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September 23, 2016

Mr. Darin Thacker
Legislative Director
U.S. Senator Steve Daines (MT)
320 Hart Senate Office Building
Washington, D.C. 20510

Re: S.2012/H.R.2647 Tribal Forest Management Provisions

Dear Darin,

Thank you once again, for the courtesy of meeting with me this past Monday, September 19, 2016 at your offices, and for scheduling the conference call with Mr. Robert Robinson, Chairman of Western States Constitutional Rights, LLC, to discuss my clients' concerns with the language contained in Title VII of H.R. 2647 and Title VI of S.2012.

I also appreciate the invitation you extended for me to provide you and your colleagues with corrective language that would eliminate, if not, substantially reduce the likelihood of federally recognized tribes with and without current reservations asserting their religious, spiritual and cultural rights to aboriginal lands incident to entering into a Tribal Forest Protection Act adjacent lands stewardship contract. As we discussed, the language of these bills currently provides tribal governments with the opportunity to exercise such rights at the expense of adjacent and downstream nontribal forest and non-forest landowners as well as timber contractors.

Upon further study of this issue following this afternoon's conference call, I come across information about which you and your staff may be unaware. I believe it makes textual reform much more difficult, and could, perhaps, delay the bill's passage beyond December.

In my professional opinion, Congress has a distinct problem that it will find difficult to overcome. It is quite apparent from the materials I have reviewed, that the virtually identical eligibility criteria within Title VI of S.2012 and Title VII of H.R. 2647, and the highly similar selection criteria and proposal evaluation and determination factors set forth in Sections 2(c)(4) and 2(e)(2)(D) of the Tribal Forest Protection Act of 2004 (Public Law 108-278), respectively, dovetail nicely and are consistent with the Obama administration Bureau of Indian Affairs' "Reserved Treaty Rights Land Program" (RTRL).

The BIA "Reserved Treaty Rights Land Program" provides Congressionally appropriated "Wildland Fire Management funding [...] for the purpose of treating and restoring tribal priority landscapes **within and adjacent to ancestral and reserved treaty right lands**. [...] **Ancestral rights associated with non-trust, non-reservation land** is of critical importance to many American Indians and Alaska Natives across the United States" (emphasis added).

This language was quoted from a May 7, 2015 BIA memorandum entitled, "Reserved Treaty Rights Lands National Implementation" issued by the Acting BIA Director to All Regional Directors (attached hereto). The accompanying "Reserved Treaty Rights Land Plan" (attached hereto) further elaborates on this theme. It states that,

> "Beginning in FY 2015, Fuels Management Funding has been appropriated for the purpose of treating and restoring tribal landscapes within and adjacent to **reserved treaty right lands**. As stated in the Fiscal Year 2015 Wildland Fire Management Budget Justification, treaties with Native American tribes establish a unique set of rights, benefits, and conditions for Tribes. Like Other treaty obligations of the United States, Indian treaties are considered to be 'the supreme law of the land,' and are foundation upon which Federal Indian law and Federal Indian trust relationship are based.
>
> Within the various processes utilized [to] establish tribal and native organizations' relationships with the United States government, **retention of ancestral rights** remains a common recognized connection. **Examples include but are not limited to religious and cultural use, hunting, fishing and gathering**. For many Tribes, the reserved rights areas fall under the management of other Federal agencies and in some cases Tribes share co-management rights with Federal agencies.
>
> [...] As stated earlier, **the intent of the RTRL program is to meet DOI trust responsibilities for ancestral areas** that are tribal resource management priorities at high risk to Wildland fire.
>
> [...The] intent [of] collaborati[on] agreements is to facilitate comprehensive land management treatments that are **designed to positively affect reserved treat rights resources** while moving Tribal priority landscapes to desired future conditions and long term ecological resilience to wildland fire" (emphasis added).

The conundrum facing the conference committee and the congressional sponsors of S.2012, H.R. 2647 and the Tribal Forest Protection Act of 2004 is not limited to their problematic texts; unfortunately, it is a conundrum of credibility. Indeed, the eligibility criteria language of each of these bills can EASILY be used by federally recognized tribes, especially if sponsored by a progressive BIA in conjunction with a progressive U.S. Forest Service, to fulfill the promise and objectives of the Obama **BIA's Reserved Treaty Rights Land Program**. **That program focuses on protecting tribes' off-reservation reserved treaty right/ancestral/aboriginal lands and appurtenant natural resource (e.g., water) rights**.

There is NO escaping this conclusion, and there is no easy way to fix the language of S.2012/H.R.2647 to ensure that it is neither intended nor capable of being implemented and/or manipulated in a manner that protects tribes' reserved treaty right/ancestral/aboriginal lands and appurtenant resource rights (e.g., water rights) at the expense of private state-recognized water and land rights.

You indicated during our telephone conference call that the energy bill would not likely be passed following conference committee reconciliation until late December of this year. Even so, that still may not provide enough time to make the appropriate language changes earlier that month to reflect a narrower congressional intent. Therefore, should it become apparent by early December 2016 that it is not possible to make changes to the language of S.2012/H.R.2647 that are acceptable to my clients and other similarly situated rural landowners throughout this great nation, would Senator Daines be willing to work to ensure that Title VI of S.2012 and Title VII of H.R. 2647 are stripped from the final energy bill?

As previously stated, my clients and I are willing to collaborate with Senator Daines and his congressional colleagues to arrive at acceptable textual language that does not sacrifice or otherwise jeopardize their state-recognized private property rights. However, they are unwilling to agree to and will vociforously oppose any energy bill provision that does jeopardize their state-recognized private property rights in fulfillment of federal agencies' federal trust obligation to Native American tribes. This would amount to socially reprehensible and constitutionally prohibited racial discrimination.

I trust you will understand and respect the position of my clients and all those similarly situated.

Very truly yours,

Lawrence Kogan

Lawrence Kogan
Managing Principal

Cc: Sen. Jon Tester, MT
Rep. Ryan Zinke, MT
Rep. Rob Bishop, UT, Chair House Natural Resources Committee
Rep. Don Young, AL & Chair, House Subcommittee on Indian and Alaska Native Affairs
Rep. John Fleming, LA & Chair, House Subcommittee on Water, Power and Oceans
Rep. Mike Conaway, TX, & Chair, House Committee on Agriculture
Rep. Glenn Thompson, PA & Chair, House Subcommittee on Conservation and Forestry
Sen. Lisa Murkowski, AL & Chair, Senate Committee on Energy & Natural Resources
Sen. John Barrasso, WY & Chair, Senate Subcommittee on Public Lands, Forests, and Mining
Sen. Mike Lee, UT & Chair, Senate Subcommittee on Water and Power
Sen. Pat Roberts, KS & Chair, Senate Committee on Agriculture, Nutrition & Forestry
Sen. David Perdue, GA & Chair, Senate Subcommittee on Conservation, Forestry and Natural Resources

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