UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS

LEGISLATIVE HEARING ON H.R. 3532,
"To empower federally recognized Indian tribes to accept restricted fee tribal lands, and for other purposes."

TESTIMONY OF

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Good afternoon, Chairman Young and distinguished members of the Subcommittee.

My name is Robert T. Coulter and I am the founder and President of the Indian Law Resource Center, a non-profit American Indian legal organization that provides legal assistance to Indian and Alaska Native nations. I am a member of the Citizen Potawatomi Nation and I have been a practicing lawyer for more than 40 years.

I do not speak about this bill today for any Indian nations nor any organizations of Indian nations. I speak solely as an Indian lawyer who has studied and written about these matters for many years. I assume that the Subcommittee joins me in understanding that the desires and needs of Indian nations, expressed by their own leaders, are of paramount importance in the consideration of this bill.

I am very pleased to be invited to testify on H.R. 3532, because I believe that the core concept of this bill will clarify and improve federal law in an area that is of utmost importance to federally recognized American Indian and Alaska Native governments. The federal law concerning the status of and title to Indian lands has become needlessly complex, confusing, and in some respects nonsensical.

This bill, if enacted with a few clarifying changes, would make it possible for Indian nations to have greater legal certainty about the status of their lands and resources, would remove a number of unfair and obsolete barriers to Indian nations' management and use of their lands, and would provide explicit legal protections against taxation by state and local governments and against alienation without approval of the federal government. Restricted fee lands held by an Indian nation under this act would be Indian Country for jurisdictional and other purposes.

This bill would correct several longstanding faults in federal law, the first of

which is the mistaken idea that land belonging to an Indian nation must be held in trust in order for it to be free from state and local taxation. For generations, land of Indian nations was deemed not taxable by states simply because it was the property of an Indian nation. The United States Supreme Court repeatedly declared this to be the law and policy of the United States in cases such as The Kansas Indians, 72 U.S. 737 (1867), and The New York Indians, 72 U.S. 761 (1867). This legal principle was in accord with the widely accepted idea that governments do not normally tax one another. Only relatively recently did the concept arise that Indian land is taxable unless it is held in trust by the United States or a state government. This concept is not a rule that finds any support as matter of policy or legal reasoning. It seems to have come from the mistaken notion that all tribally owned lands are in trust. By according at least some lands a more clear and sensible tax status, this bill will remove a pointless complexity in existing law and permit tribes to hold land without fear of state and local taxation and without the unneeded intrusion of the United States as trustee.

It is a fact that many Indian nations have been practically required to put their lands into trust – not because they really needed or wanted a trustee – but because they were required to do so in order that the lands would be free from taxation, protected against alienation, and subject to Indian jurisdiction.

Similarly, there has never been a sound reason for federal law linking Indian jurisdiction with the trust status of land. The territory over which Indian nations have governmental authority should not depend on the legal character of the land title. This bill would assure that land would be Indian Country subject to Indian jurisdiction if it is held by an Indian nation and the Secretary of the Interior has given up, pursuant to this act, whatever trust title the United States held. Where an Indian nation so desires, this bill would make it possible to eliminate the needless complexity of the United States holding trust title to land and having the liabilities of a trustee, where the trust status exists only for the purpose of making the land Indian Country. Tribes, at their discretion, could get rid of the complexities and red tape of trust status for particular lands, and yet retain full jurisdiction over the area and exclude state and local jurisdiction. The bill would appear to give Indian nations greater freedom and flexibility in managing and making use of their lands without any loss of rights or other disadvantage.

Thirdly, this bill would preserve all the present legal protections against the loss or alienation of lands, particularly the protections of the Trade and Intercourse Act, 25 U.S.C. 177. The Trade and Intercourse Act provides that no conveyance of Indian land is valid unless it is approved by the federal government in a treaty, convention, or act of Congress. This act has been widely accepted by Indian nations as a sound legal measure to guard against frauds, swindles, and abusive transactions that historically have so often resulted in the loss of Indian lands. The act does not prohibit conveyance of Indian lands but requires that any such conveyance be first approved by Congress.

