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Committee on Natural Resources

The Hon. Rob Bishop	The Hon. Raul Grijalva
Chairman	Ranking Member

Subcommittee on Federal Lands

The Hon. Tom McClintock	The Hon. Coleen Hanabasa
Chairman	Ranking Member

Yerington Paiute Tribe
Testimony by Chairman Laurie A. Thom
Legislative Hearing on H.R. 5347
1324 Longworth House Office Building
July 17, 2018

Dear Chairman Bishop and McClintock, and Ranking Members Grijalva and Hanabusa:

To and through Chairman Bishop,
I present the following testimony in strong opposition to H.R. 5347, "Lyon County Economic Development and Environmental Remediation Act", being presented by Representative Mark E. Amodei (R-NV-02). I apologize for not being able to attend this hearing in person, but my Tribe is hosting the Regional Tribal Operations Committee for all tribes in Region IX.

Executive Summary

H.R. 5347 requests a no-cost land sale (essentially a direct land transfer) without full disclosure or understanding of the blatant violation of the foundational principles of Indian Law, misrepresentation of the appropriate facts, and is generally contrary to the public's best interest. Of principal concern, the Bill features a failure to conduct meaningful consultation with the adjacent federally recognized Tribes, currently a participating stakeholder of the site. The Bill is misleading, misrepresents tribal interests and fails to address the crucial non-treaty rights that the federally recognized Tribes hold. The Bill also misrepresents the value of the land, wholly ignoring several undisturbed parcels outside of the mine site boundary of significant economic and cultural

value, and it misrepresents the United States' potential CERCLA liability as significant when it is likely to be minimal and likely nonexistent.

Consultation Provided in the Bill is Completely Ineffective

The Bill completely misunderstands the basic principle of meaningful government-to-government consultation with the Tribes. Section 5(d) of the Bill states:

> "Not later than 30 days after the date of enactment of this Act, the Secretary [of the DOI] shall initiate in government-to-government consultation with any Indian Tribe affected by the conveyance of the Federal selected lands..."

Consultation is a cornerstone of Federal Indian Law and occurs, by definition, *before* a decision is made. Almost every federal agency has written policies and even full handbooks on Tribal consultation. The basics of meaningful consultation are well defined in case law, and one of the simplest requirements is that meaningful government-to-government consultation occurs *prior to* decisions being made as *part of* the decision-making process. The proposed Bill does not acknowledge a need for consultation until after it has passed, thereby rendering consultation completely meaningless. All of the losses to the tribe which are described in this paper will be irrevocable at that point, and the "consultation" will be nothing more than a condescending and pointless informational session at best.

The federal government and its agencies, in this case BLM, have a fiduciary or trust responsibility to the Tribe (See United States v. Cherokee Nation o/Oklahoma, 480 U.S. 700, 707 (1987); United States v. Alitchell, 463 U.S. 206, 225 (1983); Seminole Nation v. United States, 316 U.S. 289, 296-97 (1942)). The sale of these public lands to a private entity, essentially removing the federal authority from the land and the Tribe's voice in how it is managed, is a unilateral abrogation of Tribal rights and of the federal trust responsibility. The sale of these lands without meaningful government-to-government consultation is a breach and failure of this federal trust responsibility.

The United States has a fiduciary duty to the Tribes with regard to all of their assets and rights. A key component of this duty requires meaningful consultation "in advance with the decision maker or with intermediaries with the clear authority to present tribal views with the decision maker" (Lower Brule Sioux Tribe v. Deer, 911 F.Supp 395,401 (D.S.D. 1995)). The bill states government-to-government consultation will occur after its enactment. Clearly this is a complete failure of the consultation requirements of the United States' fiduciary duties. This attempt to eliminate the procedural rights of the Tribe is a serious breach of Federal law.

Land Transfer Significantly Affects Tribal Interests
Section 5(e) of the Bill states in complete error:

> "Tribal Rights Unaffected. - Nothing in this Act alters or diminishes the treaty rights of any Indian Tribe."

