 2019

Dear Chairman Hoeven and Vice-Chairman Udall:

I write on behalf of the National Congress of American Indians (NCAI), the oldest and largest organization serving the interests of American Indian and Alaska Na-

tive tribal nations and citizens, to express NCAI's support for the immediate consideration and passage of S. 279, the Tribal School Federal Insurance Parity Act.

Access to healthcare is a concern for all Americans—especially within tribal communities. In 2010, Congress intended to improve healthcare access by authorizing tribal nations utilizing Indian Self-Determination and Education Assistance Act (ISDEAA) programs to participate in the Federal Employee Health Benefit (FEHB) program. Unfortunately, after consideration by the Department of the Interior and Office Personnel Management (OPM), it was determined that Tribal Grant School employees (25 U.S.C. Ch. 27) are ineligible for FEHB, even though Tribal Grant Schools operate under the ISDEAA model.

Tribal Grant School employees should have access to FEHB. We thank Senator John Thune for introducing S. 279. This legislation will ensure Tribal Grant School employees have access to this vital program, thereby improving prospects for recruiting and retaining excellent teachers at tribal schools and reducing the healthcare costs of tribal schools so that school resources can be appropriately focused on education.

Tribal nations have greatly appreciated the work of Congress to ensure that the benefits of the FEHB program reach Indian Country. NCAI urges the prompt passage of this legislation that is vital for Tribal Grant School employees. We look forward to working with you.

Respectfully,

JEFFERSON KEEL,  
*President, NCAI*

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NATIONAL INDIAN HEALTH BOARD  
*April 12, 2019*

Hon. John Thune,  
United States Senate,  
Washington, DC.

RE: SUPPORT FOR THE TRIBAL SCHOOL FEDERAL INSURANCE PARITY ACT

Dear Senator Thune,

I write today to express my support for S. 279, the Tribal School Federal Insurance Parity Act. As you know, American Indians and Alaska Natives (AI/ANs) face significant challenges in healthcare access and coverage, and this legislation will make positive improvements towards reducing the costs of health coverage for Tribal Schools while freeing up funds for recruitment and retention of education-specific needs.

In recent years, the cost of health care has skyrocketed, straining the limited budgets of Tribal Schools who have been forced to spend a larger percentage of their education dollars on health insurance coverage for employees. In fact, Tribal Grant Schools have reported experiencing a 50 percent increase in health insurance premium rates over the last few years. Since the 1988 passage of the Tribally-Controlled Schools Act (P.L. 100-297), Tribes have been able to expand their self-governance authorities and control over education and schooling programs. There are currently 128 Tribal Grant Schools nationwide, and 3 Tribal schools operating under self-determination contracts as established under P.L. 93-638. However, these schools have been restricted from receiving Federal Employee Health Benefits (FEHB) and Federal Employees Group Life Insurance (FEGLI) eligibility. As a result, they are forced to utilize portions of their education budgets to cover these expenses.

By permitting Tribal Grant Schools to access FEHB and FEGLI benefits, it frees up more of Tribes' education funding to be spent on much-needed education supplies, recruitment of new teachers, and other resource needs. It also honors the federal trust responsibility for health services and furthers the government-to-government relationship between Tribal Nations and the federal government.

Thank you for taking on this important issue by re-introducing the Tribal School Federal Insurance Parity Act. This effort is an important first step towards reducing Tribal health expenditures and improving educational outcomes in Indian Country. Please know that NIHB is here to offer any support or assistance you may need in moving this legislation through Congress.

Yours in Health,

VICTORIA KITCHEYAN, *Chairperson*

RESOLUTION NO. 19–102 OF THE OGLALA SIOUX TRIBAL COUNCIL OF THE OGLALA SIOUX TRIBE SUPPORTING THE PASSAGE OF S. 279, THE TRIBAL SCHOOL FEDERAL SCHOOL INSURANCE PARITY ACT, AND AUTHORIZES THE SUBMISSION OF A LETTER OF SUPPORT ON BEHALF OF THE OGLALA SIOUX TRIBE.

**WHEREAS**, the Oglala Sioux Tribe adopted its Constitution and ByLaws by referendum vote on December 14, 1935, in accordance with Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. § 5123), and under Article III of the Constitution, the Oglala Sioux Tribal Council is the governing body of the Oglala Sioux Tribe, and

**WHEREAS**, pursuant to the Constitution and By-laws of the Oglala Sioux Tribe, the Oglala Sioux Tribal Council exercises legislative powers to enact and promulgate resolutions and ordinances, and

**WHEREAS**, Article IV, Sections 1(f), 1(k), 1(m), 1(w) empower the Tribal Council to manage the economic affairs of the Tribe, protect and preserve the property of the Tribe, adopt laws governing the conduct of persons on the Pine Ridge Indian Reservation, and adopt laws protecting and promoting the health and general welfare of the Oglala Sioux Tribe and its membership, and

**WHEREAS**, Article IV, Section 1(a) authorizes the Tribal Council to negotiate with Federal, State, and local governments, on behalf of the Tribe, and to advise and consult on behalf of the Tribe, and **WHEREAS**, Senator Thune (R–SD) introduced S. 279, the Tribal School Federal Insurance Parity Act, on January 30, 2019, and co-sponsored by Senator Rounds (R–SD), and

**WHEREAS**, S. 279 is a tribal initiative that would amend Section 409 of the Indian Health Care Improvement Act to allow tribal grant schools, including the six tribally controlled grant schools on the Pine Ridge Indian Reservation, to participate in the Federal Employee Health Benefits program, and

**WHEREAS**, Federal Employee Health Benefits and Federal Employees Group Life Insurance provide comprehensive health care coverage and group term life insurance, and access to these programs would result in our schools paying substantially lower rates and bring savings that would greatly benefit our schools, and

**WHEREAS**, the Oglala Sioux Tribal Council has determined that is in the best interest of the Oglala Sioux Tribe to support the passage of S. 279 and the written testimony submitted by Ms. Cecelia Fire Thunder from OLNEC; now

**THEREFORE BE IT RESOLVED**, that the Oglala Sioux Tribal Council hereby supports the passage of S. 279, the Tribal School Federal Insurance Parity Act, and

**BE IT FURTHER RESOLVED**, that the Oglala Sioux Tribal Council hereby authorizes and supports the submission of the attached letter in support of S. 279 as well the written testimony submitted by Ms. Cecelia Fire Thunder from OLNEC and requests that the Oglala Sioux Tribe’s letter of support to be included in the hearing record for S. 279, and

**BE IT FURTHER RESOLVED**, that the President or in his absence, the Vice-President, is authorized and directed to sign this letter of support.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as the undersigned Secretary of the Oglala Sioux Tribal Council, of the Oglala Sioux Tribe hereby certify that this Resolution was adopted by a vote of: 18 For; 0 Against; 0 Abstain; and 0 Not Voting; during a REGULAR SESSION held on the 1st day of MAY, 2019

Julian Bear Runner, President, Oglala Sioux Tribe

OFFICE OF THE PRESIDENT

*April 30, 2019*

Hon. John Hoeven,  
Chairman,  
Hon. Tom Udall,  
Vice-Chairman,  
U.S. Senate Committee on Indian Affairs,  
Hart Senate Office Building,  
Washington, DC.

RE: SUPPORT FOR S. 279, THE TRIBAL SCHOOL FEDERAL INSURANCE PARITY ACT

Dear Chairman Hoeven and Vice Chairman Udall:

I am writing on behalf of the Oglala Sioux Tribe to thank you for holding the May 1, 2019 hearing on S. 279, the Tribal School Federal Insurance Parity Act. We strongly support this important bill and have actively promoted its concept for years. The bill is a tribal initiative: one borne from our desire for our tribally controlled grant schools, which operate under the Tribally Controlled Schools Act of 1988, Pub. L. 100-297 (TCSA), and the Indian Self Determination and Education Assistance Act of 1975 (ISDEAA), to save money on healthcare benefits for their employees. Our Tribe has worked with and supported the Oglala Lakota Nation Education Coalition (OLNEC) in the long effort to realize what this bill will accomplish.

S. 279 would allow our six tribally controlled grant schools on our Pine Ridge Indian Reservation to access Federal Employee Health Benefits (FEHB) and Federal Employees Group Life Insurance (FEGLI). FEHB is an employer-sponsored group health insurance program administered by the Office of Personnel Management that provides comprehensive health care coverage for federal employees, annuitants, and their families and FEGLI provides group term life insurance.

Access to these federal programs would result in our schools paying substantially lower rates for employee healthcare in the same manner that Bureau of Indian Education schools currently do. This will bring about significant savings for our tribally controlled grant schools, which currently struggle to make ends meet, to the point of being forced to use Indian School Equalization Program (ISEP) dollars to cover myriad funding shortfalls. Our tribally controlled grant schools will be able to use the savings that will be achieved from S.279 for instructional services, teacher salaries and classroom amenities, all toward improving the quality of our students' educations and enhancing their school experiences. Our tribally controlled grant schools would no longer be encumbered with the heavy financial burden of high health care premiums for their employees.

We support the written testimony provided by Ms. Cecelia Fire Thunder from OLNEC, and we refer you to that testimony for our tribally controlled grant schools' specific health care costs. We note that such testimony sets out that access to FEHB would save our Little Wound School over \$1 million. Please consider the good those dollars could do for our tribal members' education.

Thank you again for holding this important hearing. I ask that this letter be included in the hearing record.

We also express heartfelt thanks to Senators Thune and Rounds for introducing S.279. We also thank Vice-Chairman Udall for cosponsoring the bill. We call upon this Committee to move the bill forward and work toward its enactment. It is a good bill: one that aligns with our 1868 Treaty of Fort Laramie that established the United States' obligations to provide for the education of our tribal youth.

Sincerely,

JULIAN BEAR RUNNER, PRESIDENT, OGLALA SIOUX TRIBE

The CHAIRMAN. That is impressive. Your hearing now seems to be quite good. Remarkable.

We will start with rounds of questioning. Secretary Tahsuda, according to the resolution passed in our State, we have nine schools in my home State that can't participate in the Federal Employee Health Benefits program. I want to confirm that S. 279 would bring parity across all BIE schools, so that every school employee would be eligible to receive Federal health insurance.

Mr. TAHSUDA. Thank you, Chairman. Yes.

The CHAIRMAN. Okay. S. 790 would authorize the Department of Interior to take land into trust for a tribe in another State for the purpose of gaming. Does the Department of Interior support S. 790?

Mr. TAHSUDA. Thank you, Chairman. I appreciate the question. In general, I would say that the Department supports the equal application of laws to federally-recognized tribes, such as the Catwaba Indian Nation. It is clear that the benefits Congress intended for the Tribe through the settlement act have not been realized. This has resulted in disparate treatment for this Tribe, when compared to other federally-recognized tribes.

We have offered some language suggestions, and if those are made, as we suggested, we believe that Congress will not only provide parity to the Tribe, so that it can finally realize some of the promises made through the settlement act, but that Congress will provide the Department with good clarity so that we can meet our statutory and trust responsibilities for the Tribe.

The CHAIRMAN. Does the Department consider S. 790 to be off-reservation gaming?

Mr. TAHSUDA. Thank you, Chairman. If you are asking whether we would process the land acquisition specified in S. 790, as drafted, as an off-reservation acquisition under our regulations, the answer would be yes.

The CHAIRMAN. Does the Department consider this to be a mandatory or discretionary trust land acquisition?

Mr. TAHSUDA. Again, Chairman, as drafted, the Department would process the land acquisition as a discretionary acquisition. Again, in my testimony we made several technical suggestions to better effectuate the intent of the bill. I would note, as an additional suggestion, that a mandatory acquisition would provide a more direct avenue for the Department to take the land into trust for the Tribe.

