

Testimony of Fred Allyn III, Mayor of the Town of Ledyard, Connecticut

**House Committee on Natural Resources
Subcommittee on Indian, Insular and Alaska Native Affairs**

Oversight Hearing on:

"Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act. "

July 13, 2017

Chairman LaMalfa, Ranking Member Torres, and Members of the Subcommittee, thank you for the opportunity to testify on issues related to trust land acquisition under the Indian Reorganization Act of 1934 (IRA). I am the Mayor of Ledyard, Connecticut, a municipal government for a town of 15,000 residents, located in the southeastern corner of the State. I also submit this testimony on behalf of our neighboring towns of Preston and North Stonington.

Based on our experiences with the Mashantucket Pequot and Mohegan Tribes, we are uniquely situated to provide testimony on the issues associated with Indian gaming, including trust land, off-reservation casinos and gaming-related facilities, taxation of non-tribal personal property on reservation lands, and tribal acknowledgment. Our experience comes from decades of serving as the host community for the reservation of the Mashantucket Pequot Tribe, the Foxwoods Resort Casino and, to a lesser degree, from our proximity to the Reservation of the Mohegan Tribe and the Mohegan Sun Casino.

The purpose of this testimony is to discuss why the current standards and procedures of the Bureau of Indian Affairs (BIA) regulations for trust land acquisition in 25 C.F.R. Part 151 are seriously flawed and need to be revised to ensure that decisions meet the intent of Congress in the IRA. My testimony will speak to the concerns of local government bodies with the BIA rules. I also will speak to an Advance Notice of Proposed Rulemaking (ANPRM), published by the Obama Administration on December 9, 2016, to revise the current rules implementing the Indian Trader laws. 81 Fed. Reg. 89,015-017. As my testimony will discuss, the ANPRM will be very harmful to state and local governments and is motivated not by a desire to address the regulation of "Indian traders" but instead to manufacture a basis for the preemption of state and local taxation of non-Indian economic activities on Indian lands. The potential loss of such tax revenues on Indian lands is one of the significant burdens imposed on local governments when land is taken into trust.

Impacts to Local Communities

Before making recommendations, I offer perspective on why acquiring off-reservation land in trust has such a profound negative impact on local communities. These impacts fall into four categories. While the nature and extent of the impacts will vary according to the intended

use of the land, I believe that these types of impacts will be experienced by most communities that confront the expansion of tribal lands pursuant to trust land acquisition undertaken by the Secretary of the Interior through the BIA.

First, local governments will experience an increase in the demand for government services, especially when gaming or large-scale economic development occurs, bringing large influxes of both patrons and employees. Local governments provide services used by all, including emergency and law enforcement services, public sanitation, and the expansion and maintenance of public roads, schools, and hospitals. These services directly benefit, and often are essential to, such tribal economic development. In fact, it is generally the case that states and local governments do not differentiate between tribal members and other citizens in providing governmental services.

Second, while financial burdens increase, revenues decline from the loss of tax base. Land in trust is not subject to state and local property taxes, and economic substitution effects can affect the local economy, resulting in losses of other tax revenue streams as well. Increasingly, tribes are challenging state and local taxation of non-Indian activities on trust lands, further threatening local government funding.

Third, control is lost over the use of land, often resulting in fragmented development and negative environmental and quality-of-life impacts. Once taken into trust, land is not subject to local zoning laws, allowing incompatible development that the local government cannot regulate. State and local environmental laws also do not apply.

Finally, changes occur in the nature of daily life in the area surrounding the trust land, and in the ability of residents or government officials to decide whether those changes are desirable or how they should be achieved. Large-scale tribal gaming or other economic development can completely transform the character of a small town or a rural community. To a large extent, local communities can feel as if they have lost control of their own future.

Our experience illustrates these impacts. As noted above, the three Towns extensive experience with trust land acquisition by the Secretary of the Interior. Our experience dates from 1993, when we learned that the Mashantucket Pequot Tribe had filed an application to have 247 acres of off-reservation land acquired in trust on its behalf. Concerned about the loss of tax revenue in the face of growing burdens on our small-town government due to the success of the Foxwoods Casino and negative impacts of development inconsistent with local land use and environmental laws, Ledyard joined with the neighboring Towns of North Stonington and Preston to oppose the Secretary's acquisition of this land in trust.

