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Statement of
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Chukma (hello), thank you for having me in lovely Washington DC today. My name is Eric Henson, and I am delighted to be here with you as we discuss this important issue. I am an Executive Vice President at Compass Lexecon, which is one of the world's leading economics consulting firms, and a Research Affiliate with the Harvard Project on American Indian Economic Development, at Harvard's John F. Kennedy School of Government in Cambridge, MA.¹ I primarily work out of the Compass Lexecon offices in Boston, MA and Tucson, AZ.² In both of my professional positions I am engaged in an ongoing effort to understand what makes tribal economies work best.³ I am a citizen of the Chickasaw Nation, and I grew up in one of the country's great oil producing regions, the Permian Basin of West Texas.

I have a Master's Degree in Public Policy from the John F. Kennedy School of Government at Harvard University, an MA in Economics from Southern Methodist University, and a BBA in Business Economics from the University of Texas at San Antonio. I attended Harvard as the Kennedy School's Christian Johnson Native American Fellow. I have been engaged in Indian affairs since graduate school; my Master's thesis at Harvard examined the importance of a uniform commercial code for economic development on the Crow Reservation.

¹ Referred to herein as "HPAIED" or "Harvard Project."

² I appear today not as a representative of Compass Lexecon or Harvard University. Furthermore, I have no financial interest in pending legislation that might impact my opinions in any way.

³ See, e.g., The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions Under US Policies of Self-Determination*, New York: Oxford University Press, 2008.

I've had the great privilege of visiting many of the tribal lands that might be impacted by the legislation that we will be discussing today.

THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT

Since its inception in 1987, the Harvard Project has collaborated with Native Nations to understand how and why tribal economies, social institutions, and political systems either succeed or fail. At the Harvard Project, my colleagues and I undertake research and teaching specifically tailored to meet the needs of tribal communities and tribal leadership.

Because the findings of the Harvard Project are widely disseminated and are well known by those with an interest in Indian affairs, I will not belabor the research here. Instead, I provide a brief summary. Prior to the 1980s, there was a notable lack of research pertaining to economic development in Indian Country. The small amount that was available contained at least two consistent themes: First, the overriding focus was on what the federal government could do to create jobs, raise income, and increase household wealth. This helped contribute to the unbalanced relationship between the Bureau of Indian Affairs ("BIA"), other federal programs, and the tribes, which often became dependent on federal funding and expertise. Second, the federal policies and programs that did exist within Indian Country constituted what we refer to as a "Planner's Approach" to economic and community development. The Planner's Approach was simplistic in treating economic development as a fundamental question of resources and expertise, as opposed to one of incentives and institutions.

A fundamental flaw of the Planner's Approach was the erroneous assumption that a nation's economic development is a mechanical process that can be achieved by way of the imposition of a predetermined blueprint. While it is advisable and even advantageous to plan ahead, it is an exercise in hubris to think that one can "plan" an economy, in the sense of expecting tribal councils, national legislatures, or federal planners to correctly select a portfolio of businesses, projects, and activities that will not only survive, but meet the needs of tribal citizens, and thrive over time.⁴

⁴ Consider the natural experiment of the German economies after World War II. The parts of former Germany subjected to market forces (i.e., West Germany) became a powerhouse of development in post-war Europe. The parts of former Germany subjected to centralized planning (i.e., East Germany) stagnated and the citizenry had to be forcefully restrained from leaving for better opportunities elsewhere. For a discussion in the context of Indian Country, see, the US Senate, Senate Committee on Indian Affairs, *Forum on Establishing a Tribally Owned Development Corporation*, September 20, 2004, Statement of Joseph Kalt, noting that "Economic development is an organic process. In an environment in which opportunities are subject to the vicissitudes of competition and continually changing marketplace conditions, economic development occurs as the sum of small, adaptive decisions of myriad individuals who by luck or preparation are in the right place at the right time to take advantage of unplanned prospects. Economic development is much more analogous to tenacious plants looking for places to pop up and take root, than to an engineered system."

