Committee on Resources

Testimony

**TESTIMONY OF CHAIRMAN JOSEPH A. PAKOOTAS,
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CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION
ON
HOUSE BILL H.R. 3987: "DEER AND ELK PROTECTION ACT"**

The Colville Confederated Tribes would like to present the following testimony into the record before the House of Representatives on Bill H.R. 3987, the Deer and Elk Protection Act.

The Colville Tribes are strongly opposed to H.R. 3987 which is a divisive piece of legislation and a blatant attempt to undermine tribal sovereignty. If passed, it would

violate numerous laws, endanger the health of deer and elk, and undermine existing successful efforts by tribes and states to cooperatively solve resource and wildlife issues.

Our testimony today centers around three main points. One, the Colville Tribes have a long standing federally recognized right to hunt off of the Colville reservation. Two, the language of this bill would abrogate this right to hunt off of the Colville reservation. The reasons why this right should not be abrogated are numerous and will be specifically detailed below. Three, the findings contained in the bill are false and inaccurate.

Indian hunting rights, whether on or off reservation, have long been recognized as distinct tribal property rights[(1)] stemming from the "reserved rights doctrine."[(2)] In the specific case of the Colville Tribes, the right to hunt off reservation centers around use of the North Half reservation territory and the express retention of the right to hunt in the North Half contained in Article 6(six) of the 1891 agreement between the Colville Tribes and the federal government.

The original reservation of the Colville Tribes was significantly reduced through an agreement with the federal government in 1891. According to the terms of this agreement, the 1.5 million acre "North Half" of the Colville Tribes' reservation was granted to the federal government, consistent with certain limitations. Prominent among these was the explicit language in Article 6(six) of the agreement that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."[(3)]

This agreement was approved by Congress through a series of statutes in 1892 and 1906 through 1911. Additionally, the Colville Tribes' off reservation hunting rights on the territory of the North Half were directly reaffirmed by the Supreme Court in the case of Antoine v. Washington.[(4)] As stated by the Supreme Court, the Congressional ratification of the North Half agreement made its provisions the supreme law of the land, and as such precluded the application of State game laws through the force of the supremacy clause of the United States Constitution.[(5)] Thus, Congressional statutory authorization of the North Half agreement and its provision granting the Colvilles' right to hunt off reservation in the North Half coupled

with the subsequent Antoine decision establish an explicit off reservation hunting right for the Colville Tribes.

Regardless of the source and extent of the tribal right to hunt off-reservation, any abridgement of this property right would constitute a "taking" under the Fifth Amendment of the Constitution.[(6)] As the United States Supreme Court recognized in its 1968 decision in Menominee, the Congressional abrogation of a tribe's right to hunt would give rise to a Fifth Amendment taking.[(7)]

In regards to the compensation needed to "take" the Colvilles' right to hunt in the North Half, a cursory look at the details of the 1891 agreement point to a figure that would be staggering, even for the budget parameters of an entity as large as the federal government. According to the 1891 agreement, the Colville Tribes granted to the federal government 1.5 million acres for the mere price of one dollar per acre, coupled with the right to hunt and fish in the territory of the North Half, unabridged in any way, for perpetuity. Considering the loss of mere timber, mineral, and other resource extraction commodities, the price of one dollar per acre is absurdly inadequate. Add to this the loss of roughly fifty percent of the tribal reservation land base, and the value of hunting and fishing in Colville tribal culture and it is quickly apparent that the greatest benefit of the 1891 agreement from the tribal perspective was the retainment of the right to hunt and fish in the North Half. Thus, the amount of compensation needed to be appropriated from the federal budget for the taking of the Colville Tribes's off-reservation hunting right in the North Half, coupled with the necessary compensation for the taking of all other Washington tribes reserved right to hunt would dwarf any perceived benefit from H.R. 3987.

That the language of H.R. 3987 would be an abridgement and complete taking of the Colvilles' right to hunt off reservation cannot be denied. Under the language of the bill, Colville tribal members hunting rights would be qualified by the State of Washington by requiring Colville tribal members to comply without their consent with any State law governing non-Indian hunters, including such items as time of hunting season, bag limits, and licensing requirements. Previous "right to hunt" language reserving to Indians in an area ceded to the United States "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory"[(8)] and "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory..."[(9)] has been held by the Supreme Court to prohibit qualification by the State.[(10)] In the specific case of the Colville Tribes and the right to hunt contained in the 1891 agreement, "Article 6 presents an even stronger case since Congress' ratification of it included the flat prohibition that the right "shall not be taken away or in anywise abridged" (emphasis added).[(11)] Thus, while holding no comment on the amount or type of qualification prohibited by other "right to hunt" language, the Colville "right to hunt" language contained in Article 6 clearly prohibits any State qualification.