Congressional intent expressed through legislation provides us the record needed to take the land into trust, including obviating the need to distinguish between on-reservation and off-reservation. Without clear language provided by mandatory acquisition language, the Department must develop an expensive administrative record that can be time-consuming and expensive not just for us, but for the tribe, and still leave the tribe, in our decision, open to technical challenges and potential litigation.

The CHAIRMAN. Service areas are used for determining housing, health care and law enforcement. Does the Department of Interior believe that service areas should also be used to determine whether land should be taken into trust for the purpose of gaming?

Mr. TAHSUDA. Thank you, Chairman. Again, a good question. At the risk of trying to define congressional intent, I would say that in the Department, we often view service areas as an indication of congressional recognition of a specific tribe's connection to a particular geographic area. However, unless the statute specifies otherwise, we would still consider the application for fee to trust in a service area to be discretionary, off-reservation acquisition under Part 151 of our regulations.

The CHAIRMAN. Chief Harris, in your testimony you stated land taken into trust in North Carolina through this bill complies with the Catawba 1993 settlement. Why doesn't the Tribe pursue land into trust for the purpose of gaming on the Catawba Reservation in the State of South Carolina?

Mr. HARRIS. Due to the 1993 settlement agreement, and the restrictions that were imposed on us by the State of South Carolina, we have tried to move forward in South Carolina and have been turned down twice by the Supreme Court of South Carolina. So we turned our attentions to North Carolina, as —

The CHAIRMAN. I am sorry, say the last part again. I apologize.

Mr. HARRIS. Where did you actually lose me?

The CHAIRMAN. Why not in South Carolina?

Mr. HARRIS. Okay, why not in South Carolina? We have been restricted by the settlement agreement itself. When we first signed it in 1993, there was gaming within the State of South Carolina. We were entitled to have that gaming.

When South Carolina withdrew and stopped gaming, we weren't allowed to have gaming, but they moved forward with riverboat gaming, which goes out three miles into Federal waters and games, but it's taxed by the South Carolina Department of Revenue. When we took that issue back to the State Supreme Court, we ended up in the South Carolina Supreme Court. The reason they ruled against us was that is water, not land. Therefore, you cannot game on your reservation.

The CHAIRMAN. The Eastern Band of Cherokee is another federally-recognized tribe located in North Carolina.

Mr. HARRIS. Correct.

The CHAIRMAN. They conduct gaming. What outreach have you made to address their concerns of having another gaming operation in North Carolina?

Mr. HARRIS. We have spoken to three of the tribal leaders of the Eastern Band of Cherokee, trying to get them to see if we can enter into a partnership of some kind allowing us to game within our service area. Currently, they are restricted by their exclusivity zone within the State of North Carolina. So they cannot game in Cleveland County. They are locked out of that by their agreement.

The CHAIRMAN. They are locked out of what?

Mr. HARRIS. They are locked out of Cleveland County.

The CHAIRMAN. Why?

Mr. HARRIS. Because of the exclusivity zone they have with the State of North Carolina.

The CHAIRMAN. Okay.

Mr. HARRIS. Everything they have is in, their gaming is west of I-26. This location is east of I-26.

The CHAIRMAN. You have had a dialogue with them?

Mr. HARRIS. Yes, I have spoken with all three of their leaders, over a seven-year period.

The CHAIRMAN. And where are they in terms of your application in this legislation?

Mr. HARRIS. They are resistant to our application. Actually, I think they have been to many of your offices, and they oppose 790.

The CHAIRMAN. I may ask you more about this, but right now, Vice Chair, do you want to go next?

Senator UDALL. I will yield to Senator Cortez Masto.

The CHAIRMAN. Okay. Senator Cortez Masto.

**STATEMENT OF HON. CATHERINE CORTEZ MASTO,  
U.S. SENATOR FROM NEVADA**

Senator CORTEZ MASTO. Thank you, I appreciate that. Thank you, Mr. Chair and Ranking Member.

Let me follow up on the conversation on 790. Just for the record, I do support Senate Bills 279 and 832. Thank you for being here.

I do have questions about S. 790. Let me just start with Mr. Tahsuda. I understand in your recent analysis of 790 you mention your concerns with the bill, but you do not make mention of the provision in the bill that exempts this project from Section 20 of

the Indian Gaming Regulatory Act. Does the Department have any concerns that the act itself and the consultation process with the local stakeholders is taken out? Do you have concerns about that waiver?

Mr. TAHSUDA. Thank you, Senator Cortez Masto. The Section 20 provision of IGRA historically reflects Congress' intent to restrict the discretionary authority of the Secretary to take land into trust for gaming purposes outside of existing reservations in 1998 or land that the tribe had in 1998, and to ensure that as an exception to that general restriction that there would be involvement by the non-tribal officials around them, government officials around them.

Senator CORTEZ MASTO. Including the governor?

Mr. TAHSUDA. Yes, including the governor. Very importantly. So in a bill like this in which Congress is taking action, waiving Section 20 would be appropriate, I think, because it is requiring the action of the two Senators in North Carolina who have signed onto the bill indicating that Congress' original concern that the Administration would act without having other political involvement, that is not the case in this situation.

Senator CORTEZ MASTO. If Section 20 were, if we did not waive Section 20, it stayed in, would the Catawba Tribe be able to move forward with what they are trying to do today?

Mr. TAHSUDA. So if the bill as drafted—

Senator CORTEZ MASTO. If Section 20 were there, would they still comply under your consultation process that you would have to undergo for Section 20?

Mr. TAHSUDA. I believe we would then have to engage in the discussion with the governor. We would go through our process, as we did. So it's a two-part determination.

Senator CORTEZ MASTO. And that has not happened at all. In other words, there's a consultation process for you to engage in under Section 20.

Mr. TAHSUDA. Correct.

Senator CORTEZ MASTO. Have you done that with respect to the Catawba Tribe?

Mr. TAHSUDA. Consulting with the Catawba Tribe?

Senator CORTEZ MASTO. Have you engaged in the consultation process under Section 20 that you are required to engage in for purposes of what the Catawba Tribe is trying to do?

Mr. TAHSUDA. We have not, Senator.

Senator CORTEZ MASTO. Because of it being waived, is that right?

Mr. TAHSUDA. I am sorry, no, let me distinguish that. The Tribe has provided an application for that property through our regular administrative process. But that is in the early stages. Our administrative process is quite lengthy, as most of you know, it takes us a long time to act on these issues.

Senator CORTEZ MASTO. So the consultation process that would be engaged in under Section 20 that you would be responsible for has not occurred?

Mr. TAHSUDA. Exactly. We are not at that stage.

Senator CORTEZ MASTO. So you do not know, under that process, whether they would comply or not comply with the exceptions? In other words, what they are trying to do is put casino gaming in North Carolina.



Mr. TAHSUDA. Yes.

Senator CORTEZ MASTO. And you have to engage in Section 20 to determine whether they are okay to do that off-reservation gaming and you have to talk with the stakeholders, you have to talk with the governor, you have to do a consultation to see if they comply with the provisions of Section 20 or the exceptions to be able to do that, correct?

Mr. TAHSUDA. Yes, if I understand you correctly, Senator, I would say yes. As drafted, it seems that the intent would be for it to be a discretionary —

Senator CORTEZ MASTO. I guess my point is this. Let me just refer this. Why are we waiving Section 20? Because this can't be done without waiver of it? In other words, why don't we keep Section 20 in and let you go through your process?

Mr. TAHSUDA. In my opinion, it would just add an additional administrative hurdle. So by the action —

Senator CORTEZ MASTO. Every other tribe has to go through that hurdle. So why would we waive that for them? That is what I am trying to understand. What is the distinction here? Why don't we allow them to go through that process like everyone else? Because we're setting a bad precedent. How many other tribes have we waived Section 20 for?

Mr. TAHSUDA. Let me take a step back and maybe this will be a better explanation. In the general course of considering an off-reservation Section 20 two-part determination, that means that the land is either not on the current reservation or it is post-1988 land. The tribe then is not, is asking for land outside of its sort of jurisdiction.

Senator CORTEZ MASTO. Right.

Mr. TAHSUDA. So we would go through an off-reservation acquisition process, not related to the gaming, just in general. Our fee-to-trust off-reservation acquisition process requires an extensive discussion with the local community. We consider effects on property tax rolls, jurisdictional conflicts. Those are all things that we consider anyway. So that would be part of the off-reservation acquisition process.

Then in addition to that, once that is completed, we would go through a gaming analysis to determine whether the land would be appropriate for gaming and that would be the two-part determination, that would be the Secretary's part. We would make the determination if it is appropriate for gaming. Then we would ask the State, usually through the governor, to concur in that. That is the second part of the two-part determination.

Senator CORTEZ MASTO. So why don't we just go through that process?

Mr. TAHSUDA. In this case, Congress has already, again, at the risk of divining Congress' intent, it would seem that Congress in 1993 determined that the Tribe had a strong historical connection to the area that is called the service area. So in the normal context, the Tribe is going outside of somewhere that they had a connection —

Senator CORTEZ MASTO. I am running out of time. Thank you. You don't need to explain Congress' intent. I am just trying to understand why the Department would support this if we haven't

even gone through the process yet, and is it a bad precedent that we are setting here, and are we making something, carving out something unique for a tribe that we wouldn't do any other way. So that is my concern.

Thank you for the indulgence.

Senator UDALL. [Presiding] If you have additional questions, and you wanted to finish, that is all right. I know you are getting close on your vote.

Senator CORTEZ MASTO. I am, thank you.

So I do, actually. Let me just follow up then, and maybe Chief Harris of the Catawba Tribe, have you had conversations with any of the State leaders in North Carolina, or the governor?

Mr. HARRIS. Yes, of course. We have letters of support from the area we are talking to.

Senator CORTEZ MASTO. Do you have a letter of support from the governor of North Carolina?

Mr. HARRIS. Not the governor of North Carolina, no.

Senator CORTEZ MASTO. Okay, and the governmental is instrumental to, at least under Section 20 of the provision, to get that support, is that correct, Mr. Tahsuda?

Mr. TAHSUDA. If Section 20 were not waived, yes. Again, every State has slightly different legal requirements as to who gets to determine on behalf of the State, but usually it is the governor, yes.

Senator CORTEZ MASTO. Well, I can tell you what I am looking at in the Indian Gaming Regulatory Act, it is very specific under Section 20 that it has to be the governor of the State. And that is the rule that you would have to follow, correct?

Mr. TAHSUDA. That is the language of the act. However, each State determines for itself who directs the governor to take the action. In some States the governor has complete discretion to say yes or no. In a lot of States, the State legislature actually can restrict the governor's discretion to say yes or no.

Senator CORTEZ MASTO. So you are telling me the State legislature can restrict the governor under Federal law from weighing in on this?

Mr. TAHSUDA. Yes. That has been sort of the direction that court cases have gone over the years.

Senator CORTEZ MASTO. Wow. That is a new one on me. That is interesting. I will have to look into that. I have never heard that the State has the ability to come in and waive Federal law or change Federal law in any manner whatsoever.

So thank you. I appreciate the indulgence.

Senator UDALL. Thank you. Ms. Fire Thunder, in February this year, I received a letter from the Santa Fe Indian School that linked improvement recruitment and retention at BIE 297 schools with access to the Federal Employee Health Benefits program. The letter said, "Access to these benefits will support us in our efforts to attract and retain the best teachers."

Ms. Fire Thunder, can you briefly explain how the Tribal School Federal Insurance Parity Act will give 297 schools more tools to tackle teacher shortages?