The discussion above raises one obvious question: If one cannot “plan” an economy to arrive at productive and sustainable development, what is the alternative? While there is no predetermined blueprint for success, there are some general tenets for effective, long-term economic development, and these tenets are now being demonstrated by a large number of tribes in Indian Country. We have found that these tenets of sustainable development are applicable to developing nations the world over, and are being acted upon by many successful tribes in Indian Country. The tenets that matter can be summarized as institutions, culture, and sovereignty.

Institutions Matter: The nature of a society’s institutions, whether social, cultural, and/or governmental, determines the incentives around productive or unproductive activity. Research has demonstrated that successful economic development turns on a tribe’s institutions operating under: (i) a rule of law (i.e., a respect for tribal law and the establishment of legitimate means for dispute resolution); (ii) a separation of politics from day-to-day administration and business affairs (i.e., enterprises and economic transactions are free from societal politics and power struggles); and (iii) an efficient bureaucracy (i.e., clarity of procedures, good record-keeping, efficient administration processes, reliable computer networks, and the like).

Culture Matters: Given the importance of institutions within a society, the social norms and worldview of the citizens that interact with those institutions also matter.⁵ For governing institutions to provide the foundation upon which sustained economic development can take place, there first should be a *cultural match*. One can think of cultural match as the consonance between the structure of a society’s formal institutions of governance (and its economic development initiatives) and its underlying norms of political power and authority. In order to function effectively, a society’s institutions and corresponding economic development must be consistent with underlying cultural, political, and organizational norms. Simply put, they must be seen as legitimate in the eyes of the society’s citizenry.

Sovereignty Matters: Self-determination is key in Indian Country and its importance to economic development cannot be overlooked. There are at least four inseparable issues connecting sovereignty and self-determination to economic and community development that must be kept in mind: (i) without self-determination, it is impractical (and perhaps impossible) to change institutions so that they more closely match those of Native Nations and their unique economic needs; (ii) absent a strong sense of ownership, it is unquestionably difficult to get a local community involved and interested in the payoff from tribal economic investments; (iii) accountability is critical, as those making the investments and program decisions need to be held accountable for how all tribal resources are used; and (iv) leadership matters in all political settings, including tribal (an increasing number of astute, capable, highly experienced leaders are emerging within Indian Country).

⁵ See, e.g., Miriam Jorgensen, *Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development*, Doctoral Dissertation, May 2000, at page 129.

After years of research, it has become clear that tribes must have autonomy in order to foster institutions that are a cultural match for their societies. Successful tribal governments all exhibit this pairing of institutions and a cultural match. This is why policies of sovereignty and self-determination have been the only strategy that has shown any prospect of breaking the patterns of poverty and dependence that became so familiar on reservations from the late 1800s until at least the 1990s. It is only logical that it requires self-rule for a culture to put in place institutions that are a cultural match. Thus, we can restate the uniform qualities that have marked successful economic development in Indian Country as aggressive assertions of sovereignty, resulting in self-governed institutions that are characterized by a cultural match. It has repeatedly been shown that, when a tribe takes control of its institutions and runs them in congruence with its own cultural norms, the result is a set of economic, social, and political systems that work for its citizens.⁶ Continued dependence on the federal government removes accountability for tribal leadership and undermines the processes necessary for stable and lasting economic development. The negative results of such dependence should not be surprising.

LAND STATUS ON NATIVE AMERICAN LANDS

Our meeting today has been arranged so that we can discuss the potential for reclassification of certain tribal lands from their trust designation to restricted fee tribal land. This restricted fee tribal land will be owned by the tribe in question and will maintain restrictions against alienation and taxation. *Critically, this reclassification will only be initiated at the request of the tribe.* Tribes that choose to reclassify land in this manner may lease, grant easements, or grant a right-of-way on restricted fee land for any period of time without the Department of Interior's review and approval. In addition, tribal laws that establish a system of land tenure governing the use of restricted fee land have precedence over federal laws and regulations governing the use of such land, with an exception relating to the restriction against the land's alienation and taxation. The stated goal of the legislation is to let tribes more easily pursue economic and other opportunities on these restricted lands.