The Trade and Intercourse Act itself says nothing about being limited to Indian

lands held in trust, but, again, the mistaken belief has arisen that the act applies only to trust lands. The protection of the act should apply to all land owned by Indian nations, at least where the nation wants the act to apply, whether the land is held in trust or not. Indeed, the federal courts have repeatedly held that the Trade and Intercourse Act is applicable to lands owned by Indian nations, even where those lands are not held in trust by the federal government. This bill would assure that land held by a tribe under the status described in this bill, would continue to have the protection of the Trade and Intercourse Act. In this respect the bill would provide greater clarity and certainty, though it may not create new law on this point.

Section 2(c) of the bill, by providing greater scope for long-term leases of Indian land, would make a partial incursion on the protections of the Trade and Intercourse Act, while it gives Indian nations greater flexibility to make use of and benefit from their lands and resources. It is crucial to hear from Indian nations whether they wish to make this trade-off – whether the advantages outweigh the risks. The views and wishes of the Indian governments should be controlling.

The present language of Section 2(c) is unclear as to whether the section applies only to lands that have been taken out of trust pursuant to Section 2(a), or whether it applies to all Indian land that is now subject to a restraint against taxation and a restraint against alienation (the Trade and Intercourse Act). This would make an enormous difference in the scope of application of the bill, because most land owned by Indian nations is subject to restraints against alienation and taxation. If the section applies only to land requested to be taken out of trust by an Indian nation, then it would not reduce the protections of the Trade and Intercourse Act unless an Indian nation so requested. Other Indian nations would continue with the same legal protections that exist now. The intent and language of Section 2(c) and 2(d) as well should be clarified.

Section 2(d) of the bill would make it possible for Indian governments to free themselves from the restrictions of a number of statutes and regulations that now give federal officials excessive and unilateral control over much tribally-owned land. This could be a great improvement for Indian nations that desire greater freedom to manage and use their lands and resources without all of the present federal controls. This section could remove some major impediments to economic development by Indian governments and help to create a better, more friendly, and predictable business climate in Indian Country.

The present language of Section 2(d), like the previous section, is unclear as to whether the section applies only to lands that have been taken out of trust pursuant to Section 2(a), or whether it applies to all Indian land that is now subject to a restraint against taxation and a restraint against alienation (the Trade and Intercourse Act) – that is, most Indian land.

An important aspect of this bill is that the procedure it provides for taking land

out of trust is optional for tribes. Nations are free to use the procedure, but an Indian nation would incur no penalty or disadvantage if it wishes to maintain the status quo. Thus, if Sections 2(c) and (d) apply only to lands taken out of trust pursuant to Section 2(a), then, in effect, (c) and (d) apply only where an Indian nation has decided to take particular lands out of trust. That option permits Indian nations to maintain the status quo if they wish to do so.

Section 2(e) providing that bill should not be construed to diminish the federal government's trust responsibility is important, because the government's responsibility extends to assisting and protecting Indian nations regardless of the trust status of their lands. The general trust responsibility of the United States is not limited to lands or property held in trust, but it is a more general government-to-government responsibility arising out of treaties, the historical relationship to Indian and Alaska Native nations, and legal rules and policies that have been acknowledged and applied for almost two hundred years.

Pursuant to this general trust responsibility, the United States is obligated to assist Indian nations in safeguarding and managing their lands and resources. This general legal obligation and its limitations are discussed and analyzed in *General Principles of Law Relating to Native Lands and Natural Resources*, by the Indian Law Resource Center and available from the Indian Land Tenure Foundation, www.indianlandtenure.org.

The United States should use its full authority to guard against and prosecute wrong-doing against Indian nations, especially crimes against nations relating to their lands and resources. Likewise, the United States should continue to offer to Indian nations, as requested, technical assistance and legal assistance for the preservation, conservation, and sustainable use of their lands and resources.

Chairman Young and members of this Subcommittee, thank you again for the invitation to offer these views concerning H.R. 3532 and for holding this legislative hearing. We look forward to learning the positions and wishes of Indian nations concerning this bill. I am happy to answer any questions whenever the time is appropriate.

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