White Paper of the Ute Indian Tribe of the Uintah and Ouray Reservation

On

The American Indian Empowerment Act of 2017

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On January 3, 2017, the American Indian Empowerment Act (the "Act") was introduced in Congress by Representative Don Young (R) of Alaska. An identical bill has been introduced in three prior congressional sessions in 2011, 2013, and 2015. The Act requires the Secretary, at the request of the governing body of a federally recognized Indian tribe, to convey as restricted fee, title to all or part of lands held in trust for the Indian tribe. The Act states that tribes may lease and grant easements and rights of way over the lands without Secretarial approval. The Act also allows the tribe to pass laws governing the use of such lands that shall preempt federal law upon publication in the Federal Register. Finally, the Act claims to not diminish the Federal trust responsibility to any tribe.

Proponents of the American Indian Empowerment Act believe this bill will promote tribal self-determination by eliminating federal barriers to development. The Ute Indian Tribe supports federal legislation that promotes sovereignty, self-determination, and tribal economic development, and believes there are steps Congress can and should take to remove unnecessary federal barriers to development in Indian Country. However, the bill as drafted has some serious flaws and faint echoes of the "good intentions" of assimilation, allotment, and termination. Therefore, this Paper aims to demonstrate the weaknesses of the American Indian Empowerment Act as drafted, and suggest ways it can be improved. This Paper also offers alternatives to the restricted fee model proposed in the Act.

I. Benefits of the American Indian Empowerment Act

This section of the Paper analyses the positive aspects of each part of the Act. The subsequent sections will look at the Act in more detail to expose its flaws and explore ways the Act can be improved as well as alternatives to the Act for the greater benefit of Indian Tribes.

A. Voluntary Conveyance

One of the most important aspects of the Act is that it is voluntary. Pursuant to Section 2(a) of the Act, a tribe may elect to transfer its trust lands into restricted fee, or may leave some or all of its lands in trust. True sovereignty and self-determination require a tribe be able to use its lands the best way it sees fit, including putting lands into trust if that most aligns with the needs and goals of a tribe.

B. Lands Remain Indian Country and Subject to Tribal Control

It is important that tribal lands remain Indian Country regardless of how that land is held. Section 2(b) of the Act deems lands held by a tribe to be Indian Country under 18 U.S.C. §1151 and that these lands are subject to a restriction against alienation and taxation. This section of the Act applies the restrictions of the Trade and Intercourse Act of June 30, 1834[1] to a tribe's restricted fee lands conveyed under the Act. The Trade and Intercourse Act itself does not specifically mention trust or restricted fee lands, so interpretation of these restrictions is important. This part of the Act will prevent permanent alienation of tribal lands, a key factor in maintaining a tribal land base.

C. Secretarial Approval Not Required for Easements, Rights of Way, or Leases

Section 2(c) of the Act allows tribes to grant easements, rights of way, and leases for any period of time without review and approval of the Secretary. This will avoid a significant amount of bureaucratic delay or obstruction for tribes wishing to develop these lands. This section specifically supersedes the Long-Term Leasing Act,[2] removing any limitation on the length of leases on these tribal lands. It would remain to be seen how courts will interpret this provision in light of the restriction against alienation.

D. The Act Allows Tribal Law to Govern Tribal Lands

The Ute Tribe has often commented that it is important that Indian lands not be treated like public lands. Section 2(d) of the Act allows tribal law to preempt federal law governing the use of restricted fee lands upon publication in the federal register. There is no doubt that tribes know how to best manage their lands, something that should be reflected in federal Indian policy.

E. The Federal Trust Responsibility is Preserved

Section 2(e) states that nothing in the Act shall be construed to diminish the Federal trust responsibility to any Indian Tribe. The federal trust responsibility is a cornerstone and basic principle of Indian law stemming from early treaties with Tribes.[3] The government has an obligation to Tribes to assist in safeguarding and managing tribal lands and resources regardless of the trust status of those resources. The trust responsibility is a historical relationship between tribes and the United States, embodied by the government-to-government relationship that has evolved from this history.