Promoting opportunities for tribal self-determination and governance is something the federal government has tried to do over the last several decades, but many of these efforts have largely fallen short. Consider, for example, a well-known example from the energy industry. The *Indian Tribal Energy Development and Self-Determination Act* ("ITEDSA") of 2005 (which is part of the *Energy Policy Act* of 2005), was an attempt to give tribes the option to exercise greater authority over their own energy resources. Under the ITEDSA, something known as the Tribal Energy Resource Agreement ("TERA") allows a tribe, at its own discretion, to enter into leases, business agreements and right-of-way agreements for energy development on their lands

⁶ Stephen Cornell and Joseph Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations," *Joint Occasional Papers on Native Affairs*, 2003, No. 2003-02.

without review or approval from the Secretary of the Interior. However, as is widely reported, not a single tribe entered into a TERA agreement in more than a decade after passage of the Act. This lack of adoption of TERAs has been attributed to factors such as uncertainty about some of the TERA regulations and a complicated, confusing, and time-consuming application process.⁷

In many cases tribal land is remote, non-contiguous, undeveloped, or some combination of all of these. These characteristics can present significant barriers to economic development; however, these locational characteristics are often secondary to the tangle of laws and regulations impacting the ability of tribes and individual Indians to borrow money, control the legal environment in which commerce operates on tribal lands, and reach quick decisions regarding development opportunities. Tribal governments must often approach questions of how best to develop their economies under the need for federal approval of both large and small details. By allowing tribes greater control of say, leasing decisions, the federal government would remove one element of uncertainty from tribal economic development, potentially enhancing the ability of tribes to engage in business activities more efficiently, and certainly promoting tribal self-determination and self-governance.

EVIDENCE FOR REMOVING TRUST RESTRICTIONS FROM CERTAIN TRIBAL LANDS

HR 215 appears to be an attempt at simplifying the federal law surrounding tribal development opportunities (e.g., the leasing of tribal land). To the extent it reduces the time and uncertainty involved in these development efforts, the Act has the potential for broad impacts. A good bit of reporting, legal scholarship, and economics literature tells us that trust status affects land use in at least a few important ways: (i) although the trust designation helps keep land from falling out of Indian ownership; (ii) there is a burdensome and sometime prohibitive extra layer of bureaucracy that comes with trust status; (iii) and it reduces the productivity that could otherwise be realized from the land in question.⁸ This reduction in productivity arises in economics research in virtually all similar contexts, because with a lack of secure property rights all economic actors (including individual Indians and tribes) face barriers to contracting with others, and barriers to secured contracting unambiguously stymie economic development. Variations on this conclusion are echoed throughout the reporting, scholarship, and literature on tribal economic development. A sample can be seen here:

⁷ *Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands*, United States Government Accountability Office, June 15, 2015 (“GAO Report”), at pages 32-33.

⁸ Terry Anderson and Dominic Parker, “Economic Development Lessons from and for North American Indian Economies,” *The Australian Journal of Agricultural and Resource Economics*, January 2009, Vol 53(1) at pages 105-127.

- Robert Miller, Professor of Law at Arizona State University, wrote in 2012 about the significant hurdles Indian people face in securing private loans to start businesses. One of the three most popular ways to obtain the average start-up business loan in the US is to take a mortgage on a home. However, many Indians who own homes on reservations live on trust lands, in which case the US is the legal owner of the land. In this situation, individual Indians cannot mortgage their land, and so face a major obstacle in raising investment capital.⁹
- Naomi Schaefer Riley, writing in *The Atlantic* in 2016, pointed to how Indians have long suffered from possession of what the Hayek Medal and Milton Freedman Prize-winning economist Hernando de Soto has termed “dead capital,” assets that cannot be easily bought, sold, or used for investment purposes. While Indians may possess a certain amount of land on paper, the insecurity of ownership makes them unable to create value from the land by selling it, buying even more to take advantage of economies of scale, or borrowing against it.¹⁰
- Ronald Trosper, Professor of American Indian Studies at the University of Arizona, has studied a wide range of issues affecting Indian people, including how lower agricultural productivity has been attributed to land tenure differences following the end of the allotment era, when reservation lands were effectively frozen in trust status. As early as 1978, Professor Trosper observed that ranches operated by Indians on Montana’s Northern Cheyenne reservation generated less output per acre than ranches operated by non-Indians adjacent to the reservation. One possible explanation for this lower output was that land tenure on reservations constrained Indians from operating their ranches at an efficient scale and optimizing their resource mix.¹¹
- Terry Anderson and Dean Lueck provide another example of how agricultural lands held in trust exhibit lower productivity than fee-simple lands on reservations. Writing in 1992, Dr. Anderson (a Senior Fellow at both the Property and Environment Research Center and the Hoover Institution at Stanford) and Professor Lueck (Professor of Economics and Director of the Ostrom Workshop at Indiana University) estimated the impact of land tenure on the productivity of agricultural land on large reservations, and benchmarked the productivity of tribal and individual trust lands against those of fee-simple lands on reservations. Dr. Anderson and Professor Lueck found the per-acre value of agriculture to be 85-90 per cent lower on tribal trust land and 30-40 per cent lower on individual trust land.¹²