Ms. FIRE THUNDER. When we go recruiting, and we go to the university campuses around our region to recruit, inevitably we need to be able to offer non-tribal members who have the background to

come teach in our schools, like in any part of the United States, a package that is not only salary, but has a good health insurance package. This will also, we hope that that is going to allow those who are undecided to come to our schools, that this health insurance package will be an inducement for them to consider to come work at our schools.

Senator UDALL. Thank you for that answer.

Teacher recruitment and retention in Indian Country has long been a concern of this Committee. In fact, at our last Government Accountability Office high-risk hearing in March, Senator Tester asked BIE Director Dearman if he had any data on teacher vacancies at the Bureau. He didn't at the time, but he promised to get back to the Committee.

Mr. Tahsuda, since then, has the Department been able to determine the number of BIE teacher vacancies at direct service schools?

Mr. TAHSUDA. Senator Udall, let me make sure. Are you asking about teacher vacancies that are directly operated schools?

Senator UDALL. Yes, that is correct.

Mr. TAHSUDA. At the risk of being inaccurate, I would like to get back to you with some direct numbers. We have been working on a workforce plan. There is also, as you would guess, in schools there is some fluctuation from year to year, as you have fluctuations in student populations at different age groups and you need different teachers. So sometimes we have short-term shortages. We would like to get back to you, though, with sort of the overall plan and where we are with that.

Senator UDALL. Okay, and you will get back to us for the record on that.

Mr. TAHSUDA. Yes.

Senator UDALL. Okay, great. And has the Department been able to reach out to tribally-operated BIE schools to estimate their teacher vacancy levels?

Mr. TAHSUDA. I understand that is a work in progress. Again, if I could get back to you, and we could at least give you a status report of where we are with that. As you might guess, that is less under our control and we are more dependent upon the time and the resources that the tribes and the schools have available to give us information as we ask for it. But we will provide that to you as well as we can.

Senator UDALL. Okay. Whether it is teacher vacancies, causes of student absenteeism, or student outcomes, this Committee's oversight efforts have been hindered by the lack of good data house-keeping at BIE. The department must do a better job of tracking BIE data. I hope you will take that message back to Assistant Secretary Sweeney. I would like you to follow up with Senator Tester and me about teacher vacancy data.

Ms. Fire Thunder, are there high teacher vacancy rates on Pine Ridge?

Ms. FIRE THUNDER. At Little Wound School, 100 percent of our administrators are tribal members, our superintendent, our high school principal, our middle school principal and our elementary principal are all tribal members. We have Oglala College on our reservation, they have done a bang-up job and we work very closely

with them as we begin to recruit high school students now to consider teaching as a career. So we are doing all kinds of things collectively, talking to each other, to induce more of our tribal citizens to become teachers and to be present in the classroom.

Senator, my big push is to try and get more men in the classroom. At Little Wound School, we have three men in our classrooms. At Loneman School, there are seven men in the classroom. So we are working very diligently, collectively, helping each other to fulfill that need. We really are looking forward to creating that stronger partnership to get more of our own tribal citizens into the classroom. I think we are doing a pretty good job. Thank you.

Senator UDALL. Would you agree that teacher shortages are a problem facing all three types of BIE schools?

Ms. FIRE THUNDER. I agree teacher shortage is a problem not only on Indian reservations, but across the United States. It seems to be a conversation in the State of South Dakota as well, of off-reservation schools that are not Indian schools. The teacher shortage is a big challenge not only for us, but across America.

Senator UDALL. We have heard today that S. 279 will help BIE 297 schools offer more competitive recruitment packages. As I mentioned in my opening, I was glad to join Senator Tester last month to reintroduce the Native Educator Support and Training Act, another bill that would give Native schools more teacher resources. I hope we can work together, the Chairman and myself, to get both bills across the finish line soon.

Now, moving on to New Mexico, tribal issues in the Acoma BIE 297 experience, Mr. Tahsuda, last year, Acoma Pueblo took over operation of the Sky City Community School from the Federal Government via a 297 BIE grant. But I understand that the Pueblo's department of education experienced a number of obstacles post-takeover, obstacles such as BIE did not leave the tribe usable copies of student records of special education files, BIE did not inform the tribe that 297 schools might be ineligible to continue renting school buses from the GSA, and the Pueblo found a number of student health and safety issues related to the school facilities after it took charge of the campus.

I want to make sure Acoma is getting proper and prompt assistance from BIE on these issues. But I also want to make sure communities that don't take over BIE direct service schools via 297 grants don't encounter the same issues. It seems to me that the BIE should have encountered and solved these same problems before. This was by no means the first 297 conversion.

Will you commit the Department to working with Acoma and my staff to resolve the remaining issues with the 297 transition, especially on the GSA buses problem?

Mr. TAHSUDA. Thank you, Vice Chairman. Short answer yes, obviously we will work with you as closely as we can. We can look immediately into the question about the records. I would be ashamed if that is what happened, but we will certainly look into that.

The school bus rental issue was not one of our own making, unfortunately, it was a GSA issue they raised with us. But I believe we have, I think we have resolved that with them and that it

should not be a problem going forward. We will confirm that for you, though.

So the question of facilities, this is a question that we have across the board, obviously. Frankly, we probably, if we had historically been able to keep up better with the maintenance, et cetera, on our school facilities, we might have more tribes that would be taking them over. But I do know that we try to do our best to have the facility in the best condition we can, given the budgets that we have, before we turn them over to a tribe and they take it over.

I do know that it is actually a pretty in-depth discussion and review that happens between the BIE staff, both locally at the school and all the way up to the director's office, with the tribe, the local community, et cetera. I know they work with them often to make sure that they are going to have a very involved parent committee, et cetera. We usually have ones with our directly-operated schools. Sometimes when a tribe takes it over there is a perception that we don't need that. But we work hard with them.

So things like that, I know they work closely with them. For Acoma in particular, again, if you could bear with me, we will try to get more information and get back to you on that.

Senator UDALL. Okay, thank you for that commitment.

Does the Department have a checklist or technical assistance protocol for communities that want to take over BIE direct service schools via 297 grants?

Mr. TAHSUDA. Thank you, Senator. We do, we can provide that to you. In fact, at your convenience, I will come with Director Dearman and we can quickly go through the checklist and tell you what the process is.

Senator UDALL. Does that protocol or guidance anticipate issues like those flagged by Acoma? And if not, why not?

Mr. TAHSUDA. I would say that it should. Again, if we get a chance to sit down with you, perhaps Director Dearman, who has been involved with it, I have not personally been involved in a transfer over, but he has. Maybe he can give a better explanation in person.

Senator UDALL. I look forward to that.

Chief Harris, the Committee just held a hearing on community development in Indian Country. We examined the different programs offered by the Federal Government to provide access to capital to Indian Country. Can you tell the Committee about the Tribe's economic development ventures and any obstacles that you have faced in jump-starting your tribal economy?

Mr. HARRIS. I think, if we start from the beginning, it was the land mass itself. It is kind of hard to build an economic development program on 1,000 acres when you are also housing your own citizens on that acreage.

We currently have one employee who is not under a Federal grant. It is a pumper truck business. So we have been greatly restricted by the agreement, and hard to actually work with the Federal Government on trying to get economic development for the Catawba people.

Let me go back and address one thing that Senator Cortez Masto said, and that was the Section 20 provision. There is one

part of that provision that says that no lands taken after 1998 can be gamed on. So if you keep the provision in, then we are asking 790 to take land into trust for the purpose of gaming. So just remove it, and that way you won't have to deal with that issue.

Senator UDALL. Yes. And John, you were answering questions on that, too. Does that spark additional comment by you?

Mr. TAHSUDA. Yes, Senator. To clarify, Senator, the bill is intended to clarify and correct some provisions of the settlement act that did not operate the way they were intended. If you are going to do that, if Congress is going to act, it would seem like you would want to do it in the most direct manner possible, so that we have clear direction, we can take action on behalf of the tribe, as seems to be the intend of the bill, in the most direct way possible.

Senator UDALL. Okay. Let's see here. Chief Harris, does the Tribe own the land that is described in the bill?

Mr. HARRIS. We do not own the land. We have a power of attorney over it, basically, where it is holding as we work our way through this. If we end up with a piece of property, that would be great.

Senator UDALL. Who owns the land right now?

Mr. HARRIS. Right now it is shared, I guess, is the best way to put it, between the owner and the nation.

Senator UDALL. Who is the actual owner of the property right now?

Mr. HARRIS. His name is Tester. John Tester, if you want his name. Not that one there.

Senator UDALL. Not that one.

Mr. HARRIS. It would be wonderful if it was, but it is not.

[Laughter.]

Senator UDALL. You know, Tester has always wanted to be rich. I know he hung out at the lunch with Senator Rockefeller. People always asked him why he did, and he said he wanted him to adopt him.

[Laughter.]

Mr. HARRIS. Maybe we can work something out on this end.

Senator UDALL. Can you tell us on this John Tester, is he a businessman and where does he reside?

Mr. HARRIS. He is a businessman, and he does reside in North Carolina.

Senator UDALL. Okay, in North Carolina, which city?

Mr. HARRIS. Outside of Charlotte.

Senator UDALL. Okay. Great. And if we need further information on him?

Mr. HARRIS. I will be more than happy to provide any information.

Senator UDALL. Great.

Mr. Tahsuda, since the tribe does not currently own the land, how does this impact the Department's process for placing the land into trust?

Senator UDALL. Thank you, Senator. I guess in short it doesn't affect the process much. We oftentimes, particularly in economic development ventures, we get asked by the tribe to consider taking the land into trust. It may be owned by a business partner or somebody else. The actual process would be rather than from the

tribal ownership to Federal, in benefit for tribal ownership, it would be from the other party to the United States, but in benefit for the tribe. So it doesn't really impact how we process it differently.

The only issues we have are to make sure that we have access to follow through on our process, like NEPA, et cetera, so that we can walk the property and do the physical things that we have to do to process the application. That is the only thing.

Senator UDALL. To your knowledge, has the Department ever taken land into trust for a parcel a tribe does not own?

Mr. TAHSUDA. I believe we have done it many times. I don't know if I can give you a number, but it is not unusual.

Senator UDALL. Okay, and you could give us examples on that?

Mr. TAHSUDA. Yes, sir.

Senator UDALL. And Council Member Suppah, the supplemental treaty has been in place since 1865. According to testimony received by the Committee it appears both the governor of Oregon and the Department have no objection to this treaty being repealed. Since the 1865 supplemental treaty has been in place, has your tribe been hindered by any of its requirements, such as needing permission to leave the reservation from the area superintendent of Indian Affairs, or if so, can you tell the Committee some of those hindrances?

Mr. SUPPAH. Maybe the statement in the testimony, because the 1865 treaty has never been enforced, its nullification will have no impact on the State of Oregon's rights or that of its citizens. The bill simply states that the 1865 treaty shall have no force or effect. It would allow the Warm Springs Tribes to continue to exercise their 1855 off-reservation rights without future fear of litigation or extortion.

Senator UDALL. Councilman, thank you very much for that answer.

Mr. HARRIS, I noticed you were helped by your assistant with something. Is there something you want to amend your answer on?

Mr. HARRIS. I will be honest with you, I am sitting here and I have never done this before, so I am quite nervous.

Senator UDALL. Well, we want you to be totally relaxed and give us accurate answers. So you take your time.

Mr. HARRIS. Let me take a breath and go with this.

Senator UDALL. Drink some water and just relax, take a couple of breaths, that is fine. Don't worry.

Mr. HARRIS. Okay. So the word I was looking for was, the tribe does have an option on the land, an agreement to sell. That was the word I was looking for.

Senator UDALL. So the tribe has an option.

Mr. HARRIS. Yes.

Senator UDALL. But the tribe hasn't exercised its option, so it has a legal option on the land owned by John Tester.