This statement is irrelevant and misleading. Treaty rights are not the only rights that Indian Tribes hold. Unless title to traditionally occupied aboriginal lands has been expressly terminated by an act of congress, the Tribe retains aboriginal rights to the land. (See United States v Pueblo of San Ildefonso (1975) 206 Ct Cl 649, 513 F2d 1383; Gila River Pima—Maricopa Indian Community v. United States (1974) 204 Ct Cl 137) Aboriginal rights include rights to access the land and use it in the traditional and customary manner. Although neither the Yerington Paiute nor the Walker River Paiute Tribe have written treaties with the United States, both tribes retain their aboriginal rights to the land. Federal Parcel 1 contains lands that contain significant cultural sites to the Yerington Paiute Tribe. A sale of those lands into private ownership could be construed as a congressional extinguishment of the aboriginal title, and would be a significant loss to the Tribe. Coupled with the failure to provide meaningful consultation as described above, this Bill attempts to terminate Indian rights without consultation.

The statement that Tribal rights would not be impacted by this decision is wholly inaccurate. These impacts can include but are not limited to access to public traditional tribal lands and cultural heritage sites, investments in future beneficial uses and economic development on lands that have been essential to tribal life since time immemorial.

CERCLA Liability Is Likely to be Minimal to the Federal Government
H.R. 5347 Sec.3 of the Bill erroneously finds that:

> "the United States may be designated as a potentially responsible party under CERCLA and accordingly could be assigned a significant liability share for CERCLA response costs...potential for CERCLA liability is substantially greater than the fair market value of the Federal Selected lands..."

These statements are unsubstantiated and misleading. There are two potential liabilities for the United States government, and neither one is likely to result in response costs to the United States.

The first potential liability is the cleanup of the lands previously owned by the now bankrupt Arimetco. When there is no viable potentially responsible party, the United States will bear the costs for CERCLA cleanup actions per its duty to protect human health and the environment. However, in this instance the United States is not likely to bear the burden for the cost of cleanup to the Arimetco sites because there is a viable PRP in BP, and the Arimetco sites

are de minimis in size compared to the whole of the contaminated site and the contamination has yet to be shown as divisible from the overall harm of contamination. When a site is de minimis and the contamination indivisible, the strong trend in the courts is to hold the viable private party responsible in whole. Public policy dictates that the people of the United States should not bear the burden of cleanup for a site when a viable private party that profited from the activities that generated hazardous waste is available to fund cleanup. In this case, ARC, a BP subsidiary, failed to be mentioned in the text of the Bill.

The second potential liability to the United States is as an owner of the contaminated lands. While recent cases have demonstrated a trend in finding the Federal government liable as an owner where they owned the lands being mined by a private corporation, it is crucial to remember that under CERCLA, liability is joint and several. A CERCLA Sec. 113 suit will not necessarily find that the Federal government has a substantial share in the cleanup costs. Because the government's role as an owner was passive their liability is likely to be found minimal compared to BP. In addition, statutes such as the General Mining Act of 1872 indicate congress's position that opening lands to mining is in the public's best interest as it opens up economic opportunities and availability of resources. Courts adjudicating CERCLA Sec. 113 actions make equitable distributions of cleanup costs. BP is the party that profited from the mining, and the Federal government merely made the lands available so that the public could benefit from the mining; once again public policy demands that BP bear the burden for the costs of clean up and therefore the Federal government's equitable share is likely to be very low, if any at all.

It is noteworthy that the ability of the federal government to enforce environmental and other related regulations will be substantially reduced by the proposed action. This will place more burden on local and state government to regulate and otherwise enforce environmental remediation by the responsible party, BP.

The Value of the Land is Significant, and Likely to Increase

H.R. 5347's finding of CERCLA liability costs being greater than the value of the land is entirely speculative and unsubstantiated. As explained above, the government's equitable share of the cleanup costs is likely to be minimal or none at all. H.R. 5347 cites no documentation of the valuation of the land to be transferred. Sec. 4(c) states:

> "Equal Value- The value of the Federal selected lands is deemed to be equal to or less than the United States portion of the CERCLA response costs at the Site and no further valuation is required for the purposes of this Act or the conveyance of the Federal selected lands under this Act."

The Bill never specifies a value of the land, the United States' portion of the CERCLA response costs have not been determined, and yet the Bill simply declares by fiat that two values that don't exist are equal, and that no further valuation will be conducted. Mr. Amodei seems to think he can simply conject facts without validation. The assertion that the lands to be transferred are of little value is simply not true. Several of the parcels selected for transfer are of significant economic and cultural value.