⁹ Robert Miller, *Reservation “Capitalism”: Economic Development in Indian Country*, University of Nebraska Press, Lincoln, Nebraska, 2012.

¹⁰ Naomi Schaefer Riley, “One Way to Help Native Americans: Property Rights,” *The Atlantic*, July 30, 2016, at <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/> (accessed October 21, 2017).

¹¹ Ronald Trosper, “American Indian Ranching Efficiency,” *American Economic Review*, 1978, Vol 68(4) at pages 503-516.

¹² Terry Anderson and Dean Lueck, “Land Tenure and Agricultural Productivity on Indian Reservations,” *Journal of Law and Economics*, 1992, Vol 35 at pages 427-454.

- Kevin Gover, former head of the BIA and current Director of the Smithsonian’s National Museum of the American Indian, noted in 2006 that the federal trust responsibility was based on the flawed propositions of Indian incompetence and the dismantling of tribes as political institutions separate from the United States. Mr. Gover asserts that these foundations of the trust relationship led to “a stifling, paternalistic, and ultimately ineffective system of managing Indian property” that strangles economic initiative and prolongs Indian poverty.¹³
- Lance Morgan, President and CEO of Ho-Chunk, Inc. (at the Winnebago Tribe of Nebraska) called attention to the inability of Indians to tax trust land or leverage trust land for loan collateral in written testimony in 2006. Mr. Morgan asserts that this has obstructed Indian economic development in several ways, such as by causing tribes to operate with insufficient tax bases for a host of governmental functions, “kill[ing] home ownership in Indian Country,” and making tribal farming essentially impossible on the reservation.¹⁴
- Dustin Frye, Assistant Professor of Economics at Vassar College, has published on how higher transaction costs associated with heavy federal administrative oversight and the inability to lease land for long periods results in worsened economic outcomes. Writing in 2012, Professor Frye found that the implementation of the *Long-Term Leasing Act* of 1955, which increased lease lengths and reduced oversight, contributed to improved economic outcomes due to lower transaction costs and reduced uncertainty of lease rental income.¹⁵

¹³ Kevin Gover, “An Indian Trust for the Twenty-First Century,” *Natural Resources Journal*, 2006, Vol 46 at pages 317-374.

¹⁴ US Senate, Senate Committee on Indian Affairs, *Oversight Hearing on Indian Economic Development*, May 10, 2006, 109th Congress, Washington: GPO, 2006, Statement of Lance Morgan. Note that in this same Congressional hearing, my colleague Dr. Miriam Jorgensen spoke of at least three related outcomes derived from tribal control of economic development (see the record of the oral hearing at <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg27563/html/CHRG-109shrg27563.htm> (accessed October 23, 2017)). These outcomes are ownership, accountability, and leadership development. An increased sense of ownership in this context leads to accountability, which is critical because in a model where the federal government makes decisions for tribes, “program managers are accountable to Washington and not to tribal citizens ... but under ... manifestations of self-determination and sovereignty, tribal government program managers become accountable to tribal citizens for how resources [including] a tribal government’s own resources, are used.” It will surprise no one in our hearing on HR 215 that tribal accountability for programs administered by tribes themselves leads to improved program outcomes in sectors ranging from forestry management to health care. In 2006, Dr. Jorgensen went on to describe what she termed the “largely unsung payoff to self-determination,” which is the development of better tribal leadership. Better tribal leadership can only be achieved when tribal leaders are empowered to practice the act of governance, and better “leadership skills result in more effective bureaucracy, creative programming, new economic opportunities, and even the expanded use of self-governance, so you get a virtuous cycle of economic growth and community change going in these communities.”