Viewed conversely, to hold as H.R. 3987 proposes that Indians who are beneficiaries of the reserved hunting rights of treaty and other federal agreements are subject to the same regulations and prohibitions as the State may impose on non-Indians, is to hold that Congress and the federal government preserved nothing which the Indians would not have had without such legislation. Such a finding would not only defy any logical interpretation of a negotiated, bargained agreement between tribes and the federal government regarding the ceding of land, but would also violate long standing judicial holdings on the interpretation of treaties and federal-tribal agreements.[(12)] Thus, the canons of treaty construction, coupled with the judicial recognition of the unqualified purity of the Colvilles' right to hunt, dictate that H.R. 3987 be analyzed as an abrogation and taking of Colville tribal property rights.

In addition to previous points, H.R. 3987 should be rejected due to the false and incorrect findings contained within the language of the bill. Any legislation, regardless of subject matter or interest groups affected, that is based upon inaccuracies of this size and scope must be discarded as inherently flawed. A technical analysis of these findings is attached for your review.

Technical Analysis of the Findings in H.R. 3987

The proposed legislation is inherently flawed because the findings upon which it is based are false and therefore incorrect. The first finding states that "dramatic economic changes have taken place in the State of Washington since Indian tribes signed treaties with the Federal Government and, as a result of those changes, Indians and Indian tribes in the State of Washington no longer rely on hunting deer and elk for subsistence."

We agree that dramatic changes, economic and otherwise, have occurred in Washington State since the mid-1800s. Indians in Washington are well aware of these changes. Prior to treaty signings, we lived our traditional ways on the lands and waters of our ancestors. By the turn of the century, we had all been put on reservations. At present, we are striving to retain our cultural and spiritual identity while adapting to the complex backdrop of a modern world. These are indeed dramatic changes.

We do not agree, however, that Indian people no longer rely on deer and elk for subsistence as a result of such changes. In fact, this statement could not be further from the truth. The referenced economic changes have not "floated all boats equally" and unemployment on the Colville Reservation remains exponentially higher than non-reservation communities. In addition, many Colville tribal members who are employed do not make incomes that permit food acquisition on a regular basis from a grocery store. The proposed legislation implies that all or most Indians now have the means to purchase all their food. This is simply not true. Diet supplementation with wild game is absolutely essential for many Colville families. Year in, year out, many of our people depend on deer and elk taken on the North Half.

In addition to playing an essential role in providing general dietary sustenance, deer and elk are also traditional cultural and religious foods of the Colville Tribes. The use of deer and elk meat is absolutely essential to many religious ceremonies of the Colville Tribes, while body parts such as hides, antlers, bones, and hooves have important ceremonial uses also. Further, many religious ceremonies of the Colville Tribes require relatively immediate access to deer and elk meat and body parts. Any application of State hunting law which would infringe upon these religious tenets of the Colville Tribes would be subject to First Amendment and Indian religious freedom protection.[(13)]

The second finding of the bill states that "the consistent enforcement of laws and regulations pertaining to hunting deer and elk throughout the State of Washington on all lands outside of Indian reservations is necessary for the conservation of deer and elk and to protect public safety." This statement is true in principal but not in substance. It implies that State of Washington rules are the only ones that can be consistent. This is not true. Indian Tribes also believe in and practice "the consistent enforcement" of their laws.

The second finding is also not substantiated by harvest statistics or other related facts. Human predation is typically the most significant direct form of mortality on ungulate populations, particularly in modern times. To combat this, conservation measures such as bag limits are often necessary to maintain herds. H.R. 3987 implies that tribal seasons are excessive and threaten herd sustainability statewide. Data clearly show,

however, that the greatest pressure on Washington deer and elk populations is non-Indian harvest, not tribal harvest. In fact, the non-Indian, state harvest typically exceeds tribal harvest by several orders of magnitude.