II. Issues of Concern and Opportunities for Improvement in the American Indian Empowerment Act

While the prior section points out the potential benefits of the American Indian Empowerment Act, the Ute Tribe cannot support the Act as drafted because it is too vague and

[1] 25 U.S.C. §177.
[2] 25 U.S.C. §415.
[3] Cohen's Handbook of Federal Indian Law §5.04(3)(a) (2012 ed.).

unclear. The status and future of lands once transferred into restricted fee ownership under the Act is uncertain. The Ute Tribe faces ongoing attacks on its tribal lands from federal, state, and local governments. Like many Tribes, the Ute Tribe fights every day to maintain its tribal land base and its authority and jurisdiction over those lands. The Ute Tribe supports removing barriers to tribal control of tribal lands, but to truly empower tribes as the Act suggests, the issues contained in this section must first be addressed. Many of these issues have been raised before, including in hearings held on the bill in 2012,[4] therefore it is concerning that they have not been addressed in the current version of the Act.

Now is not the time to pass legislation that would promote transferring trust lands into a more uncertain category of Indian land holdings. How this Administration will handle Indian policy is undefined. The Trump administration has shown hostility towards the fee-to-trust process by adding additional hurdles to an already complicated procedure,[5] and the Secretary of the Interior has advocated for an "off ramp" from the trust land model – a similar line of thinking that led to the loss of 90 million acres of Indian lands during allotment.[6] Thus, caution is prudent in this potential move away from a trust land model and toward a private fee land model that creates significant risk of state jurisdiction. Additionally, there is disagreement as to whether restricted fee land is treated any differently than trust land under federal law.[7]

The following sections point out the flaws of the Act and how these flaws might be remedied.

A. Ensure Tribal Requests are Valid Under Tribal Law

The Act requires the Secretary to convey trust lands to a tribe upon "a written request adopted by the governing body of a federally recognized Indian tribe." For some tribes, the business committee or its equivalent may not be authorized under the tribal constitution to make such serious land use decisions without consensus from the tribal membership as a whole. The Secretary must ensure that the request for the transfer of land complies with and is valid under applicable tribal law.

B. Clarify Application to Fractionated Interests

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[4] US House of Representatives, House Committee on Natural Resources, Subcommittee on Indian and Alaska Native Affairs, *Hearing on HR 3532, American Indian Empowerment Act*, February 7, 2012, 112th Congress, Washington: GPO, 2012, Statement of Donald "Del" Laverdure, Principal Deputy Assistant Secretary for Indian Affairs, US Department of the Interior.

[5] https://www.indianz.com/News/2017/10/17/tribes-slam-trump-administration-for-see.asp

[6] https://www.indianz.com/News/2017/05/03/secretary-zinke-advocates-offramp-for-ta.asp

[7] *Compare, e.g.*, 25 U.S.C. §§ 3703, 3715 (leasing of Indian agricultural lands), 25 U.S.C. § 323 (rights-of-way), 25 U.S.C. § 81 (contracts and agreements with Indian tribes that encumber Indian lands) (collectively, statutes that treat restricted fee and trust lands the same) *with Oklahoma Tax Commission v. United States*, 319 U.S. 518 (1943) (upholding state inheritance tax on restricted personal property held by the Secretary of Interior for the benefit of Indian allottees, where such tax wouldn't apply to similar trust property), *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948) (applying state inheritance tax to restricted mineral rights of tribal members), and *Bd. Of County Comm'rs v. Seber*, 318 U.S. 705 (1943) (holding that state may not tax Indian restricted Indian lands, even when lands were not trust lands).

The Act does not indicate whether it will apply only to lands where a tribe is the sole beneficial owner, or whether it will also apply to lands where the tribe owns only a fractional interest. Tribes should not have to inherit broken land management systems, and the government should not address the problem by handing it over to tribes for them to solve on their own. Land tenure in Indian Country is still riddled with complications stemming from allotment and termination. The government should resolve these issues before transferring land to tribes.

The goals of the Act would best be met if it applied only to lands fully owned by a tribe. However, due to the fractionated nature of Indian Country, it is unclear how much land would be available for transfer under this Act if full beneficial ownership of the Tribe were required. The Act may not be applicable to the significant amounts of fractionated land, meaning additional avenues for empowerment of tribes through economic development must be created.