¹⁵ Dustin Frye, *Leasing, Law, and Land Tenure: Measuring the Impact of the Long-Term Leasing Act of 1955 on Indian Land Holdings*, December 11, 2012.

Perhaps Leonard Carlson, Associate Professor of Economics at Emory College, said it best in 1981, when he noted that “No student of property-rights literature or, indeed, economic theory will be surprised that the complicated and heavily supervised property rights that emerged from allotment led to inefficiencies, corruption, and losses for both Indians and society.”¹⁶

CONCERNS AND RECOMMENDATIONS FOR THE *AMERICAN INDIAN EMPOWERMENT ACT*

While extant economic literature provides substantial evidence in favor of allowing tribal communities to have greater control of their land, critics of HR 215 have raised a series of reasonable concerns: (i) the Act currently provides no mechanism to convert land back into trust status, nor does the Act include language clarifying whether reversal is an option; (ii) there are questions about how the Act’s language on preemption of federal law and regulations could affect trust responsibilities of the federal government, as these are provided by federal statute and regulation; (iii) the Act could allow state or local governments to implement property taxes on tribal lands; these taxes are preempted when tribal land is held in trust but not when fee land is at issue.¹⁷ Indeed, tribes have shown us with their actions that they want consolidation of the land base under trust status: Under the Obama administration, the Bureau of Indian Affairs processed 2,265 individual trust applications and restored more than 542,000 acres of land into trust.¹⁸ Tribal leaders have spoken of the many important uses trust land is put to in their communities¹⁹ and the National Congress of American Indians places great importance of keeping land in trust noting:

“Of the 90 million acres of tribal land lost through the allotment process, only about eight percent has been reacquired in trust status since the IRA was passed in 1934. Still today, many tribes have no land base, and many tribes have insufficient lands to support housing and self-government. And the legacy of the allotment policy, which has deeply

¹⁶ Leonard Carlson, *Indians, Bureaucrats, and Land: the Dawes Act and the Decline of Indian Farming*, Greenwood Press, Westport, CT, 1981.

¹⁷ Kelly Croman-Neelands, *Indian Tax Strategies: Structuring Tribal Business Deals to Maximize Tax Opportunities*, at <http://www.ncsl.org/documents/energy/indiantax.pdf>, (accessed October 22, 2017).

¹⁸ US Department of Interior, *Obama Administration Exceeds Ambitious Goal to Restore 500,000 Acres of Tribal Homelands*, October 12, 2016, at <https://www.doi.gov/pressreleases/obama-administration-exceeds-ambitious-goal-restore-500000-acres-tribal-homelands>, (accessed October 22, 2017). I acknowledge that it is difficult to say how many of the 2,265 applications processed by the Obama administration would have been submitted by tribes had the *American Indian Empowerment Act* been in place during the same time period; it is entirely possible that some of the acreage in question would be seen by tribes as more desirable with the restricted fee land designation.