Our lawsuit, filed in 1995, lasted for almost ten years. In the end, the Tribe withdrew its request and instead worked with the Town to pursue its off-reservation development plans in accordance with state and local laws, and to acquire land in trust only for on-reservation parcels, which the Town of Ledyard has been able to support.

Our experience also comes from recent litigation with the Tribe over its claim that non-tribal slot machine vendors who lease gaming equipment for use at Foxwoods are exempt from

local personal property tax. *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). In 2005, the Tribe challenged Ledyard's assessment of Connecticut's personal property tax on the lessors of slot machines used by the Tribe at its casino, arguing that the tax, which the Tribe contractually agreed to pay, infringed on tribal sovereignty. After eight years of litigation, the Second Circuit ultimately ruled that non-Indian slot machine companies must indeed pay personal property tax like any other business that maintains such property. *Id.* The Court found that the State and local interests in the tax revenues at stake outweighed the Federal and Tribal interests in economic development and tribal sovereignty. The Court found that the economic effect of the tax on the Tribe was minimal, but the tax revenues were essential to the Town's ability to fund public services, including the education of Tribal children, and the maintenance of the roads that bring customers to the Tribe's casino. In short, the Town and State had more at stake than the Tribe.

The result of this progression from divisive and expensive litigation and conflict to amicable and collaborative land use planning provides important lessons learned and a clear picture of the changes needed to improve trust land acquisition decision-making, which I offer in this testimony.

The Town of Ledyard

We commend the Tribe for its great success in developing Foxwoods and achieving governmental and economic self-sufficiency. The fact remains, however, that the Town of Ledyard has been adversely impacted since the opening of the first casino in 1992. This is a result of the governmental burdens our Town must bear to accommodate Foxwoods and the lack of an adequate source of revenue for that purpose due to the tax-exempt status of trust land.

To understand the basis for my testimony, the Subcommittee needs background information on my Town. Ledyard has an annual budget of \$55 million, which is a mere fraction of the annual revenues of the Tribe, estimated to be in excess of \$1.5 billion/year. Within such a small budget, we must be able to recover *all of the costs* of the governmental services we supply to the Tribe and provide for our own residents. This must occur with declining State Aid.

The shortfall in the Town's budget increases every time the federal government takes more land into trust. Currently, the Tribe has approximately 1,095 acres held in non-taxable trust within its existing reservation boundary, which encompasses about twice that amount of land. At present, we do not believe the Tribe seeks to add any trust land outside of its reservation boundaries. Since the enactment of the Connecticut Indian Land Claim Settlement Act of 1983, however, the Tribe has gradually and continually expanded the amount of land in trust status inside the reservation.

Consistent with the Town's cooperative working relationship with the Tribe, we have supported on-reservation trust land acquisition, provided all applicable laws are satisfied and the Town is consulted with in advance. In supporting these requests, however, the Town has had to absorb a significant loss in tax revenue every time another acquisition is completed. For example, the federal government's most recent trust land acquisition for the Tribe cost the Town approximately \$250,000 in annual property tax revenue. We believe the Tribe intends to

continue to add more trust land within its reservation boundaries, so further losses in tax revenue to the Town will occur.

Flaws in the Current Trust Acquisition Process

The current trust acquisition process is so deficient that it cannot possibly meet the intent of Congress in enacting the IRA. The current process suffers from two overriding flaws: 1) the lack of objective standards governing the trust acquisition decision; and 2) the lack of procedures that ensure real consideration of the impacts to local communities. This lack of any real constraints on the BIA's discretionary authority is what allowed the Obama Administration to make the heavily-publicized political commitment to take 500,000 acres of land into trust while in office, and in fact was able to exceed that target.¹ The trust acquisition process should not be so unconstrained as to allow administrations to make political promises to take such a significant and arbitrary amount of land into trust, even before any consideration of the actual merits of individual applications.

In our 1995 lawsuit, joined by the State of Connecticut, we argued that Section 5 of the IRA was intended to serve a limited, but important, purpose of assisting tribes in achieving a sufficient land base, usually within reservation boundaries, to achieve economic development and provide for their members. We also argued, in the first case to raise the so-called "*Carciari* issue" that such authority has to be used only for "any recognized Indian tribe now under federal jurisdiction." Unfortunately, while this intent of Congress was clear, apparently the words chosen in section 5 were not, which has allowed BIA to proceed with trust land acquisition that has virtually no limits and no discernible standards, and to acquire land in trust for tribes that were not recognized in 1934.