C. Clarify Application to Restricted Fee Lands Not Transferred from Trust

The Act uses general language when discussing tribal authority over restricted fee lands, and does not denote whether its provisions will only apply to the specific lands transferred out of trust and into restricted fee under the Act, or whether it could apply to lands otherwise held in restricted fee by tribes acquired outside of the trust-to-fee process of the Act. The scope of potential preemption of federal laws is therefore unclear.

The Act must clarify whether, if a tribe requested some of its trust lands be conveyed as restricted fee under the Act, the exemptions to the Long-term leasing Act and other federal laws would apply to other restricted fee held by the tribe. If they would not, this will create further confusion in the management of tribal lands, because certain restricted fee lands would be treated differently and subject to different statutes than other restricted fee lands. Furthermore, for tribes to fully leverage any benefits of restricted fee lands, they may need to first go through the fee-to-trust process and then turn around and seek a trust-to-fee conveyance. As mentioned above, the Trump administration has been erecting hurdles to the fee-to-trust process. Self-determination is best served if tribes can decide which lands to manage free of federal interference, regardless of whether those lands originated as trust lands.

D. Clarify Application of Other Relevant Federal Laws and Preemption by Tribal Law

The Act needs clarification as to how and whether federal statutes not mentioned in the Act would be preempted by its application. Many statutes treat restricted fee and trust lands the same,[8] and it is unclear how these statutes would be affected under the Act. There are many federal statutes not addressed in the Act that deal with leasing and Secretarial approval.[9] The Act must indicate its preemptive effect on all applicable statues to avoid complicated or conflicting interpretations by tribes, agencies, or courts at a later date. Without such clarification, case-by-case analysis may be required before a tribe can lease land without any federal review or approval

[8] See, e.g., 25 U.S.C. §§ 3703, 3715 (leasing of Indian agricultural lands); 25 U.S.C. § 323 (rights-of-way); 25 U.S.C. § 81 (contracts and agreements with Indian tribes that encumber Indian lands).

[9] These statues include American Indian Agricultural Resources Management Act, the Native American Housing and Self-Determination Act, the Indian Mineral Leasing Act, and the Indian Mineral Development Act.

under the Act. Congress should perform a study of all relevant laws prior to enacting legislation that does not make clear its full preemptive effect.

Additionally, the Act states that tribal laws "establishing a system of land tenure" shall preempt any provision of Federal law governing the use of such lands. The Act does not define what a system of land tenure might or can look like. More specificity is required as to how tribes can establish a system of land tenure and what tribal laws can preempt federal laws. As mentioned above, the Act as drafted is unclear whether this preemption would only apply to the restricted fee lands conveyed under the Act or to other restricted fee lands held by a tribe, potentially leading to further confusion and overlapping law. Preemptive reconciliation of these issues is required to avoid uncertainty that would hinder economic development.

E. Resolve Any and All Ambiguities Regarding Potential State Jurisdiction Over Restricted Fee Lands

The Act must ensure there will be absolutely no state jurisdiction or regulation over lands conveyed to a tribe. The Ute Tribe has fought too long and hard to take steps backward from its hard-won jurisdiction. The Act must clarify how state jurisdiction over restricted fee lands obtained through and outside this process would be affected. Indian Country needs legislation that reinforces Tribal rights and sovereign authority over Tribal lands and language that clearly excludes state and local governments' jurisdictional authority over any activities on tribal lands. The language in any such legislation should cover all aspects of jurisdiction, including jurisdiction over environmental, taxation, criminal, and civil matters. The hearing memorandum itself from the Majority Committee Staff on the Subcommittee on Indian, Insular and Alaska Native Affairs notes that land under the Act would keep its immunity from civil regulation and taxation, and "likely" state criminal jurisdiction. Certainty and stability are what drive economic growth in Indian Country. No level of uncertainty regarding state jurisdiction over Indian lands is acceptable to the Ute Indian Tribe. The Act must explicitly include language that these restricted fee lands are under exclusive tribal control, not subject to state or federal regulation, taxation, or laws.