¹⁹ US House of Representatives, 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 Ron Allen, Tribal Chairman/CEO Jamestown S’klallam Tribe and Treasurer of the National Congress of American Indians, at page 2.

fractionated heirship of trust lands, means that, for most tribes, far more Indian land passes out of trust than into trust each year.”²⁰

I will be the first to admit that I am not an expert in psychology, but my observation is that people tend to be resistant to change. Resistance to change, coupled with the tremendous historical loss of land base suffered by the tribes, makes concerns about the potential for unforeseen outcomes understandable with any legislation that is a bold departure from decades of prior practice. As with any new public policy, there is always a possibility of unintended consequences, and it is important to consider how HR 215 could negatively impact tribal land ownership, as well as relations between the federal or state authorities and tribal governments. For instance, if HR 215 reduces the uncertainty surrounding a tribe’s ability to determine the length of a lease (unambiguously a good thing in nearly all instances) but also opens the door for new taxation of tribal lands (which clearly erodes tribal sovereignty and self-determination), then tribal economies might see no gain from the Act, and could even suffer economic losses as outside taxes would be detrimental to tribal economic activity. On the important issue of taxation, the trust status of tribal land preempts state and local property taxation, but preemption is not clearly attached to fee land.²¹

In fact, Obama administration officials noted their concerns with a previous version of HR 215 (HR 3532 in the 112th Congress). Donald (Del) Laverdure was the Principal Deputy Assistant Secretary for Indian Affairs at the time, and in testimony noted that the Act was “too imprecise a tool for accomplishing its stated aim and as a result has the potential to create confusion.”²² More specifically, the administration’s concerns included:

- Clarification as to whether this authority applies only to land in which the tribe is the sole beneficial owner, or whether it extends to land in which the tribe owns only a fractional interest;
- Once land is converted from trust to restricted fee, clarification on whether there would be a mechanism to convert the land back into trust status if the tribe so desires, or whether this process is irreversible;
- Ambiguity as to how the bill would affect statutes or case law that treats trust and restricted land the same (these include: leasing of Indian agricultural lands; rights-of-way; and contracts and agreements with Indian tribes that encumber Indian lands);

²⁰ National Congress of American Indians, *Trust Land*, at <http://www.ncai.org/policy-issues/land-natural-resources/trust-land>, (accessed October 22, 2017).

²¹ *Mescalero Apache Tribe v. Jones* (1973) and *Shaw v. Gibson-Zahniser Oil Corp* (1928).

²² 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 (“Laverdure Statement”) at page 2.

- Ambiguity about whether the bill would apply to restricted fee land held by tribes acquired outside the proposed trust-to-fee conversion process; and
- Ambiguity surrounding the bill's allowance for tribal law to preempt federal law when tribal law establishes "a system of land tenure." The bill's requirement that it not diminish the trust responsibility of the federal government creates further uncertainty; particularly as the bill might allow preemption of federal laws that establish the United States' responsibilities when holding tribal land in trust.²³

CONCLUSIONS

Is the bold step envisioned in HR 215 justified? We have at least one example we can turn to in considering this question. This is the *Helping Expedite and Advance Responsible Tribal Homeownership Act* of 2012 ("HEARTH"), which provides similar (albeit less ambitious) improvement in the federal law that governs the leasing of tribal surface lands.²⁴ My understanding is that HEARTH has as its foundation ideas that were articulated in earlier limited legislation authorizing tribes such as the Navajo Nation to independently lease surface lands without Secretarial approval for each individual lease; HEARTH extended those rights to all tribes.²⁵ HEARTH allows for projects that lease only surface land and does not extend tribal leasing authority over subsurface extraction or exploration (so, for example home leasing on surface lands would fall under the ambit of HEARTH). The model presented by HEARTH has received particular attention in the energy sector, with projects on surface land often being renewable energy projects, such as utility-scale solar or wind farms. While it is promising that under HEARTH tribes can implement their own regulations governing the leasing of Indian lands (including for renewable energy development), such projects have not yet truly taken off.²⁶ While HEARTH offered a step in the right direction, it has not generated the kind of tribal

²³ See Laverdure Statement at pages 2-3.

²⁴ HEARTH does not cover subsurface leasing or the ability to grant rights-of-way (Code of Federal Regulations, Title 25 – Indians, at §162.006(b)(1)).