Mr. HARRIS. Correct.

Senator UDALL. Not Senator Tester.

Mr. HARRIS. Not Senator Tester. Unless there is something I don't know.

[Laughter.]

Senator UDALL. Yes. And he is a North Carolina citizen?

Mr. HARRIS. Yes, that is correct.

Senator UDALL. Okay, well. Yes, please.

Ms. FIRE THUNDER. Thank you, Senator Udall. I just wanted to introduce for the record a letter from my tribal president, from the Oglala Sioux Tribe, supporting this legislation that we were talking about. I am so excited and nervous, it has taken us eight years to get here, Senator.

Senator UDALL. Okay, we are allowing that into the record.

I don't like the idea of everybody being nervous here. I am going to adjourn the hearing, but take a couple of breaths, don't hurry. There are a lot of friendly people out behind you.

I am going to have to run for a vote. But I believe at this point, from everyone that has come and gone, I am the only one here, if there are no more questions for today, members may also submit follow-up written questions for the record that may go to all of you. The hearing record will be open for two weeks to allow that.

I want to thank the witnesses for their time and testimony. We really, really appreciate your testimony. Sorry to have to run, but you don't have to run, you can take it slow, take a breath. You will be fine. Cheers, take care.

The hearing is adjourned.

[Whereupon, at 3:45 p.m., the hearing was adjourned.]



# A P P E N D I X

PREPARED STATEMENT OF ELLEN F. ROSENBLUM, ATTORNEY GENERAL, OREGON  
DEPARTMENT OF JUSTICE

NO. 8295

This opinion responds to a question from Governor Kate Brown about the off-reservation hunting rights of the Confederated Tribes of the Warm Springs Reservation of Oregon (“the Tribe”). It focuses on whether the Tribe’s off-reservation hunting rights would be defined by the Treaty with the Tribes of Middle Oregon of June 25, 1855 (“1855 Treaty”)–which reserved those rights–or by the Treaty with the Middle Oregon Tribes of November 15, 1865 (“1865 Treaty”)–which on its face relinquished them.

## QUESTION PRESENTED

Does the doctrine of issue preclusion bar the State from disputing that the 1855 Treaty governs the Warm Springs Tribe’s off-reservation hunting rights?

## SHORT ANSWER

Yes. Issue preclusion would bar the State from litigating whether the Tribe holds off-reservation hunting rights based on the 1855 Treaty, including from arguing that the 1865 Treaty relinquished those rights. In *U.S. v. Oregon*, the State litigated, and lost, the issue of whether the earlier 1855 Treaty governs the Tribe’s off-reservation fishing rights. The issue of whether the Tribe holds off-reservation hunting rights based on the 1855 Treaty is substantially identical to the issue earlier litigated. Therefore, the State would be precluded from litigating that hunting-rights issue with the Tribe, and accordingly, from arguing that the 1865 Treaty relinquished those rights.

Our analysis is specific to treaties, as opposed to generally applicable laws. It is also specific to potential civil litigation between the Tribe and the State construing the Tribe’s off-reservation hunting rights. Issue preclusion is generally disfavored against the government where the parties are not the same as in the earlier litigation, or where preclusion would result in inequitable administration of the law. Neither of those circumstances is present here: the Tribe is the only entity whose off-reservation hunting and fishing rights are addressed by the 1855 and 1865 treaties, and both the Tribe and the State were parties to the earlier *U.S. v. Oregon* litigation.

As a practical matter, the Oregon Fish and Wildlife Commission adopts the rules that are criminally enforced by law enforcement officers in Oregon, and in turn by county District Attorneys. As a state agency, the Commission is guided by this opinion. Accordingly, any rules adopted by the Commission should be consistent with this opinion. And, further, the criminal enforcement of the Commission’s rules should be consistent with this opinion.

This opinion does not address whether issue preclusion applies to any other issue relevant to the Tribe’s off-reservation hunting rights.

## DISCUSSION

### I. Background

In 1855, the Tribe entered into a treaty with the federal government that ceded the Tribe’s territorial interests in exchange for consideration that included a reservation and monetary compensation.<sup>1</sup> The Tribe also reserved certain off-reservation hunting and fishing rights: the right to take fish “at all other usual and accustomed stations, in common with citizens of the United States,” as well as “the privilege of hunting\* \* \* on unclaimed lands, in common with citizens.”<sup>2</sup>

<sup>1</sup>Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat 963 (1859).

<sup>2</sup>*Id.* at 964.

However, the later 1865 Treaty ostensibly relinquished those same off-reservation hunting and fishing rights.<sup>3</sup> The 1865 Treaty contained other unfavorable terms, such as restricting the Tribe to its reservation absent written permission from the federal superintendent of Indian affairs.<sup>4</sup> Examining these terms and the historical record, a United States Forest Service study later concluded that the tribal leaders' signatures were obtained by fraudulent means.<sup>5</sup> Despite these circumstances, this opinion focuses only on whether the State would be precluded from asserting the 1865 Treaty. It therefore does not address the validity of the 1865 Treaty.

In 1968, the Tribe and the State litigated the Tribe's off-reservation fishing rights in *U.S. v. Oregon* in federal district court in Oregon.<sup>6</sup> The Tribe contended that the State could restrict the Tribe's off-reservation fishing only in certain circumstances.<sup>7</sup> The State, on the other hand, argued that it could regulate the Tribe's fishing to the same extent as it could regulate the fishing of other persons.<sup>8</sup> The primary issue in dispute was how to interpret the wording of the 1855 Treaty that reserved to the Tribe rights "in common with citizens of the United States."<sup>9</sup> However, the State also attacked the relevance of the 1855 Treaty. The State argued that the Tribe's off-reservation fishing rights had been modified by Oregon's admission to the union and then by the 1918 Columbia River Compact.<sup>10</sup>

The court ruled for the Tribe, noting that the United States Supreme Court had interpreted similar treaties to permit fishing regulations only if they were necessary for the conservation of fish, met appropriate standards, and did not discriminate against the Tribe.<sup>11</sup> The court rejected the State's arguments that the Tribe's off-reservation fishing rights had been altered by Oregon's admission to the Union or by congressional approval of the 1918 Columbia River Compact.<sup>12</sup>

Although the court's judgment in *U.S. v. Oregon* construed the Tribe's off-reservation fishing rights, it did not address the Tribe's off-reservation hunting rights—rights that were reserved by the same 1855 Treaty. The governor has asked us whether any issue resolved by that judgment would preclude the State from arguing in potential litigation with the Tribe that the 1865 Treaty relinquished those off-reservation hunting rights.

## II. Issue Preclusion Standard

Issue preclusion "bars the relitigation of issues actually adjudicated in previous litigation between the same parties."<sup>13</sup> This "protect[ s] litigants from the burden of relitigating an identical issue with the same party [and] pro mot[ es] judicial economy by preventing needless litigation."<sup>14</sup> Three elements must be satisfied in order for issue preclusion to apply:

- (1) the issue at stake must be identical to the one alleged in the prior litigation;
- (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.<sup>15</sup>

<sup>3</sup>Treaty with the Middle Oregon Tribes, Nov 15, 1865, 14 Stat 751, 751 (1867) ("[I]t is hereby stipulated and agreed that \* \* \* the right to take fish [and] hunt game \* \* \* upon lands without the reservation\* \* \* are hereby relinquished.")

<sup>4</sup>*Id.* at 751–52.

<sup>5</sup>Les McConnell, USDA Forest Service-Pacific Northwest Region, *The Off-Reservation Treaty Reserved Rights of the Tribes of Middle Oregon 2* (June 20, 1997).

<sup>6</sup>*See Sohapp v. Smith*, 302 F Supp 899,903–04 (D Or 1969). The United States government and several other tribes also were parties to the litigation against the State; however, those parties are not relevant to our discussion here.

<sup>7</sup>*Id.* at 907.

<sup>8</sup>*Id.*

<sup>9</sup>*See Id.* at 904–05.

<sup>10</sup>*Id.* at 912. The compact between Oregon and Washington governs the regulation, preservation, and protection offish in the Columbia River. ORS 507.010.

<sup>11</sup>*Sohappy*, 302 F Supp at 906–07; Judgment at 2–3, *United States v. Oregon*, No 68–513 (D Or Oct 10, 1969). After the district court issued its judgment, it retained jurisdiction and "became the forum for allocating the harvest offish that enter the Columbia River System." *United States v. Oregon*, 913 F2d 576, 579 (9th Cir 1990). That substantial subsequent history does not affect our analysis here.

<sup>12</sup>*Sohappy*, 302 F Supp at 912.

<sup>13</sup>*Clark v. Bear Stearns & Co., Inc.*, 966 F2d 1318, 1320 (9th Cir 1992). Because the preclusive issue involved here was resolved by a federal district court in litigation based on a federal question, we look to federal common law. *See Taylor v. Sturgell*, 553 US 880, 891, 128 S Ct 2161, 171 LEd 2d 155 (2008) ("The preclusive effect of a federal-court judgment is determined by federal common law.")

<sup>14</sup>*Parklane Hosiery Co., Inc. v. Shore*, 439 US 322, 326, 99 S Ct 645, 58 LEd 2d 552 (1979).

<sup>15</sup>*Clark*, 966 F2d at 1320. Issue preclusion does not apply when the party "did not have a 'full and fair opportunity to litigate' the issue in the earlier litigation. *Allen v. McCurry*, 449

The relevant issue does not necessarily have to be expressly mentioned in the prior litigation: “[n]ecessary inferences from the judgment, pleadings and evidence will be given preclusive effect.”<sup>16</sup>

The Ninth Circuit Court of Appeals has recognized that properly defining the relevant issues can be a “murky area.”<sup>17</sup> To resolve close cases, that court looks to four factors from the *Restatement (Second) of Judgments*:

(1) is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? (2) does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? (3) could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? (4) how closely related are the claims involved in the two proceedings?<sup>18</sup>

These factors “are not applied mechanistically.”<sup>19</sup> They seek to balance “a desire not to deprive a litigant of an adequate day in court” against “a desire to prevent repetitious litigation of what is essentially the same dispute.”<sup>20</sup>

Although issue preclusion typically applies when both the parties in the subsequent suit are identical, it can also apply where the party asserting preclusion was not involved in the earlier suit.<sup>21</sup> However, the United States Supreme Court has been skeptical of applying this nonmutual issue preclusion when the party defending against preclusion is the federal government.<sup>22</sup> And federal appellate courts have applied the same reasoning to state governments defending against preclusion.<sup>23</sup> Applying nonmutual issue preclusion against the government in the criminal context is also disfavored.<sup>24</sup>

Similar concerns underlie the exception that issue preclusion will not apply if it would result in the inequitable administration of the law.<sup>25</sup> This exception typically disfavors applying issue preclusion against governments that are enforcing generally applicable laws, that is, laws “that affect[] members of the public generally.”<sup>26</sup> Allowing issue preclusion in such cases could “give one person a favored position in current administration of a law.”<sup>27</sup>

### III. Issue Preclusion Analysis

The court’s judgment in *U.S. v. Oregon* construed the Tribe’s off-reservation fishing rights to allow State regulation only in certain circumstances.<sup>28</sup> The judgment and the court’s opinion make clear that to reach this result, the court necessarily determined that the Tribe holds off-reservation fishing rights based on the 1855 Treaty. For example, the court repeatedly stated that its reasoning was based on precedent concerning regulation of federal treaty rights.<sup>29</sup> And the only treaty before the court that could have been the source of the Tribe’s rights was the 1855 Treaty.<sup>30</sup>

In addition, the parties actually litigated this fishing-rights issue: the State argued that any 1855 Treaty off-reservation fishing rights were altered both by Or-

US 90, 95, 101 S Ct 411, 66 LEd 2d 308 (1980). Nothing in the record available to us suggests that the State did not have that opportunity in *U.S. v. Oregon*.