A portion of Federal Parcel 1 is adjacent to the existing US highway 95, which is proposed for expansion as part of an economic development plan for northern Nevada. The expansion includes increasing the highway width to four lanes, requiring a purchase of private adjacent lands and lands currently owned by the BLM. What this Bill proposes is to give these valuable and desirable public lands at no cost to a foreign corporation, which in turn, the state of Nevada would need to purchase back at fair market value for the expansion of the highway. This is a misallocation of taxpayer dollars and a significant and unnecessary expense to the state of Nevada. It is shameful that a congressman of the state of Nevada would give away land for free without consideration to the cost to constituents of his own state.

The mine site and proposed location of public lands recommended for transfer are *not* in Mr. Amodei's congressional district. The Yerington Paiute Tribe reservation is within Mr. Amodei's District and all requests for meetings have gone unanswered.

Federal Parcel 2, a 60-acre plot, outside of the mine site has not been shown to be contaminated, and is understood to have been part of a proposal for the extraction of mining fill and topsoil material which is of significant economic value. Before the area could be used for fill, allowable on public lands through BLM, other local sources would have to be utilized. This could be an economic benefit to local businesses in the area to extract and transport fill material from existing sources. Handing this section of the property at no charge to BP effectively takes money from local businesses and subsequent local tax revenue from the community.

The value, let alone existence of the Tribal cultural sites has been entirely omitted from the Bill's description of land value, and is an aspect of the land that could only be understood though close consultation with the Tribe, consultation which would not take place until after the bill is passed and the land transferred. A full cultural inventory must take place on the site as well as the surrounding lands. Additional discussions with PRP, on the use of the parcel of land located to the west of the mine, are to mitigate the tailing piles by spreading the tailings over the parcel. This activity could cause eternal loss of access to cultural sites. In turn, the boundaries of the mine site would be expanded, once contaminated materials are moved from the mapped mine site. The Tribe has shown interest in purchasing these lands of significant cultural value. Historical Tribal documents provide that past Tribal Chairmen have requested this BLM parcel and other parcels of BLM land located in our traditional lands. The specific land in question was denied due to "contamination", but in fact that parcel is not fenced nor denied for public access. Regular access and public traffic is occurring as well as exploratory drilling for material data.

As such, it is against public policy to include them in this no-cost land transfer to a foreign corporation.

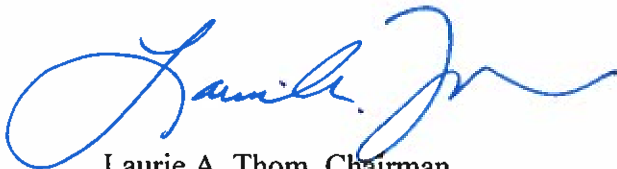
In addition, regardless of the present value of the land, fair market value of the land will increase substantially as the cleanup activities are completed. The expanded highway corridor will also increase the land values and economic opportunities available to the land owner.

Conclusion

The only party that benefits from the public land offering in H.R. 5347 is the foreign corporation, BP. All other stakeholders face significant losses, including loss of representation. The Tribe completely loses access to their traditional tribal land and their cultural sites, economic opportunities, and are subjected to multiple blatant violations of their rights. The United States loses valuable land and gains nothing. The people of Nevada will suffer an economic loss when important economic resources are provided at no cost to BP and lose a significant amount of tax payer dollars including the future purchase of land back from BP, who obtained it for free. This bill results in long and short-term losses for all parties except for the party responsible for cleanup who gains valuable lands for which they were already liable for pursuant to CERCLA law.

For these reasons, I urge you to oppose HR 5347.

Sincerely,



Laurie A. Thom, Chairman

Yerington Paiute Tribe

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May3, 2018

Dear Congressperson:

The Yerington Paiute Tribe is deeply concerned after reviewing Congressman Amodei's proposed Bill H.R. 5347. Our valid and significant concerns are outlined below.

There are a number of inaccuracies and misrepresentations in the bill presented by Congressman Amodei including the terms of government-to-government consultation [Section 5(D)].