²⁵ Monte Mills, "New Approaches to Energy Development in Indian Country," *The Federal Lawyer*, April 2016 at page 53. Under HEARTH, the Pueblo of Sandia was the second tribe (after the Federated Indians of Graton Rancheria) to be approved for tribal regulations on their land (US Department of the Interior, "Secretary Salazar Signs Historic Agreement in New Mexico to Help Spur Economic Development in Indian Country," March 14, 2013). The Governor of the Pueblo, Victor Montoya, said at the time that he expected HEARTH to aid in elimination of red tape and quicker negotiations with companies looking to lease land. With the help of HEARTH, the Pueblo has been working to develop its airport and improve its retail center (*Albuquerque Journal*, "A 'historic day' at pueblo," March 15, 2013).

²⁶ See GAO Report at pages 2-3. As of March 2015 only one utility-scale wind facility was in operation on tribal land, with one more such facility and one utility-scale solar facility under construction at that time. This is in stark contrast with the significant developments in utility-scale wind and solar capacity in the United States (data indicate that in the decade between 2004 and 2013, 686 utility-scale wind projects and 778 utility-scale solar projects were constructed nationally). I have not managed to find more current data on such development projects.

uptake that would potentially propel tribes to substantial economic gains. With most tribes lagging behind neighboring communities, perhaps bolder action is needed.²⁷

Tribes face numerous burdens when developing their economies. Beyond the challenges that often come from the remote locations of tribal land, tribes frequently must work through an extensive bureaucracy in order to keep their lands in trust while opening them to economic development with non-tribal entities. The energy sector highlights tribal struggles with this process. Research notes that some tribes engaged in natural resource industries are often overly and unjustly burdened by the current system. Cumbersome regulations and/or past mismanagement by the federal government deter some tribes from proceeding with energy development. Complying with unwieldy federal regulations and application processes can be incredibly time-intensive and complex, and mismanagement and delays of energy projects cost tribes a significant amount of revenues. Consider one example of bureaucratic impediments that have stymied energy development for tribes such as the Crow Nation. In January 2005, the Crow Tribal Council approved an oil and gas lease on tribal lands,²⁸ but development of the resource was blocked until September 2007 due to the excessively slow review and approval process in place at the BIA.²⁹ Additionally, the Crow Nation reports that BIA's records for surface and mineral ownership are repeatedly missing or out-of-date.³⁰ Persisting issues and inefficiencies, layers of regulatory oversight, lack of access to markets, higher-than-elsewhere permitting costs, and persistent infrastructure challenges create an environment of uncertainty and contribute to lackluster economic development.³¹

Due to these inefficiencies and challenges, the BIA is not always able to aid tribal economic development to the best of its capabilities. The BIA is extremely important for the

²⁷ GAO Report at page 3.

²⁸ Clair Johnson, "Crow Tribe signs lease with oil exploration firm," *Billings Gazette*, May 16, 2005, at <http://billingsgazette.com/news/state-and-regional/montana/crow-tribe-signs-lease-with-oil-exploration-firm/article85763605-8812-5993-a56d-8717f7c71bff.html>. See also, "Crow Tribe Signs oil and gas development deal," May 17, 2005, at <http://www.indianz.com/News/2005/008205.asp> (accessed October 21, 2017).

²⁹ US House of Representatives, House Committee on Natural Resources, Subcommittee on Indian and Alaska Native Affairs, *Hearing on Tribal Development of Energy Resources and the Creation of Energy Jobs on Indian Lands*, April 1, 2011, 112th Congress, Washington: GPO, 2011, Statement of Scott Russell, Secretary of the Crow Nation, at page 13. Delayed approval of oil and gas leases can have a particularly detrimental impact on the potential revenues earned from energy development projects in a world of falling oil and gas prices. In cases where oil and gas prices have fallen significantly in the long waiting period between application submission and BIA approval, tribes have seen development opportunities abandoned. Development efforts not completed have effectively forced certain tribes to forego the potentially significant revenues that would have started flowing at higher price levels.

³⁰ See, e.g., *On Improving Tribal-Corporate Relation in the Mining Sector: A White Paper on Strategies for Both Sides of the Table*, HPAIED, April 2014, at <http://hpaied.org/sites/default/files/documents/miningrelations.pdf>, (accessed October 21, 2017) at page 91.