<sup>16</sup> *Davis & Cox v. Summa Corp.*, 751 F2d 1507, 1518 (9th Cir 1985).

<sup>17</sup> *Starker v. United States*, 602 F2d 1341, 1344 (9th Cir 1979).

<sup>18</sup> See *Kamilche Co. v. United States*, 53 F3d 1059, 1062 (9th Cir 1995) (quoting *Restatement (Second) of Judgments* § 27 cmt c (1982)), amended by 75 F3d 1391 (9th Cir 1996).

<sup>19</sup> *Howard v. City of Coos Bay*, 871 F3d 1032, 1041 (9th Cir 2017).

<sup>20</sup> *Restatement* § 27 cmt c.

<sup>21</sup> *Parklane*, 439 US at 331–32.

<sup>22</sup> *United States v. Mendoza*, 464 US 154, 162–63, 104 S Ct 568, 78 LEd 2d 379 (1984) (distinguishing the conduct of government litigation from the conduct of private civil litigation).

<sup>23</sup> *Idaho Potato Comm’n v. G & T Terminal Packaging, Inc.*, 425 F3d 708, 713–14 (9th Cir 2005) (applying *Mendoza* reasoning to protect state agency from nonmutual issue preclusion); *Hercules Carriers, Inc. v. Claimant State of Fla.*, 768 F2d 1558, 1579 (11th Cir 1985) (recognizing that *Mendoza* reasoning applies to state governments as well).

<sup>24</sup> *Standefér v. United States*, 447 US 10, 21–25, 100 S Ct 1999, 64 LEd 2d 689 (1980).

<sup>25</sup> *Restatement* § 28(2).

<sup>26</sup> *Id.* § 28 cmt c.

<sup>27</sup> *Id.*

<sup>28</sup> Judgment at 2–3, *U.S. v. Oregon*, No 68–513.

<sup>29</sup> *Sohappy*, 302 F Supp at 906 (relying on Supreme Court case that “restated the nature of the non-exclusive off-reservation fishing rights secured by these Indian treaties”); *id.* at 908 (“I believe that these contentions of the plaintiffs and the tribes correctly state the law applicable to state regulation of the Indians’ federal treaty right.”). The judgment repeatedly referred to treaties, treaty tribes, treaty fishing, and treaty fisheries. Judgment at 2–3, *U.S. v. Oregon*, No 68–513.

<sup>30</sup> See *Sohappy*, 302 F Supp at 904.

egon’s admission to the union and by congressional approval of the 1918 Columbia River Compact.<sup>31</sup>

*U.S. v. Oregon* focused only on the Tribe’s off-reservation fishing rights, not on off-reservation hunting rights. However, the Ninth Circuit has recognized that in narrow circumstances, issues pertaining to different rights may be so similar as to allow issue preclusion. For example, in *Kamilche Co. v. United States*, the court held that the federal government was precluded from litigating the ownership of a disputed parcel of land, even though the specific acres at issue had not been at issue in the earlier suit.<sup>32</sup> The court applied the *Restatement* factors discussed above, emphasizing that the evidence and arguments necessary to prove ownership of the earlier-litigated acres were identical to the evidence and arguments necessary to prove ownership of the subsequently litigated acres.<sup>33</sup>

We see a similarly close connection here between the issues of whether the Tribe holds off-reservation hunting rights based on the 1855 Treaty and whether the tribe holds offreservation fishing rights based on that treaty.<sup>34</sup> Both these rights were reserved by the Tribe in the same clause in the 1855 Treaty.<sup>35</sup> And the *U.S. v. Oregon* court relied on evidence concerning both: For example, the court noted that during negotiations over the 1855 Treaty, “the tribal leaders expressed great concern over their right to continue to resort to their fishing places and *hunting grounds*.”<sup>36</sup> The court added that the leaders “were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and game there.”<sup>37</sup>

Because of these similarities, the evidence and arguments necessary to prove that the Tribe holds off-reservation hunting rights based on the 1855 Treaty would substantially overlap with the evidence and arguments in *U.S. v. Oregon*. For example, in the potential hunting-rights litigation, the Tribe would likely point to the text of the 1855 Treaty as having reserved those rights, and to the historical circumstances surrounding the negotiation of those rights. The Tribe would also argue that Oregon’s admission to the union did not modify those rights.

In addition, we see nothing to indicate that the legal analysis relevant to determining whether the Tribe reserved off-reservation hunting rights in the 1855 Treaty would differ from the analysis in *U.S. v. Oregon*. Or that the legal analysis relevant to the effect of Oregon’s admission to the union on those hunting rights would differ from the analysis in the earlier matter.

The above similarities also indicate that litigating whether the Tribe holds off-reservation hunting rights based on the 1855 Treaty would be essentially the same dispute as was resolved earlier in *U.S. v. Oregon*. Applying issue preclusion would therefore serve the underlying goals of increasing judicial economy and not unnecessarily burdening prevailing parties.

Because the identical issue was actually litigated in *U.S. v. Oregon*, and was critical and necessary to the court’s judgment, the State would therefore be precluded from litigating with the Tribe the issue of whether the 1855 Treaty controls the Tribe’s off-reservation hunting rights. That conclusion would also preclude the State from making any legal arguments inconsistent with the court’s resolution of the issue.<sup>38</sup> Accordingly, the State would be precluded from arguing that the 1865 Treaty relinquished the Tribe’s off-reservation hunting rights.

Essential to our reasoning is that there are no arguments unique to off-reservation hunting rights—as distinct from off-reservation fishing rights—that indicate those rights were relinquished or modified. The existence of such arguments would

<sup>31</sup> *Id.* at 912.

<sup>32</sup> 53 F3d at 1062–63.

<sup>33</sup> *Id.* at 1062.

<sup>34</sup> Our conclusion—that the issues surrounding whether the Tribe holds off-reservation fishing and hunting treaty rights are identical—does not mean that every issue concerning fishing rights is the same as every issue concerning hunting rights. As an illustrative example, the geographic scope of the tribe’s off-reservation fishing rights is not coterminous with the geographic scope of its off-reservation hunting rights. See 1855 Treaty, 12 Stat at 964 (reserving the right to take fish at “usual and accustomed stations,” while reserving the right to hunt “on unclaimed lands”).

<sup>35</sup> *Id.*

<sup>36</sup> *Sohappy*, 302 F Supp at 906 (emphasis added).

<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> See *Kamilche*, 53 F3d at 1063 (“[O]nce an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case.” (Italics in original; internal quotation marks omitted.)).

likely mean that the State did not have a full and fair opportunity to litigate the issue in *U.S. v. Oregon*.<sup>39</sup>

Furthermore, none of the concerns exist here with applying preclusion against a government. First, we are dealing with mutual issue preclusion because the State and the Tribe were both parties to *U.S. v. Oregon*. This eliminates the concerns with applying nonmutual issue preclusion. And second, preclusion will not result in the inequitable administration of the law because the 1855 and 1865 treaties are not generally applicable laws: the Tribe is the only entity whose off-reservation hunting and fishing rights are addressed by these treaties.

**Attachment**

KATE BROWN, GOVERNOR, STATE OF UTAH  
*January 31, 2019*

Chairman Austin Greene, Jr. and Members of the Tribal Council,  
Confederated Tribes of Warm Springs,  
Warm Springs, OR.

RE: POLICY OF MY ADMINISTRATION REGARDING THE 1865 HUNTINGTON TREATY

Dear Chairman Greene and Honorable Members of the Tribal Council of the Confederated Tribes of Warm Springs:

I write to state my position, and the position of my administration, on the document known as the Huntington Treaty of 1865.

The Oregon Department of Justice once described this document to the Oregon Court of Appeals as a “historical curiosity ... that has never been enforced.” I have concluded that it was induced through fraudulent and dishonorable means and represents, as the late Senator Mark O. Hatfield eloquently stated on the floor of the United States Senate in 1996, a “historical travesty.” It is unimaginable that the proud and independent Tribes of Middle Oregon who signed the Treaty of June 25, 1855, and insisted on language in that Treaty reserving their sovereign rights to fish, hunt, and gather traditional foods, would have knowingly surrendered those rights for virtually nothing just ten years later and agreed to the indignity of needing the Federal Government’s written consent to leave the reservation.

Accordingly, by this letter to you, the governing body of the Confederated Tribes of the Warm Springs Reservation of Oregon, I declare it the policy of the Office of the Governor of the State of Oregon that the fraudulent Huntington Treaty of 1865 is to be regarded as a nullity with no effect whatsoever. It shall be the policy of the Office of the Governor, so long as I am the Governor of Oregon, that no state agency or official under my authority shall assert on behalf of the State that the fraudulent Huntington Treaty of 1865 has now, or ever has had, any legal effect whatsoever.

In pursuit of this policy, I further pledge that I will devote the resources of my office, as Governor of Oregon, to work together with you to secure appropriate congressional action that will unequivocally, for once and for all time, rescind and nullify the historical injustice of the—Huntington Treaty of 1865.

Thank you for your attention to this important matter.

Sincerely,

GOVERNOR KATE BROWN

AMERICAN GAMING ASSOCIATION  
*May 1, 2019*

Hon. John Hoeven,  
Chairman,  
Hon. Tom Udall,  
Vice-Chairman,  
U.S. Senate Committee on Indian Affairs,  
Hart Senate Office Building,  
Washington, DC.

Dear Chairman Hoeven and Vice Chairman Udall:

On behalf of the American Gaming Association (AGA), I appreciate the opportunity to comment on S. 790, a bill to clarify certain provisions of Public Law 103–116, the Catawba Indian Tribe of South Carolina Land Settlement Act of 1993, and for other purposes.

<sup>39</sup>See *Maciel v. Comm’r*, 489 F3d 1018, 1023 (9th Cir 2007) (issue preclusion does not apply when a party “had good reason not to contest an issue vigorously during the first action”). The existence of unique arguments might also suggest that the relevant issues are not identical.

In recent years, AGA has expanded its membership to be more reflective of the U.S. gaming industry, and now includes gaming suppliers and tribal gaming operators. In line with AGA's membership evolution, we have also modernized our position regarding off-reservation tribal gaming. In the past, AGA opposed all efforts to open off-reservation gaming facilities. After lengthy and open discussions with our membership, we have modified this position and recognize the Indian Gaming Regulatory Act (IGRA) specifically contains exceptions. However, our membership continues to have significant concerns about tribes attempting to locate new facilities far from their homelands simply to increase their potential profit. Accordingly, AGA believes a Tribe should be required to have both historic and geographic connections to the land they are acquiring for off-reservation gaming. While AGA is not in a position to serve as the arbiter of competing assertions related to fact patterns surrounding tribal land claims, we strongly recommend the Committee ensure both of these important criteria are met as you consider S. 790.

AGA also supports policies that strengthen process transparency and clear bright-line standards to ensure marketplace certainty. AGA, therefore, has concerns that S. 790 would explicitly remove the application of section 20 of IGRA to the land authorized to be taken into trust under the bill. Circumventing the bright line standards established by IGRA creates a precedent that runs counter to our overarching goal of ensuring a consistent and transparent process surrounding off-reservation gaming determinations. We respectfully urge the Committee to strike this exception if the legislation is considered at markup.

Sincerely,

WILLIAM C. MILLER, JR.  
*President/CEO*

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KEITH MILLER, CITY COUNCILMEMBER AT-LARGE CITY OF KINGS MOUNTAIN  
*May 3, 2019*

Hon. John Hoeven,  
Chairman,  
Hon. Tom Udall,  
Vice-Chairman,  
U.S. Senate Committee on Indian Affairs,  
Hart Senate Office Building,  
Washington, DC.