"Not later than 30 days after the date of enactment of this Act, the Secretary [of the DOI] shall initiate in government-to-government consultation with any Indian Tribe affected by the conveyance of the Federal selected lands…"

Meaningful government-to-government consultation occurs *prior to* decisions being made as *part of* the decision-making process. The fiduciary duty requires meaningful consultation "**in advance** with the decision maker or with intermediaries with the clear authority to present tribal views with the decision maker" (Lower Brule Sioux Tribe v. Deer, 911 F.Supp 395,401 (D. S.D. 1995)). H.R.5347 states government-to-government consultation will occur **after** its enactment. Clearly this is a complete failure of the consultation requirements of your fiduciary duties.

The bill goes on to say:

"Tribal Rights Unaffected. - Nothing in this Act alters or diminishes the treaty rights of any Indian Tribe."

As a congressional representative of the state of Nevada, Mr. Amodei should know that neither Tribal stakeholders of the site have a treaty with the federal government. He should also know that tribal rights extend beyond treaty rights and the true impact of this project should be addressed in this section of the bill.

"**This Agency is an Equal Opportunity Provider and Employer**"

The statement that Tribal rights would not be impacted by this decision is wholly inaccurate. These impacts can include but are not limited to access to public traditional tribal lands and cultural heritage sites, investments in future beneficial uses and economic development on lands that have been essential to tribal life since time immemorial. The federal government and its agencies, in this case BLM, have a **fiduciary** or **trust** responsibility to the Tribe (See United States v. Cherokee Nation o/Oklahoma, 480 U.S. 700, 707 (1987); United States v. Alitchell, 463 U.S. 206, 225 (1983); Seminole Nation v. United States, 316 U.S. 289, 296-97 (1942)). The sale of these public lands, essentially removing the BLM authority from the land, is a unilateral abrogation of the federal trust responsibility. The sale of these lands without meaningful government-to-government consultation is a breach and failure of this federal trust responsibility.

The bill also misrepresents the nature of the land proposed for no-cost sale. Section 3, line 10, states, "The federal selected lands contain contamination and hazardous waste, and therefore the fair market value of such lands is minimal." This is not true. The proposed lands for transfer are not exclusive to the mine site, nor are they all known to be contaminated, as the bill inaccurately describes. Federal Parcel 2, a 60-acre plot, outside of the mine site has not been shown to be contaminated. In addition, this parcel is understood to have been part of a proposal for mining fill and topsoil material which is of significant economic value. A portion of Federal Parcel 1 is adjacent to the existing I-95, which is proposed for expansion as part of an economic development plan for northern Nevada. This includes expanding the highway to four lanes, requiring a purchase of private adjacent lands, and lands currently owned by the BLM. What this bill proposes is to give these very desirable and valuable public lands at no cost to a foreign corporation, which in turn, the state of Nevada would need to purchase back at fair market value for the expansion of the highway. This seems like a misallocation of tax payer dollars and a significant and unnecessary expense to the state of Nevada. It is shameful that a congressman of the state of Nevada would give away land for free without consideration to the cost to constituents of his own state. We understand that the mine site and proposed location of public lands recommended for transfer are *not* in Mr. Amodei's congressional district. Potentially, he is not concerned for the wellbeing of his rural neighbors. However, the Tribal members I represent include Mr. Amodei's constituents.

The undisturbed portion of BLM land included in the bill also has cultural sites significant to the Tribe. As the Tribe has shown interest in purchasing these lands, it is difficult to understand why these lands would be included in this no-cost land transfer to a foreign corporation. The BLM could certainly auction, sell or exchange this land to enhance community value in the usual and customary fashion.

These are only some of the many concerns the Tribe has vocalized throughout the Superfund remediation process. I would like to offer to come testify in front of the Committee on Natural Resources and to the Indian Affairs Committee regarding our concerns including those described in this letter.

Sincerely,

Laurie A. Thom, Chairman
Yerington Paiute Tribe

cc: Nevada Senator Catherine Cortez-Masto
Nevada Senator Dean Heller
Nevada Congressperson Ruben Kihuen
Congressional Committee on Natural Resources
Congressional Committee on Indian Affairs
Communications Chief Steve Clutter - BLM
Secretary Ryan Zinke – Department of the Interior
Nevada Governor Brian Sandoval
Nevada Indian Commission
Cliff Banuelos - Inter-Tribal Council of Nevada
Chairman Amber Torres - Walker River Paiute Tribe