Estimates of statewide deer harvest from 1988-1995 provided by the Washington Department of Fish and Wildlife show that tribal harvest constituted a mere 3.5 percent of the total combined tribal and non-tribal harvest[(14)] As examples, in 1995, Washington State non-Indian hunters took 37,765 deer while tribal hunters took 1,740. Over the entire eight year period (1988-95), state hunters harvested 376,160 deer and tribal hunters harvested 12,996. An identical situation exists with the statewide elk harvest. From 1988-1995, the tribal harvest made up 3.6 percent of the total combined harvest. In 1995, state hunters took 6,429 elk while tribal hunters took 286. Over the eight year period, the state harvest was 66,793 animals and tribal harvest was 2,377.

Even if tribal deer and elk harvest have been underestimated, tribal harvest levels would have to increase two hundred percent to equate with a ten percent change in the state harvest. Clearly, tribal harvest constitutes a minuscule portion of the combined harvest. It also should be noted that in cases where the combined, localized tribal and non-tribal harvests were causes for concern, tribal and state managers have come together and worked out solutions. For example, the Colville Tribes have voluntarily shortened our mule deer seasons on the North Half for the past two years in the interests of conservation.

Additionally, none of the figures on state deer and elk harvest levels figures include poaching losses. These poaching losses are significant in number and attributed almost entirely, if not completely, to non-Indians. Washington State estimates that 2,000 elk are taken out of season every year, which represents approximately six to seven years of tribal harvest, based on the 1988-1995 average.[(15)]

In view of these facts, why is the consistent enforcement of state regulations necessary for the conservation of deer and elk? Under the "reasonable and necessary conservation" rule of earlier federal court decisions, Indian hunting and fishing rights which normally may not be qualified by the states, may be regulated by the state in the interest of conservation. The State, however, must demonstrate that: (1) there is a compelling need in the interest of conservation; (2) state regulation is a reasonable and necessary conservation measure; and (3) its application to Indians is necessary in the interest of conservation.[(16)] This avenue for conservation is still left intact if H.R. 3987 is halted. The Colville Tribes propose that this avenue continue to remain as the correct form for managing and conserving deer and elk within the borders of Washington State.

H.R. 3987 also overlooks the fact that states work with tribes as sovereign co-managers of their wildlife resources. Through the co-managing process with the State of Washington, tribes set and regulate seasons for their members and monitor tribal harvests. In many cases in Washington, tribal season frameworks are forwarded to the Department of Fish and Wildlife for comment and harvest data is shared. The Colville Tribes are no exception and have a twenty year history of sharing harvest data and season information with the State. The Colvilles also have an agreement with the State of Washington wherein certain species of fish and game on the Reservation are available for non-tribal harvest in the interests of conservation and recreational opportunity. This agreement also provides for joint law enforcement and animal damage control in boundary areas.

Overall, the Colville Tribes have a good working relationship with the Washington Department of Fish and Wildlife. The Tribe and the State are involved in several joint undertakings such as off reservation big game aerial surveys, research on the state threatened sharp-tailed grouse, peregrine falcon reintroduction,

screening irrigation intake pipes to protect anadromous fish, and a mule deer research study proposal. The Tribe has also funded off reservation big game winter feeding programs and a state fish hatchery in northeastern Washington.

Another flaw in the findings of H.R. 3987 is that they assume that tribal season frameworks and bag limits are excessive and that tribal game management programs are inferior to those of a state. These assumptions demonstrate the depth of misunderstanding and lack of accurate information in the minds of many non Indians regarding tribal hunting. To illuminate the fallacy of these assumptions, it should be known that tribes are comparatively small, homogenous, interrelated groups of people. As a result, tribal hunters tend to have similar goals and views on hunting and wildlife in general. Further, tribal managers are in direct contact with a significantly larger portion of their hunters than their state counterparts. Tribal managers are also in direct contact with policy makers (the tribal councils) at a level and frequency of access superior to that of their state counterparts. These facts provide tribes the opportunity to closely monitor harvest, to take action rapidly, and in general to be adaptable and proactive at a rate that is not available to that of the State.

As an example, in Washington State elk herds in the Blue Mountains used to have only three to four bulls per one hundred cows and few, if any, mature bulls. Such attributes in turn affected calf production, survival and recruitment. These skewed demographics were found to be a result of years of heavy bull harvest under Washington State elk season frameworks rather than a result of tribal hunting.

This bill also does not mention, let alone address, other issues affecting deer and elk in Washington, particularly loss and conversion of habitat. These conditions are caused by over exploitation of forest products, improper grazing practices, urban and industrial development, and the overall crush of a growing human population and the demands put on the land as a result.