Dear Chairman Hoeven and Vice Chairman Udall:

I am writing to you regarding the S. 790—A bill to clarify certain provisions of Public Law 103.116, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 (The '93 Act). Please include this correspondence in the open record to the committee's consideration of S. 790.

May it please be it made known to the honorable members of the Committee that,

- I am among the current majority of The City of Kings Mountain City Council, 4 of 7 members, who are in opposition to the approval of the Catawba's application, has sent letters of opposition and made in person visits to the Bureau of Indian Affairs (BIA) and Department of Interiors (DOI) expressing opposition to approval of the Tribe's application, and I oppose the referral/recommendation of S. 790.
- 75 area pastors signed a letter opposing the proposed casino.
- 102 of 111 Cleveland County, NC pastors surveyed indicated "a gambling casino in Kings Mountain would be bad."
- Over 1,000 community residents have signed a petition expressing opposition to the proposed casino.

May it also be made known to the honorable members of the committee that The Catawba Indian Nation was to be paid \$50 million under the '93 Act and agreed to the conditions listed below, which may not be corrected or addressed by S. 790, and, moreover, S. 790 may be inconsistent with.

1. The '93 Act may be amended for only four reasons and casinos may not one of the four, US Code, Title 25, subchapter 43A §941 m (f); SC MOU § 19.5. If S. 790 is in effect and amendment of the '93 Act and not consistent with 25 USC 43A 941m(f) then there may be a basis for legal challenges to S. 790.

2. The time limit to purchase land for reservation purposes (casinos) may have expired in 2008, USC 25 43A § 941j (k); SC MOU § 14.14.<sup>1</sup>
3. BIA procedures and IGRA laws are non-applicable for Catawba land acquisitions and reservation status, USC Title 25, subchapter 43A § 941 j (m), I (a); SC MOU § 14.16.
4. The '93 Act extinguishes & bars future claims, USC 25, subchapter 43A § 941 d (c), (d), (e), SC 27–16–60; MOU § 6
5. Land in NC is outside of the Primary and Secondary Reservation areas, US Code, Title 25, subchapter 43A § 941 j (c) (1), (c) (2); SC 27–16–90 (E); SC MOU § 14.3, 14.4, 14.5.
6. The SC Governor, SC general assembly and the county council all need to approve expansions of noncontiguous reservation area, which may make NC acquisitions constitutionally impossible under the '93 Act, US Code, Title 25, 43A § 941 j (b); SC 27–16–90 (B) (1) (b), (b) (2), (b) (3), (E); SC MOU § 14.2 and 14.5.
7. SC law governs all gambling on all property owned by the Tribe, including land placed into Trust by BIA/DOI, and SC law currently prohibits casinos and creates an unconstitutional situation where SC law will govern activity in NC, US Code, Title 25, subchapter 43A § 9411 (b); SC 27–16–110; SC MOU § 14.16.
8. SC state and York County, SC codes & ordinances apply to all future Catawba development making a NC casino regulated by SC constitutionally impossible. SC 27–16–120 et al; SC MOU § 17.
9. Use of eminent domain (mandatory takings) is expressly prohibited, USC 25 43A§ 941j(e)(l); SC27–16–90 (H); MOU § 14.8. Note, the '93 Act incorporates the SC law and the MOU to Federal status as part of the '93 Act.

Below I discuss some of my economic, political, spiritual, and constitutional concerns with the proposed casino project. I also suggest new regulations to protect vulnerable families from financial harms created by over indulging in gambling.

**Carcieri.** The SCOTUS Carcieri decision limited Indian Gaming Regulatory Act (IGRA) land into trust applications to only those Tribes who were federally recognized before 1934. The Catawba Nation was not federally recognized until 1993. Are we ignoring Carcieri here? Do we want to open a floodgate of new tribal recognitions and federal land and jurisdiction grabs leading to a flood of new casinos nationwide?

**Loss of manufacturing jobs.** At a trade show I asked a national economic development recruiter about his experience with manufacturers' attitudes about sites near casinos. He told me about an executive that wanted to visit the proposed industrial sites at night. Standing there in the dark the recruiter asked the executive what he was looking to see. The executive said, "casino lights". I think he may not have wanted to locate a plant too close to a casino. The executive may have thought casinos increased the risks of shrinkage (employee theft), truancy, reduced productivity due to workers distracted by family financial strains from gambling losses, and corporate theft or espionage by executives who became indebted from gambling or compromised in prostitution, who then steal corporate intellectual property to pay debts or blackmailers. Our city has invested millions of dollars in our utility infrastructure, branding, site readiness and intragovernmental and community partnerships to enhance our capacity to attract and retain manufacturing jobs. I am concerned the casino may reverse our trend of expanding the number of manufacturing jobs. The casino may produce thousands of service jobs but may do so at a cost of hundreds of manufacturing jobs. Especially if the local government and utility boards become corrupted by casino shills that impair utilities to the point that manufacturers leave.

**Demonic Footholds and strongholds.** I am concerned that the regular flow of men freely spending copious amounts of cash may attract a larger underground market for drugs, prostitution and pedophilia. This, in turn, may also attract more demons, wicked spirits and fallen angels. I do not want these dark material and spiritual influences to gain larger footholds or strongholds in our community. I encourage continued discussion with casino supporters to plan for on-site chaplaincy staff, trained in deliverance and spiritual warfare. I also encourage discussion with architects to include design elements known to be irritants to demons.

**Stumbling blocks.** There may be 12 Bible passages telling us not to create stumbling blocks for our weaker brothers and sisters. Jesus himself warned it would be better for us to be drowned in the sea with a millstone tied around our necks than

<sup>1</sup>We visited with BIA staff challenging the veracity/accuracy of certain claims made in the affidavit filed on behalf of Chief Harris with respect to this point. At that time no verification by BIA/DOI of the affidavit claims had been attempted.

to cause one of the little ones who believe in Jesus to stumble. This weighs heavily on me. While it may only be about 1 in 300 people who go to a casino and become compulsively addicted, ruining their lives and families financially and socially, Jesus did not specify a minimum acceptable loss ratio. I think Jesus counts every soul precious and I am concerned He would not want us to facilitate laying this potential stumbling block in our community. Perhaps I am being overly cautious, as many legal products and activities may also represent stumbling blocks.

Regardless of the outcome of the Catawba Nation's application, Congress, DOI, BIA and the gaming industry should probably create financial suitability laws for gambling. The SEC and FINRA laws and regulations limit certain investments to investors with adequate income, assets and knowledge; and require spousal consent for certain actions. A similar regime of suitability and spousal protection laws could be created to protect the vulnerable from self-inflicted financial harm by over-indulging in gambling. I would help draft such a bill.

**Culture shift.** Christian parents without strong ties to the area have told me that if the casino comes, they are moving because they will not try to raise godly children in the shadow of a casino. Currently, most people in our community hold traditional American and Judea-Christian values. I expect the casino to change the in-migration and out-migration patterns in a way that may dilute the predominant culture of the area.

**A Republic of Sovereign States.** Indian Nation Reservations are not treaties with sovereign nations with sovereign territory. They are effectively a federal creation of a federal subdivisions supreme to State sovereignty. I am not sure this is constitutional or wise. Perhaps God will give us a chance to test this question.

**Concentration risk.** I am concerned that the proposed Catawba casino may concentrate enormous political influence in one entity, the casino. Casino profit margins may be substantially larger than other industries. Before a recent borrowing, the casino in Cherokee, NC generated over \$200 million per year in distributable income on about \$600 million in revenue, more than a 30 percent operating margin. That is a lot of money available to influence local elections. The Catawba casino could generate similarly large annual profits. However, the Catawba casino could be a multimillion dollar per year utility customer of the city, buying electricity, natural gas, water, sewer and dark fiber from the city. This may give the casino operators strong financial incentive to seek to influence their utility rates by influencing the city council who sets those rates. If the city council becomes coopted by individuals who shill for the casino our city budget and programs may coopted. Good employees will not to work for a city with a reputation of corruption. The current productivity and virtue of our city government could be eroded. The repercussions may similarly affect the community at large. I am concerned that we may start out as a small city on the interstate that gets a casino and turn into a casino on the interstate that owns a small city.

I pray God makes His perfect will clear to all of us and helps us each heed the individual calls and interpretations He places in and on our souls. I will continue to ask Him to intervene in the affairs of mankind and direct our paths for optimal outcomes. Please do not hesitate to contact me if I can help in any way.

Most respectfully,

KEITH MILLER

**Attachment**

OCTOBER 2014

Dear Honorable Cleveland County Commissioners and City of Kings Mountain Councilmen,

As ministers of the gospel and citizens of Cleveland County,

We commend you for your diligent efforts in developing our economy; and we further commend you for multiple successes creating jobs for our citizens in difficult times;

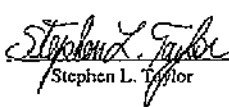
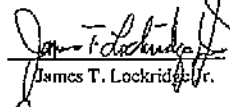
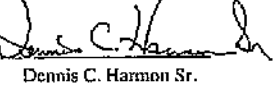
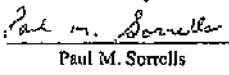
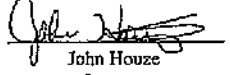
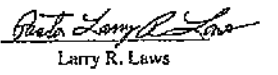
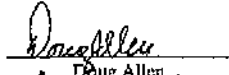
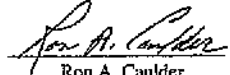
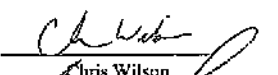
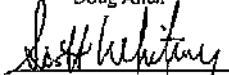
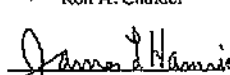
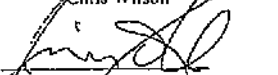
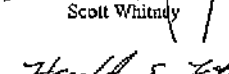
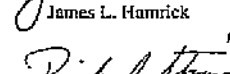

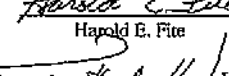
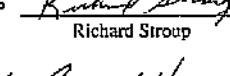
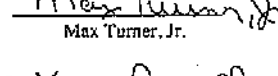
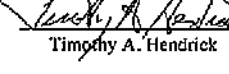
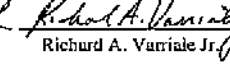
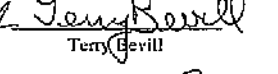
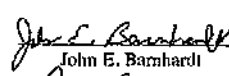
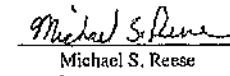
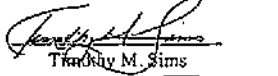
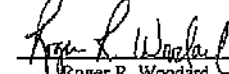
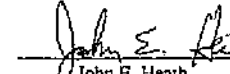
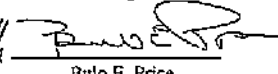
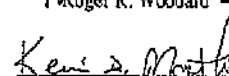
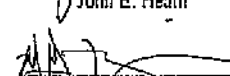
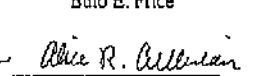
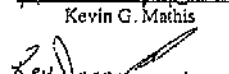
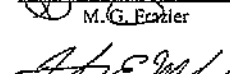
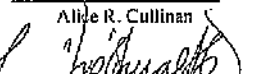
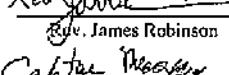
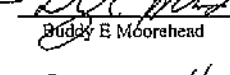
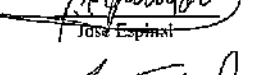
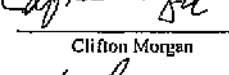
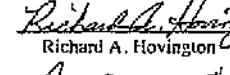
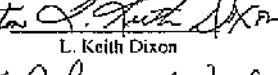