The courts have thus far not found section 5 of the IRA to be so lacking in any intelligible principle governing its exercise as to be an unconstitutional delegation of legislative authority. Nonetheless, the statute itself provides little guidance as to the basis for trust decisions. Section 5 simply states that the Secretary of the Interior is "hereby authorized, in his discretion, to acquire . . . lands . . . for the purpose of providing land for Indians." The statute thus provides no meaningful guidance to the decision maker, tribes, state or local governments, or the public.

The trust acquisition regulations at 25 C.F.R. Part 151 set forth various criteria, but provide little meaningful guidance.² For example, the regulations require the the BIA to consider "the need of the individual Indian or tribe for additional land," yet the regulations do not define or provide guidance on the type of need to be considered and how the level of need should be evaluated. The BIA regularly accepts generic statements that placing land in trust will further tribal self-governance and self-determination as showing sufficient need, and finds the need criterion satisfied for even the wealthiest of tribes.

¹ <https://www.doi.gov/pressreleases/obama-administration-exceeds-ambitious-goal-restore-500000-acres-tribal-homelands>

² See generally, Government Accountability Office, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land Trust Applications* (GAO-06-781).

Similarly, the regulations require consideration of the purposes for which the land will be used, but according to the BIA, almost any purpose will suffice. Moreover, in many cases, the tribe claims one proposed land use, or even no change in land use, but then pursues completely different uses once the land is in trust. Changes in uses are not subject to further review by the BIA, so there is a strong incentive to claim that no change in land use is intended to avoid the need for review under the National Environmental Policy Act (NEPA). As a result, the impacts of development are not considered in the trust decision, local communities are blindsided, distrust replaces cooperation, and negative impacts that could easily have been avoided or mitigated nonetheless occur.

If the land to be acquired is in unrestricted fee status, the regulations require the BIA to consider the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls. This is a fundamental concern for local governments, yet the regulations provide no guidance on what constitutes an acceptable level of tax loss. In addition, only the amount of current property taxes on what is often undeveloped land is considered, rather than the property taxes that would be generated after the land is developed, even when proposed development is the purpose of the trust request, and will generate greater demand for public services. In addition, the BIA refuses to consider the cumulative impact of trust acquisitions, and every new request is treated in isolation, even in cases where half the land in a county is already in trust.

The BIA is also required to consider jurisdiction problems and potential conflicts of land use that may arise. The exercise of zoning authority is one of the primary tools by which communities can protect their integrity, and this important local government tool is lost once land is in trust. Again, there is no guidance in the regulations on what types of jurisdictional and land use concerns might warrant denial of the application. As a result, the BIA consistently fails to accord any real weight to the loss of local government zoning authority over lands taken into trust. Indeed, the BIA often cites the need to eliminate such state and local control as a reason to take land into trust.

The BIA must also consider the extent to which the applicant has provided information that allows the Secretary to comply with environmental requirements, particularly under NEPA. Yet again, the regulations provide no guidance on the amount or type of information needed by the BIA to make the required environmental determinations. Under what is known as a categorical exclusion, the BIA frequently exempts proposed acquisitions from any environmental review at all. Rather than serving as a mechanism to explore and resolve negative impacts through agreements with local governments or other parties, or meeting tribal needs without taking land into trust, NEPA is often viewed as a roadblock to unbridled trust land acquisition, and an obstacle to be avoided.

In addition to the flaws in these standards, the BIA routinely limits, or ignores, the role of local governments in making decisions, including for off-reservation lands. The BIA limits its inquiries with local governments to little more than getting information on tax value of land to be removed from the rolls; it seldom considers the other impacts on communities or does anything to encourage cooperative relationships between tribes and local governments. Local governments are typically ignored, or treated as a problem to be overcome. As a result, there is

little incentive for tribes to work with local governments to explore alternatives to trust land acquisition, often leading to conflict, litigation, and negative impacts.

Recommendations on Trust Land

To address these concerns, the Town recommends that trust acquisitions be limited as follows: First, to give effect to the intent of Congress in enacting the IRA, on-reservation acquisitions under Section 5 of the IRA should be limited to land located within the boundaries of Indian reservations that were in existence on June 18, 1934—the date of enactment of the IRA. Second, all other lands should only be taken into trust when clear, objective standards have been met, and the concerns of local governments have been satisfied. In particular, tribes should be required to seek solutions to trust land requests before seeking BIA approval; local governments should be consulted early in the process; and no acquisition should be approved unless impacts to the local community have been addressed and mitigated, either through binding agreements with the tribe, or enforceable federal decisions. Meaningful requirements should be established for Tribes to prove the need for trust land, as envisioned by Congress in 1934. And no change in use or purpose should be allowed without a new decision.