The American West is experiencing unprecedented population growth as people depart other areas to settle in this region.[(17)] Not only is the West the fastest growing region in America, it rivals the growth rate of Africa and exceeds that of Mexico. Washington is no exception to this trend and is growing by 100,000 people a year. This State was once defined by low population densities living on rural lands held in large contiguous ownership patterns. Now many areas are seeing sharp increases in housing densities, human densities, roads, shopping malls, et cetera. This translates into less habitat for many forms of wildlife and more pressure on hunted species. This is particularly true in Washington which is the smallest western state with the second highest human population and the lowest percentage of public land.

Are not the wildlife resources of Washington, and the nation, better served through the cooperative efforts of tribal and non-tribal management entities to jointly address and solve resources problems? Would not the time and money spent in countering the divisive efforts of a few be better spent on protecting and improving critical habitat? Wouldn't it be better to bring people together to find solutions than to drive wedges between them while problems continue to multiply virtually unchecked? Our answer is an emphatic, resounding **YES**! We believe this is the best way to meet the resource challenges facing all Americans and we will continue to choose the path of cooperation and objectivity for the sake of our resources and that of future generations.

For the forgoing reasons, we urge you to oppose this bill.

ENDNOTES

1. These Indian property rights stem from Indian title as original owners of the land and the corresponding right to use and occupy the land. *See*, Mitchell v. United States, 9 (Peters) 711 (1835); Johnson v. MacIntosh, 8 (Wheat.) 543 (1823).
2. Upon the creation of tribal reservations, tribes were found to have kept the right to use the land unless they expressly gave up that right. This stems from the view of the Supreme Court that treaties were not a grant of rights to the Indians, but rather a grant of rights from them and a corresponding reservation of those rights not granted. United States v. Winans, 198 U.S. 371 (1905).
3. Agreement of Sale between the United States Government and the Confederated Tribes of the Colville Indian Reservation. (1891). National Archives Document 21167, Indian Office Inclos. No. 8-1891.
4. Antoine v. Washington, 420 US 194, 43 L.Ed 2d 129, 95 S. Ct.. 944, (1975).
5. Id. at 205.
6. Menominee Tribe v. United States, 318 F.2d 998 (Ct. Cl. 1967) affirmed 391 U.S. 404 (1968); Hynes v. Grines Packing Company, 337 U.S. 86 (1949); see, Whitefoot v. United States, 293 F.2d. 658 (Ct. Cl. 1961, cert. denied, 369 U.S. 818 (1962).
7. Id.
8. United States v. Winans, 198 US 371, 380 (1905).
9. Puyallup Tribe v. Department of Game (Puyallup I), 391 US 392, 395 (1968).
10. Id. at 398.
11. Antoine at 206.
12. Additionally, this would violate the canons of construction regarding Indian treaties and federal agreements. *See,* Winans (treaties must be interpreted as the Indians would have understood them at the time they were made); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) (doubtful or ambiguous expressions are resolved in favor of the Indian parties); Tulee v. Washington, 315 U.S. 681 (1942) (treaties must be construed liberally in favor of the Indians.)
13. See, Frank v. State, 604 P.2d 1068 (1979) (conviction under application of state hunting law overturned where use of moose meat found to be a tenet of Tribe's religious practice and State could not prove a compelling state interest).
14. Brittell, D., Letter to J. Peone, Colville Confederated Tribes. Wildlife Mgmt. Division, Wash. Dept. of Fish and Wildlife, Olympia, WA., Nov. 17, 1997.
15. Brittell, D., Letter to J. Peone, Colville Confederated Tribes. Wildlife Mgmt. Division, Wash. Dept. of Fish and Wildlife, Olympia, WA. Nov. 17, 1997.; Smith, J., W. Michaelis., K. Sloan, J. Meusser., D.J. Pierce. An analysis of elk poaching losses and other mortality sources in Washington using biotelemetry. Wash. Dept. Fish and Wildlife publ., 1994.
16. Holcomb v. Umatilla, 382 F.2d 1013 (9th Cir. 1967); State v. McCormack, 117 Wash. 2d 141, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111.
17. Knight, R.. 1998. Effects of rural housing development on wildlife. Dept. of Fish. & Wildl. Biology, Colo. St. Univ., Ft. Collins. Report submitted in Colville tribal court, case No. CV-96-16042. 4pp.

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