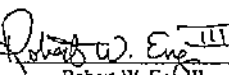
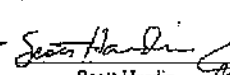
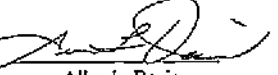
We however believe a casino in Kings Mountain will be economically and socially harmful for our community; for we believe gambling is Biblically and morally wrong;

We therefore implore you to remove your names from your letter supporting a casino, cease plans for a gambling casino, and continue good economic development;

For we humbly realize you will stand to give account for your governing—even as we ministers will stand to give account for our ministering—before the One upon whose shoulders the government will rest, before the Lord on Judgment Day



Respectfully and Prayerfully,

 Stephen L. Taylor	 James T. Lockridge Jr.	 Dennis C. Harmon Sr.
 Paul M. Sorrells	 John Houze	 Larry R. Laws
 Doug Allen	 Ron A. Caulder	 Chris Wilson
 Scott Whitney	 James L. Hamrick	 Jim Ogle
 Harold E. Fite	 Richard Stroup	 Max Turner, Jr.
 Timothy A. Hendrick	 Richard A. Varriale Jr.	 Terry Bevil
 John E. Barnhardt	 Michael S. Reese	 Timothy M. Sims
 Roger R. Woodard	 John E. Heath	 Bulo E. Price
 Kevin G. Mathis	 M. G. Frazier	 Albie R. Cullinan
 Rev. James Robinson	 Buddy E Moorehead	 Jose Espinal
 Clifton Morgan	 Richard A. Hovington	 L. Keith Dixon
 Michael Rote	 Jim C. Brackett	 Charles B. Reed
 Robert W. Eng III	 Scott Hardin	 Allen L. Davis
 Ron E. Hawkins	 J. Barry Goodman	 Barry E. Philbeck
 Marty Ramey	 David Blanton Jr.	 Andrew Neal Eflord

\*A copy of an ad that ran in the Shelby Star newspaper on Sunday, May 5th in Shelby, NC. where more than 1,200 area residents signed a statement declaring

their opposition to the proposed casino mentioned in S. 790 has been retained in the Committee files.\*

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CATHERINE CORTEZ MASTO  
TO JOHN TAHSUDA III

*Question 1.* Section 20(b) of the Indian Gaming Regulatory Act (IGRA) provides the Secretary of the Interior with the discretion to allow gaming on lands acquired in trust by the Secretary, subject to certain requirements. Two of these key requirements are the Secretary must conduct consultation, and the Secretary must obtain concurrence in his decision to allow gaming from the Governor of the State in which the gaming activity is to be conducted. Section 1 (b) of S. 790 would eliminate these requirements for the Catawba Indian Nation tribe. Is it the Department's position that a Congressional hearing may serve as an adequate substitute for the consultation requirements in § 20(b)(1)(A) of IGRA?

Answer. No, a congressional hearing is not a substitute for the Department's statutory requirement to consult under Section 20(b) of IGRA.

*Question 2.* The governor's concurrence provision of Section 20(b) of IGRA recognizes that, the proper spokesperson for the land in question is the Governor of the state where the land is located. A Governor is a state executive, operating under state law. Your testimony states, "waiving Section 20 would be appropriate, I think, because it is requiring the action of the two Senators in North Carolina who have signed onto the bill indicating that Congress' original concern that the Administration would act without having other political involvement, that is not the case in this situation." Is it the Department's view that the "action" of the two Senators from North Carolina co-sponsoring S. 790 is sufficient to adhere to the governor's concurrence provision and override the Governor's authority under IGRA?

Answer. No, however, Congress has the authority to enact legislation to alter the application of any federal statute.

*Question 3.* Please confirm that S. 790 would be the first land into trust bill that would authorize a waiver of Section 20(b) of IGRA, and state the Department's view as to why a waiver is necessary in this instance.

Answer. On several occasions Congress has waived or altered the application of Section 20(b) to a particular piece of land. For example, in the Virginia recognition statutes, Congress waived Section 20(b) by stating "gaming is prohibited" on such land.

*Question 4.* During your testimony, you stated, "every state has slightly different legal requirements as to who gets to determine on behalf of the State, but usually it is the governor. . . . "Please provide the Committee with a list of states that have eliminated the authority for the Governor to make a concurrence with the Secretary's determination that gaming on proposed trust land "would be in the best interest of the Indian tribe" and "would not be detrimental to the surrounding community."

Answer. The authority of a state official, even the chief executive of a state, is a matter of state law. The Department does not keep track of state law authorities.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO  
HON. WILLIAM HARRIS

*Question 1.* Please provide the Nation's application to the Department of the Interior to take land into trust relating to the parcel in S. 790.

Answer. See Attachment, Land into Trust Application.\*

*Question 1a.* Please also provide a list of all documents it has provided the Secretary to assist him in making a determination under IGRA Section 20(b).§

Answer. Because the Nation is not subject to IGRA, the Nation is not required, and has not provide any documents to the Secretary with regard to Section 20(b). The reason the Nation is not subject to IGRA is that the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. 103–116, formerly codified at 25 U.S.C. § 941 *et seq.* (omitted from the editorial reclassification of Title 25) ("Settlement Act") states unambiguously: "The Indian Gaming Regulatory Act shall not apply to the Tribe." Pub. L. 103–116 at § 14(a) (internal citation omitted). The

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\*The document entitled APPLICATION OF THE CATAWBA INDIAN NATION TO ACQUIRE 16.57 ACRES +/- OF OFF-RESERVATION TRUST LAND IN KINGS MOUNTAIN, NORTH CAROLINA, PURSUANT TO 25 U.S.C. § 5108 AND 25 C.F.R. PART 151—SEPTEMBER 17, 2018 has been retained in the Committee files

Settlement Act does not condition IGRA’s inapplicability to the Nation based on the geographic location of its activities. IGRA simply does not apply to the Nation regardless of where any gaming activities of the Nation are taking place.

*Question 2.* Please describe the “option” to buy the land between the Nation and the current property owner referenced in your hearing testimony.

Answer. The option agreement is with Trent Testa, in his capacity as the owner of Roadside Truck Plaza, Inc. The option was submitted to the BIA as part of its review of the Nation’s land into trust application. As Principal Deputy Assistant Secretary John Tahsuda testified at the hearing, the use of option agreements is common with land into trust applications.

*Question 2a.* Has the “option” been executed?

Answer. Yes. The option agreement was originally executed with an effective date of May 4, 2013. It was renewed several times, including most recently on September 14, 2018. It is effective through January 21, 2022.

*Question 2b.* What assurances does the Nation have that if S. 790 is enacted, the property owner will not leverage the bill to insist on selling the property at a drastically increased price, similar to what the Nation experienced with other plots of land?

Answer. The option agreement contains a fixed price for the sale of the property, which is below fair market value and which cannot be changed without the consent of both parties.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO  
JOHN TAHSUDA III

**BIE Teacher Recruitment and Retention**

*Question 1.* At the March, 13,2019 Oversight Hearing, Senator Tester asked BIE Director Dearman if he had any data on teacher vacancies at the Bureau.<sup>1</sup> Mr. Dearman responded that he did not, but he promised to get back to the Committee. However, as far as I am aware, the Committee has not received this follow-up information. For the past five school years, please provide a national and regional summary of all BIE teaching and administrative vacancies.

Answer. Prior to the 2016 BIE Reorganization contract education vacancy data, including teaching and school administrative positions, was not collected. Following the transfer of human resources functions from BIA to BIE in February 2016, BIE began tracking such data for all directly operated BIE schools, including BIE-operated schools on the Navajo reservation. The total number of vacancies within BIE-operated schools fluctuates year-to-year based upon a variety of factors, including the number of enrolled students and whether there were any school conversions. Most recently, the total number of teacher positions within BIE-operated schools was 818.

Associate Deputy Director (ADD) Offices	SY 2016–2017 Vacancies	SY 2017–2018 Vacancies	SY 2018–2019 Vacancies
Navajo Schools	20	111	138
BIE Operated Schools	4	82	88
TOTAL	24	193	226

*Question 1a.* For the past five school years, please provide an annual estimate of the number of teacher vacancies nationally and regionally at the midpoint of each school year.

Answer:

School Year 2017–2018 Facility	Teacher Vacancy Rate at Midpoint of SY
ADD Navajo Schools	11
ADD BIE Operated Schools	6
TOTAL	17

<sup>1</sup> Where Are They Now: Indian Programs on the GAO High Risk List, Hearing Before the S. Comm. on Indian Affairs, 116th Cong. (20 19) (statements of Sen. Jon Tester and Tony Dearman, Director, Bureau of Indian Affairs).

School Year 2018–2019 Facility	Teacher Vacancy Rate at Midpoint of SY
ADD Navajo Schools	12
ADD BIE Operated Schools	9
<b>TOTAL</b>	<b>21</b>

*Question 1b.* Is the Bureau able to estimate the levels of teacher vacancies at Tribally operated BIE schools?

Answer. No. Tribally operated schools maintain complete autonomy and control over their human resources functions, including identifying the number of teaching and administrative positions and hiring. Additionally, tribally controlled schools are not required, and DIE has no power to compel, the reporting of internal human resources data.

*Question 1c.* Please provide a summary of faculty and administrative vacancies at Haskell and Southwestern Indian Polytechnic University for the 2018–2019 school year.

Answer:

Institution	Vacancy Type	Vacancies for School Year 2018–2019
Haskell Indian Nations University	Faculty	2
Haskell Indian Nations University	Administrative	12
Southwestern Indian Polytechnic University	Faculty	8
Southwestern Indian Polytechnic University	Administrative	33

*Question 1d.* What recruitment and retention programs or strategies is the Bureau currently utilizing to address the number of teaching vacancies?

Answer. BIE has developed and is currently implementing milestones within its five year Strategic Direction designed to address common challenges, such as recruitment and retention. Additionally, the BIE has identified and is actively implementing the following strategies in order to address its current rate of critical skill vacancies:

- **BIE Talent Recruiters:** The BIE recently hired two full-time BIE Human Resources staff as full-time talent recruiters. These recruiters maintain direct contact with the career services offices of nine (9) tribal colleges and ten (10) universities with high Indian populations, including New Mexico, Montana, Oklahoma and South Dakota. Additionally, during 2018–2019 School Year the two BIE talent recruiters attended ten (10) regional job fairs, expanded online job advertisements beyond USA Jobs to include Handshake, which posts our announcement's on over 350 universities nationwide, Jobvite, Indeed, Team ND, which posts jobs on the career sites of six (6) North Dakota universities, and Jobzone, which posts on the career sites of nine (9) Nebraska universities.
- **Student Loan Repayment:** The BIE recently began providing student loan repayment recruitment incentives. In exchange for the student loan repayment recruitment incentive, a newly hired BIE employee must sign a written agreement to complete a specified period of employment. During FY 2019, the BIE has utilized its new student loan incentive to recruit five (5) critical skill vacancies and plans to continue utilizing this tool to fill additional vacancies.
- **Recruitment Incentive:** The BIE also recently began providing a cash recruitment incentive to recruit qualified candidates for difficult to fill vacancies. As is the case with the student loan incentive, in exchange for the cash recruitment incentive a newly hired BIE employee must sign a written agreement to complete a specified period of employment. During FY 2019, the BIE has utilized its new cash recruitment incentive to recruit one (1) critical skill vacancy and plans to continue utilizing this tool to fill additional vacancies.