³¹ Joseph Kalt, *The Mining of Crow Nation Coal: Economic Impact on Crow Reservation, Big Horn County and Montana*, The Harvard Project on American Indian Economic Development, February 4, 2014, at page 2.

administration and management of tribal land held in trust by the federal government and its smooth and timely functioning is essential for tribal development. However, underfunding and a complex set of court rulings and regulations hamper the BIA's staff (as well as staff employed by tribal governments and tribal enterprises). I have a particular background in consulting to tribal and non-tribal entities in the energy sector, and energy development offers one particularly revealing window through which to consider these problems. In ongoing discussions I have had with those working on the ground in energy development for tribes, I have heard differing views on the BIA's role. For example, I have found several instances where a lack of funding, staffing, and expertise at the BIA acts as a roadblock to the timely energy development that tribes seek; I have also found that there are instances where tribes look to the BIA for its built-in expertise and assistance in leasing oil and gas properties, and report that the area BIA office works quickly and efficiently.³² As tribal experiences with the BIA are not positive across the board, it is important to both eliminate unnecessary layers of regulation and provide the BIA with the resources needed to support tribes. This can be accomplished by using federal appropriations to provide the BIA with more of the funding it needs to increase its staff and expertise and by providing incentives for quick and timely action by existing BIA offices.

Economic development is an important goal for tribes, and granting them the ability to capitalize on their own resources without federal impediments will go a long way toward improving socioeconomic conditions for a number of tribal nations. This is evidenced by the significant economic gains realized as federal rules governing the leasing of tribal land have eased. The work of Professor Frye, noted above, demonstrates the impact of limiting the regulatory hurdles preventing the leasing of tribal trust land, and the initial response to passage of HEARTH showed the interest tribes have in taking greater control of the leasing process.³³ Streamlining economic development and minimizing federal oversight that is inefficient will empower tribes to control their own lands in a more efficient and beneficial manner. At the same time, it is important to proceed with any new legislation in a way that maintains the trust responsibility held by the US government toward the tribes. The goal should not be to upend the balance of responsibility, but should focus instead on creating an optimal environment for tribes to benefit as much as possible from tribal resources and tribal landholdings. HR 215 offers one potential initiative to greatly simplify the use (including leasing) of trust lands while simultaneously addressing the need to preserve the federal government's role as trustee.

HR 215 provides what I see as an important protection for tribal self-determination in that only a tribe can initiate the status change from trust land to restricted fee land. While leasing

³² I note that much of the positive BIA feedback I have heard involves energy leases on tribal lands that are not reservation lands, but instead are tribal landholdings in Oklahoma.

³³ More than 20 tribes applied for leasing authority under HEARTH within the first couple of years following its passage (see e.g., Intertribal Agriculture Council, "Interior Initiatives to Support Tribal-led Economic Development," June 16, 2014, at <http://www.indianaglink.com/interior-initiatives-support-tribal-led-economic-development/> (accessed October 23, 2017)).

tribal land provides one avenue to develop a tribe's economy, each tribe is in the best position to determine how it should enter into development activities. In some cases, a tribe might see trust status as the best method to protect tribal lands and secure the future of the tribe and its citizens, while a different tribe might prefer to pursue development through partnerships with non-tribal entities in the form of leases, including some with long-term expiration dates. As a self-interested party, any given tribe will be in the best position to determine how to pursue its own economic growth and development.

HR 215 offers a bold move to free up the potential for tribes to have greater control of tribal land. While it seeks to reduce the opacity and cumbersome nature of the current trust designation placed on certain landholdings, the Act needs further clarity as to how it would interact with, and impact, a range of current law and statutes. In my opinion, the current draft of the legislation would also benefit from specification regarding the ability of tribes to return land to its trust designation, if they so desire. This will clearly arise, if an initial move to restricted fee status does not meet tribal expectations and needs. HR 215 presents an opportunity for greater tribal flexibility and control of resources, which is significant; at the same time, the Act as written causes concern among a number of tribes, and adding uncertainty for tribes is not in the interest of anyone who wants tribes to prosper. A version of HR 215 with a number of clarifications could both simplify the rules that currently burden tribal use of Indian lands for economic development, while avoiding confusion that could arise from changes that could be created by the new legislation.