F. Address Specifics of Continued Trust Responsibility to Tribes

The concept of a federal trust responsibility to Indians evolved from early treaties with tribes, statutes (particularly the Trade and Intercourse Act), and Supreme Court opinions, and is now one of the cornerstones of Indian law.[10] According to its language, nothing in the Act "shall be construed to diminish the Federal trust responsibility to any Indian tribe." However, without more substance, these are empty and meaningless words. Certain statutes superseded by this Act serve as a mechanism for the federal government to carry out its trust responsibility. The Act purports to preempt federal statutes that are the source of some legally enforceable trust responsibilities. This makes suspect the notion that the trust responsibility is not diminished by the Act. This bill is attempting to do away with any enforceable aspects of the trust responsibility once the lands are transferred to a tribe. Without clarification and specifics of what trust

[10] F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 412 (2012 ed.).

responsibility remains for tribes once their lands are placed into restricted fee, courts will not find a trust responsibility exists, leaving tribes without a remedy.

In fact, in his October 25, 2017 testimony before the Subcommittee on Indian, Insular, and Alaska Native Affairs on the Act, Acting Assistant Secretary John Tahsuda III argued that "the liability on behalf of the federal government should be nonexistent."[11] The trustee itself can see the bill as drafted leaves no room for the trust responsibility.

Courts regularly fail to provide remedies for tribes based on the trust responsibility. Even when the federal government acts in the best interests of others to the detriment of the tribe, as was the case in *U.S. v. Navajo Nation*,[12] courts do not find an enforceable trust duty without clear congressional intent. The majority opinion was in agreement that the Act did not contain any trust language because such language would go against the principal purpose of the Act, which was to "enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties."

In order to bring a tribal breach of trust claim, it must be alleged that the federal government violated a substantive right owed to Indians that can be found in some source of law, such as "the Constitution, or any Act of Congress, or any regulation of an executive department," that gives rise to an enforceable trust duty.[13] Typically, establishing a trust relationship requires a clear statement of congressional or executive intent to create a trust relationship or some semblance of trust responsibilities.[14] The trust responsibility has been held to arise in certain situations such as to compel the government to undertake litigation on behalf of a tribe to protect trust property,[15] and when the federal government exercises comprehensive authority and control over tribal lands and resources.[16] In other words, "virtually all invocations of trust responsibility as a primary basis for affirmative relief are rejected by courts in the absence of a statute or regulation imposing trust-like obligations, or providing for federal control and management of trust property."[17] This means that courts tend to insist upon the existence of some significant federal supervision and control over tribal funds or other trust property.[18] The Act leaves tribes a right without a remedy.

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[11] US House of Representatives, House Committee on Natural Resources, Subcommittee on Indian and Alaska Native Affairs, *Hearing on H.R. 215, American Indian Empowerment Act*, October 25, 2017, 115th Congress, Washington: GPO, 2012, Testimony of John Tahsuda III, Acting Assistant Secretary for Indian Affairs, US Department of the Interior at page 2.

[12] 537 U.S. 488 (2003). The federal government allowed a sub-par royalty rate at the legal minimum to be negotiated for a Navajo lease to Peabody coal, betraying the trust of the tribe and acting in Peabody's interest. The Supreme Court ruled that no provision of the IMLA entitled the tribe to monetary damages as a result of the government's role in the negotiations.

[13] 28 U. S. C. § 1491.

[14] See *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009).

[15] See, e.g., *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) and *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972).

[16] See *United States v. Mitchell*, 463 U.S. 206 (1983) (Mitchell II).

[17] WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 51 (5th ed. 2009).

[18] Even if the tribes who opt to have their land transferred to restrictive fee status are able to bring a breach of trust claim it certainly would not be compensable in monetary damages. A breach of trust claim is compensable in monetary damages when the government has such broad and comprehensive authority over the trust property at issue that the source of law relied upon can be fairly interpreted to mandate compensation by the federal government

Congress passed the Indian Tribal Energy Development and Self Determination Act ("ITEDSA") as part of the Energy Policy Act of 2005.[19] Not unlike the American Indian Empowerment Act, ITEDSA allowed tribes to enter into agreements without Secretarial review or approval. To date, no tribe has taken advantage of ITEDSA in the more than 10 years since its passage. This is due to the uncertainty posed by ITEDSA including the lack of trust responsibility of the federal government. The government cannot expect tribes to use a process in which the federal government has abandoned its trust responsibility.