In addition, the Secretary's authority to take land out of trust should be confirmed. The BIA appears reluctant to remove land from trust after conveyances have been made, even if the decisions are made in error. The Secretary should also have clear authority to remove land from trust if the proposed land use changes after trust acquisition to a land use that was not considered in the original decision, or to stop the new land use from occurring until a new review is conducted.

Rulemaking to Revise the Indian Trader Regulations Will Make These Problems Worse

In addition to the loss of tax revenues from trust land acquisition, the Town is also facing the loss of potentially significant revenues from State tax laws that require the payment of personal property taxes to local governments. Those assessments amount to hundreds of thousands of dollars in personal property tax every year, and, as previously described, were upheld by the Second Circuit in 2013. To be clear, these are taxes paid by non-Indians for personal property, wherever it is held, including on Indian lands. The potential loss of these revenues would obviously be magnified as more land is taken into trust.

The BIA, however, is considering whether to proceed with an Obama Administration initiative to revive obsolete and unused regulations governing “Indian traders.” The comment letters submitted by tribes to the ANPRM, issued in December of 2016, as well as records obtained under the Freedom of Information Act documenting communication between the BIA and tribes prior to the ANPRM, reveal that the true objective of this rulemaking is to preempt State and local taxes—including taxes on sales to non-Indians, as well as non-Indian personal property—that are valid under existing law, rather than any sincere objective to modernize the role played by the archaic concept of “Indian traders.”

Our Town, in conjunction with the Towns of North Stonington and Preston, Connecticut, submitted comments opposing revising the Indian Trader regulations, which are no longer used

by the vast majority of tribes and non-Indian businesses. Congress enacted the original Indian Trader Statutes more than two centuries ago, during a time when most tribes were isolated and economically undeveloped, to protect them from exploitation.³

The current versions of the Indian Trader Statutes (Statutes) were enacted between 1834 and 1903 to prevent Indians from being defrauded by traders doing business with Indian tribes. 25 U.S.C. §§ 261-264. The Statutes authorized the federal government to regulate those who trade with Indians. *See id.* §§ 261, 262. The Statutes directed the Secretary to specify the kind and quantity of goods that traders could sell to Indians and at what prices. *See id.* In 1957, the BIA promulgated the current regulations to implement the Statutes, which, among other things, prohibited traders from selling alcohol, selling tobacco to minors, and conducting gambling of any type on Indian reservations. *See* 25 C.F.R. Part 140. The regulations required traders to seek a license, prohibited them from trading with Indians anywhere other than at trading posts, and required traders to charge prices that were fair and reasonable.

No one follows these regulations today. Tribes now conduct all sorts of business activities where they or their management companies operate gaming and sell alcohol. They also have pharmaceutical operations; they operate outlet malls, gas stations, box stores, hotels, restaurants, golf courses, convention centers and arenas. In some cases, they do this directly. In other cases, they enter into business arrangements where non-Indians operate businesses. Tribes are no longer dependent on a single or a few Indian traders for goods and services as many were when the Statutes were enacted; instead they have ordinances pursuant to which they govern their own economic activities.

There is no need, therefore, to resurrect regulations to effectuate what are paternalistic and effectively obsolete statutes. The only appropriate contemporary response is that the Statutes are obsolete and the regulations should be eliminated entirely. Both the BIA and tribes recognize the modern irrelevance of the Indian Trader Statutes and the implementing regulations.

The BIA's current effort to "update" those regulations, therefore, appeared intended, even at the time, to serve an entirely different purpose—to undermine the ability of states and local governments to assess legitimate taxes on non-Indians engaged in commerce on Indian land. Even on its face, the key focus of the ANPRM appeared to be taxation—an issue not addressed in the Indian Trader Statutes.