#### **P.L. 100–297 Tribally Controlled School Grants**

*Question 1.* On July 1, 2018, Acoma Pueblo's Department of Education (ADoE) took over operation of Sky City Community School, a BIE-operated school, via use of P.L. 100–297 grant and renamed the school Haak'u Community Academy. As

noted in my October 18, 2018 letter to BIE Director Dearman,<sup>2</sup> ADoE experienced a number of unanticipated difficulties during and after the transition process from direct service to 297 grant. For example, the week before this hearing, ADoE informed my staff that BIE did not—

- Inform the Tribe that it would remove basic software from the school’s computers;
- Leave copies of student records, including special education files that are required for *Individuals with Disabilities Act* (IDEA) compliance; and
- Inform the Tribe that “297” Grant schools are ineligible to continue using GSA school buses.

I am concerned that these miscommunications will impact the educational opportunities for Acoma students. What’s more, these difficulties seem to indicate a broader problem related to the Bureau’s technical assistance for Tribes and Tribal organizations interested in converting their direct-service BIE school to a P.L. 100–297 grant. Has the Department worked with ADoE and GSA to ensure student transportation is not disrupted at Haa’ku Academy?

Answer. The Department has worked cooperatively with both ADoE and GSA regarding this matter, and we have been able to reach a short-term accommodation with GSA. Representatives from the BIE, the Solicitor’s Office, and the Secretary’s office have, and will, continue to actively engage with the GSA in an effort to reach a final resolution that minimizes disruption to the school.

*Question 1a.* Will the Department review its protocols for student record transfers during the P.L. 100–297 conversion process to ensure there are no lapses in federal education law compliance?

Answer. On July 2, 2018, BIE and Haak’u Community Academy personnel jointly accessed the school’s student record vault to review and transfer said documents, including special education files. However, a few weeks following this transfer, school administrators communicated to BIE that some files appeared to be missing. BIE staff immediately identified that the issue was caused due to some original files being placed into archived status. BIE personnel then provided copies of the original files to the school. BIE remains committed to improving its services to Tribes and schools and regularly reviews its protocols.

*Question 1b.* What training and technical assistance does BIE offer Tribal communities interested in taking over administration of a BIE school via a P.L. 100–297 grant?

Answer. BIE’s Associate Deputy Director offices and Education Resource Centers are specifically designed to provide individualized technical assistance to schools and tribes to support their educational sovereignty, including training and assistance regarding P.L. 100–297 and 93–638 school conversions.

## S. 790

*Question 1.* Please provide a list of all documents the Secretary requires to make a determination under IGRA Section 20(b).

Answer. Section 20 of IGRA generally prohibits gaming activities on lands acquired in trust by the United States on behalf of a tribe after October 17, 1988, 25 U.S.C. § 2719. However, Congress expressly provided several exceptions to the general prohibition. The Department’s regulations at 25 C.F.R. Part 292 set forth the procedures for implementing Section 20 of IGRA.

An applicant tribe must submit a written request for a Secretarial (Two-Part) Determination, 25 U.S.C. § 2719(b)(1)(A) that contains:

- Documentation that the proposed gaming establishment will be in the best interest of the tribe and its members (25 C.F.R. § 292.17), and
- Documentation that the proposed gaming establishment will not be detrimental to the surrounding community, including NEPA compliance documentation (25 C.F.R. § 292.18).
- The governor of the state in which the gaming activity is to be conducted must provide written concurrence in the Secretarial Determination (25 C.F.R. § 292.22).

An applicant tribe must submit a written request for a determination of eligibility to conduct gaming pursuant to 25 U.S.C. § 2719(b)(1)(B)(i-iii) that contains:

<sup>2</sup>Letter from Sen. Tom Udall, vice chairman, S. Comm. of Indian Affairs, to Tony Dearman, Director, Bureau of Indian Affairs (Oct. 18, 2018) (on file with the S. Comm. of Indian Affairs).

- For settlement of a land claim, documentation that the land was acquired pursuant to the settlement of a land claim (25 C.F.R. § 292.5).
- For an initial reservation of a tribe acknowledged pursuant to the federal acknowledgment process, documentation that the tribe has been federally recognized; and has a reservation proclamation, or a significant historical connection and a modern connection to the land (25 C.F.R. § 292.6).
- For the restoration of lands for a tribe that is restored to federal recognition, documentation that the tribe was federally recognized, terminated, and restored to federal recognition, and the land qualifies as restored lands (25 C.F.R. §§ 292.7–12).

*Question 2.* Please list each instance the Department has approved gaming on lands acquired in trust by the Secretary for a tribe pursuant to Section 20(b) of the Indian Gaming Regulatory Act, including the name of the beneficiary Tribe, the date, and state in which the property is located.

Answer. See Attachment I.

*Question 3.* The Catawba Indian Nation is not the current owner of the property S. 790 would authorize the Secretary to place land into trust for the purposes of gaming. Has the Department ever taken a parcel in which a tribe did not have a recorded interest into trust pursuant to 25 C.F.R. § 151.1 *et seq.* for gaming purposes?

Answer. Yes.

*Question 3a.* If yes, please provide a complete list, specifying the beneficiary tribe, the date, and the state in which the land was taken into trust.

Answer. Tribes typically own the land in fee or exercise an option to purchase the land in fee before the government acquires it in trust. In some cases, tribes have agreements where the landowner, often the developer, transfers the land directly to the government to be held in trust for the tribe.

*Question 3b.* Does Interior's land into trust process for gaming activities differ in the situation where a tribe actually owns a parcel in fee?

Answer. No.

*Question 4.* If S. 790 is enacted, what assurances will the Department, as trustee, provide the Nation to prevent or curb the subject property owner from leveraging S. 790 in order to sell it at a drastically increased price?

Answer. The Department understands that the Nation has a binding option agreement to purchase the subject property at an already established price.

ATTACHMENT I—APPLICATIONS APPROVED PURSUANT TO SECTION 20(B) OF THE INDIAN GAMING REGULATORY ACT FOLLOWING ITS ENACTMENT ON OCTOBER 17, 1988 (25 U.S.C. § 2719(B)).

OFFICE OF INDIAN GAMING U.S. DEPARTMENT OF THE INTERIOR SEPTEMBER 11, 2019

**25 U.S.C. § 2719 (b)(1)(A): Secretarial Determination (Two Part Determination)**

Tribe	City, County & State	Date Approved
Forest County Potawatomi Community (Governor concurrence 7/24/1990)	Milwaukee, Milwaukee County, Wisconsin	07/10/1990
Confederated Tribes of Siletz Indians (Governor non-concurrence 11/20/92)	Salem, Marion County, Oregon	11/06/1992
Sault Ste. Marie Tribe of Chippewa Indians (Governor non-concurrence 9/7/1994)	Detroit, Wayne County, Michigan	08/18/1994
Kalispel Indian Community (Governor concurrence 6/26/1998)	Airway Heights, Spokane County, Washington	08/19/1997
Saint Regis Mohawk Tribe (Governor concurrence York 2/18/2007)(land not acquired in trust)	Monticello, Sullivan County, New York	04/06/2000
Keweenaw Bay Indian Community (Governor's concurrence County, Michigan 11/7/2000)	Chocolay Township, Marquette	05/09/2000

Tribe	City, County & State	Date Approved
Lac Courte Oreilles Band, Red Cliff Band & Sokaogon Chippewa Community (Governor non-concurrence 5/14/2001)	Hudson, St. Croix County, Wisconsin	02/20/2001
Jena Band of Choctaw Indians (Governor gave no written non- Louisiana concurrence)	Logansport, DeSoto Parish,	12/24/2003
Fort Mojave Indian Tribe (Governor concurrence 11/20/2008)	Needles, San Bernardino County, California	02/29/2008
Northern Cheyenne Tribe (Governor concurrence 7/30/2009)	Big Horn County, Montana	10/28/2008
Enterprise Rancheria of Maidu Indians (Governor concurrence 8/30/2012)	Yuba County, California	09/01/2011
North Fork Rancheria of Mono Indians (Governor concurrence 8/30/2012)	Madera County, California	09/01/2011
Keweenaw Bay Indian Community (Governor non-concurrence 6/18/2013)	Negaunee Township, Marquette County, Michigan	12/20/2011
Kaw Nation (Governor concurrence 5/23/2012)	Kay County, Oklahoma	05/17/2013
Menominee Indian Tribe (Governor non-concurrence 1/23/2015)	Kenosha, Kenosha County, Wisconsin	08/23/2013
Spokane Tribe of the Spokane Reservation (Governor concurrence 6/8/2016)	Spokane County, Washington	06/15/2015
Shawnee Tribe (Governor concurrence 3/3/2017)	Texas County, Oklahoma	01/19/2017

**25 U.S.C. 2719 (b)(1)(B)(i): Settlement of a land claim**

Tribe	City, County & State	Date Approved
Seneca Nation of Indians	Niagara Falls, Niagara County, New York	11/29/2002
Tohono O'odham Nation	Glendale, Maricopa County, Arizona 07/23/2010 Remand:	07/23/2014

**25 U.S.C. 2719 (b)(1)(B)(ii): Initial reservation of an Indian tribe acknowledged by the Secretary under the federal acknowledgment process**

Tribe	City, County & State	Date Approved
Mohegan Indian Tribe	New London, Montville County, Connecticut	09/28/1995
Nottawaseppi Huron Band of Pottawatomis 25 U.S.C. 2719 (b)(1)(B)(ii):	Battle Creek, Calhoun County, Michigan	07/31/2002
Match-E-BE-Nash-She-Wish Band (Gun Lake Tribe) of Pottawatomis Indians	Wayland Township, Allegan County, Michigan	02/27/2004
Snoqualmie Tribe	Snoqualmie, King County, Washington	01/13/2006
Cowlitz Indian Tribe	Clark County, Washington	12/17/2010 Remand: 04/22/2013
Mashpee Wampanoag Tribe	Bristol and Barnstable Counties, Massachusetts	09/18/2015

**25 U.S.C. 2719 (b)(1)(B)(iii): Restored lands for a tribe that is restored to federal recognition**

Tribe	City, County & State	Date Approved
Confederated Tribes of the Grand Ronde Community	Grand Ronde, Polk County, Oregon	03/05/1990
Coquille Indian Tribe	North Bend, Coos County Oregon	06/22/1994
Confederated Tribes of Siletz Indians	Lincoln City, Lincoln County, Oregon	12/13/1994
Coquille Indian Tribe	Coos Bay, Coos County, Oregon	02/01/1995
Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians	"Hatch Tract," Lane County, Oregon	01/28/1998
Little River Band of Ottawa Indians Manistee,	Manistee County, Michigan	09/24/1998
Little Traverse Bay Bands of Odawa Indians	Petoskey, Emmett County, Michigan	08/27/1999
Paskenta Band of Nomlaki Indians	Corning, Tehema County, California	11/30/2000
Lytton Rancheria	San Pablo, Contra Costa County, California	01/18/2001
Pokagon Band of Potawatomi Indians	New Buffalo, Berrien County, Michigan	01/19/2001
United Auburn Indian Community	Placer County, California	02/05/2002
Ponca Tribe of Indians	Crofton, Knox County, Nebraska	12/20/2002
Little Traverse Bay Bands of Odawa Indians	Petoskey, Emmett County, Michigan	07/18/2003
Elk Valley Rancheria	Del Norte County, California	01/04/2008
Mechoopda Indian Tribe of Chico Rancheria	Butte County, California 03/14/2008	01/24/2014
Federated Indians of Graton Rancheria	Remand: Rohnert Park, Sonoma County, California	04/18/2008
Habematolel Porno of Upper Lake	Upper Lake, Lake County, California	09/08/2008
lone Band of Miwok Indians	Amador County, California	05/24/2012
Cloverdale Rancheria of Pomo Indians of California	Sonoma County, California	04/29/2016
Pokagon Band of Potawatomi Indians, Michigan and Indiana	South Bend, St. Joseph County, Indiana	11/17/2016
Wilton Rancheria	Sacramento County, California	01/19/2017