Therefore, specifics on the extent of the trust relationship and potential liability of the federal government is needed. The Act should also clarify that, when sought by a tribe, there will still be room for technical assistance from the Secretary or BIA. Attempts by the federal government to shun its trust responsibility or improperly limit its liability will not be tolerated, making the Act as drafted unacceptable. The lack of any true trust responsibility is one of the key flaws of the process envisioned under the Act.

G. Make the Process Explicitly and Easily Reversible

The Act makes no indication of whether the trust-to-fee process is reversible. The process must be reversible to be acceptable to tribes. As mentioned above, not a single tribe has sought to utilize the ITEDSA process because of its uncertainty and potential unintended effects. That Congress thinks tribes will take advantage of a similarly problematic Act without even stating whether the process is reversible is unreasonable. Under self-determination contracts, often referred to as 638 contracts, authority can be retroceded back to the federal government. These 638 contracts are used widely in Indian Country as a self-determination and sovereignty building tool.

Furthermore, the reversal process should be straightforward and should not require a new fee-to-trust process. Between 2013 and 2015, the Ute Indian Tribe submitted eight separate applications for placing land into trust. These properties make up roughly 14,205 acres and they range from tribal hunting and fishing and grazing areas, to commercial areas that contain a convenience store and other entities. In addition to the fee-to-trust process, Interior also has not completed trust restoration under the IRA for lands opened to allotment. Tribes cannot rely on the fee-to-trust process to reverse conveyances under the Act.

III. Alternatives to the American Indian Empowerment Act of 2017

It is the position of the Ute Indian Tribe that a leap away from the trust land model is not required to achieve the goals and benefits of the Act. Greater tribal control of tribal resources will always be good for tribes, but we must hold the federal government accountable in the process. Instead of forcing tribes to reshuffle the status of remaining tribal trust lands as the Act would require, Congress needs to think more creatively about providing opportunities for tribes to

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for the damage sustained related to the trust property. *Mitchell*, 463 U.S. 206, 217 (1983). This Act gives up most, if not all, control that the Secretary has over tribal lands and resources and removes lands from trust.

[19] Pub. L. 109–58 (August 8, 2005).

promote economic use of Indian trust lands. Congress can pass laws providing for the leveraging of trust lands, incentivizing investment on trust lands, preventing treatment of Indian lands like public lands, supporting tribal use of lands through IRA Section 17 Corporations and ensuring exclusive tribal authority to regulate and tax trust lands. Rather than forcing tribes to share tax revenues from economic activity on Indian reservations with state governments, Congress should clarify exclusive tribal taxing authority within reservations. Congress must ensure there are adequate BIA staff and budgets to support tribal economic activities, and additional support for restoring trust lands. The application to Indian lands of burdensome federal statutes such as the National Environmental Policy Act ("NEPA") can be addressed directly through federal legislation.

Uncertainty in the laws surrounding tribal lands are true barriers to tribal economic development, and there are ways – drawing and expanding on programs like the HEARTH Act – to remove federal approval requirements without taking land out of trust. Congress should not pass the burden to tribes, rather the burden is on Congress to fulfil its responsibility to tribes and devise a system of Federal laws that protects and secures tribal trust lands while also promoting and allowing for economic development.

IV. Conclusion

To achieve its stated goals, the American Indian Empowerment Act must be redrafted to address the above-mentioned concerns and to remove problematic uncertainty from its provisions. The Act threatens to subject Indian trust lands to decades of new and increased uncertainty as Congress reconciles this bill with existing laws governing Indian lands and even more confusion as courts of all kinds interpret and apply the law. The Act all but revokes and terminates the trust responsibility, a cornerstone of Indian law and policy. However, there are alternative routes to achieve goals of self-determination and economic development in Indian Country that avoid the jurisdictional uncertainties created by the Act. The trust status of Indian lands is not necessarily a barrier to tribal economic development. In this era, we know that tribes do not benefit from forced assimilation. Tribes should not be expected to take on the burden of a broken Indian land tenure system. Whatever the next steps taken by Congress, they must be sure to engage in additional meaningful consultation with Indian Country on the proposed bill and other ways to improve tribal economic development.