The ANPRM states that "the Department recognizes that dual taxation on Tribal lands can undermine the Federal policies supporting Tribal economic development, self-determination, and strong Tribal governments." In that context, the ANPRM explicitly sought comments on "how the Federal government can bolster those Tribes that currently comprehensively regulate trade;" the "services [tribes] currently provide to individuals or entities doing business in Indian Country and what role do tax revenues play in providing such services;" and "how revisions to the trade regulations could facilitate economic activity in Indian country and tribal economic self-sufficiency." It therefore seems likely that the BIA intends to include a provision purporting to preempt state and local taxation on non-Indians.

³ The first Indian Trade and Intercourse Act was enacted in 1790. Act of July 22, 1790, 1 Stat. 137 ("An Act to regulate trade and intercourse with the Indian tribes.").

The Secretary does not have the power to determine the applicability of state and local laws to non-Indians and should not be attempting to do so by regulation. The Secretary's lack of authority, however, is little comfort to those local governments that will have to defend against the lawsuits that will inevitably follow. The BIA recently included similar provisions when it revised leasing and right-of-way regulations in the last Administration, and those provisions have indeed generated significant litigation across the nation. And while the Department has stated in federal courts that the tax provisions in those rules have no preemptive effect, those regulations have clearly been used to undermine state and local taxation. This is the sort of outcome federal agencies ought to be avoiding, not exacerbating.

The impression that this rulemaking effort is intended to displace valid, and very necessary, state and local taxation of non-Indian activities was fully confirmed by the comments received by the BIA in response to the ANPRM. Almost every comment letter, out more than 50 received by the BIA, was from an Indian tribe or tribal organization, and those comment letters uniformly supported the rulemaking effort as a way to eliminate the so-called "dual taxation" by state and local governments under existing law. In our view, there is no "dual taxation;" there is only the legitimate exercise of state and local authority to tax non-Indians, and the Tribe's authority to apply its power to tax where it has the authority to do so.

In addition, documents released under the Freedom of Information Act reveal that issuance of the ANPRM was heavily influenced by a coordinated effort by the National Congress of American Indians (NCAI) and numerous Indian tribes to persuade the BIA to undertake this rulemaking, specifically for the purpose of preempting State and local taxation of *all* non-Indian economic activity on Indian lands. The NCAI provided a detailed memorandum, dated July 7, 2016, that is particularly revealing. Addressed to Solicitor Hilary Tompkins, the memorandum presents a legal argument for the BIA's authority to completely delegate the Indian trader licensing function to tribal governments and to "eliminate dual taxation" by promulgating a clear and unambiguous statement of federal preemption of state and local tax laws. Expressing the concern that most Secretaries of the Interior come from a state government background, and therefore are sympathetic to the interests of state governments, the memorandum states that, "[b]ecause our proposal is for updated regulations that would further define the federal interest in limiting state taxing authority on Indian reservations, many past Secretaries of Interior wouldn't let it see the light of day."

The "light of day" is indeed the best medicine for the BIA's initiative. The ANPRM, however, failed to draw the public's attention to the purpose and implications of such a rulemaking. As a result, the public at large failed to understand the significance of this rulemaking. Our Towns were one of the very few non-Indian commenters on the ANPRM, and our comments were the only comments in opposition to this effort.

Our Town, like most local governments, is dependent on state and local taxation to fund the crucial governmental services we provide to all of our residents, including tribal members. Like virtually all (if not all) non-Indian governmental entities, we do not operate for-profit businesses and cannot easily offset tax revenues lost by federal regulation. As previously described, our Town has made significant efforts to defend our taxing authority.

The Town therefore opposes any effort by the BIA to create legal uncertainty regarding taxes that we have successfully defended in federal court, as well as any general effort to undermine state and local taxing authority under the guise of reviving now-defunct regulations. We simply cannot afford to leave personal property tax revenues on the table from all non-tribal companies doing business on the reservation. If state and local taxation authority over non-Indians is to be pre-empted, that's a decision for Congress to make, not the Assistant Secretary for Indian Affairs. We ask this Subcommittee to use its authority to ensure the ANPRM does not move forward.

Conclusion

In conclusion, the trust acquisition process must be reformed to include objective standards for off-reservation requests and the full consideration of impacts to local communities. The current rulemaking proceeding to revive the Indian Trader Regulations should be halted to protect valid State and local revenue streams from non-Indian activities on trust lands. In addition, Congress should clarify the authority of the Secretary to remove land from trust if the proposed land use changes from that which was evaluated in the original decision, or to correct decisions made in error.

Thank you for considering this testimony.

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