

Mr. Chairman, Mr. Vice Chairman, and Members of the Committee. I very much appreciate the opportunity to testify before this Committee today² at its Oversight Hearing on “The Indian Reorganization Act - 75 Years Later: Renewing our Commitment to Restore Tribal Homelands and Promote Self-Determination.”

First I would like to note with appreciation recent Committee hearings on “Setting the Standard: Domestic Policy Implications of the UN Declaration on the Rights of Indigenous Peoples,”³ and “Examining Executive Branch Authority to Acquire Trust Lands for Indian Tribes”⁴ which concerned the land into trust issues created by the decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). I was glad to see that S. 676 favorably reported to the full Senate and join others in urging that it be promptly enacted. It seems to me that those matters are intertwined with the matters which are the focus of this hearing.

One primary purpose of the IRA was to protect and restore tribal homelands by stopping the loss of Indian lands, and by providing a number of mechanisms for the consolidation of exist-ing lands and acquisition of additional lands upon which to rebuild strong viable Indian communities. A second primary purpose of the IRA was to require future administrations to honor the desires of Indian people for self-determination and self-governance by authorizing reorganized tribal governments and by creating effective federally chartered Indian business corporations to manage Indian assets and conduct Indian businesses. To support these primary objectives, the IRA contained provisions providing scholarships for higher education and providing Indian preference in government employment so that Indian people would have the technical and professional knowledge necessary to obtain Indian service jobs, govern themselves and their territories effectively, and operate businesses profitably. It also provided a system of credit in order for Indian people to obtain the resources necessary for these endeavors. I would like to address the historical rationale for the Indian Reorganization Act, its enactment, and implementation during the Roosevelt-Ickes-Collier administration. That will, I believe, give some foundation to the two suggestions that I will make to the Committee.

¹ Although I am a tenured law professor at The University of Tulsa College of Law, I am appearing before this Committee in my personal capacity as a recognized authority with a background of litigation, scholarship, commentary, and teaching in the field of Federal Indian Law. Prior to returning to law school as a professor in 1995, I spent over 16 years in the private practice of law representing Indian tribes and tribal businesses.

² Thursday, June 23 2011, 2:15 p.m., Senate Dirksen Office Building Room 628.

³ Thursday, June 9, 2011.

⁴ S. Hrg. 111-136, May 21, 2009.

Until the allotment period, Indian treaties with rare exceptions, drew boundaries between the United States and the Indian tribal nations, or ceded some tribal lands to the United States while reserving the remainder, or swapped lands with the United States with the new lands to be held as Indian lands are held as a treaty recognized title.⁵ Only a few of the several hundred treaties actually suggest that title to tribal lands was to be held “in trust” for the Tribe.⁶ With rare exceptions, federal statutes applicable within those Indian territories were aimed at controlling American citizens who were interacting in trade or other capacities with Indian people. Indian people, by and large, were not citizens of the United States absent naturalization but were governed by their own laws,⁷ and their land tenure systems were controlled by tribal, not federal or state law.⁸

The genesis of the Indian Reorganization Act can be traced back at least to the General Allotment Act of 1887.⁹ In the General Allotment Act of 1887, Congress for the first time generally imposed American real property and inheritance law upon many Indian territories,¹⁰ forced the division of the tribal domain amongst the individual citizens of tribes to be held by a United States title “in trust” for the individual allottee and their heirs, and created a fictitious “surplus” of land that the tribe could be required to sell.¹¹ The result was devastating to the Indian land base, and tribal authority over it as tribal land and property laws were displaced by those of the United States. In short, the idea of “trust land” and a non-Indian legal system was introduced into many reservations, usually then followed by an influx of non-Indian settlers as a result of the taking of the “surplus” lands that were “created” after the living individual Indians received an allotment. Though perhaps intended as a benevolent measure by some, the allotment system could not have been better designed to destroy tribal government, individualize tribal properties, and pave the way for assimilation of Indian people, forcibly if necessary, into the mass of American citizens. It was remarkably effective in converting Indian lands into non-Indian land.

⁵ G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—An Essay*, 82 N.D. L. Rev. 811 (2006). In particular note the text of that article between pages 816-22 and 833-34 considering the language of various treaties between the United States and Indian tribes.

⁶ Treaty with the Senecas, Mixed Senecas and Shawnees. Quapaws, Arts. 16, 20, 6 Feb. 23, 1867, 15 Stat. 513; Treaty with the Delawares, July 2, 1861, 12 Stat. 1177 (requiring that if purchase money was not paid, land had to be returned to United States in trust for the tribe); Treaty with the Senecas, Tonawanda Band, Art. 3, 11 Stat. 735; 12 Stat. 991, November 5, 1857 (authority to repurchase lands from the holder of “the fee” who had previously purchased the Indian title).

⁷ *Elk v. Wilkins*, 112 US 94, (1884).

⁸ *Jones v. Meehan*, 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49, (1899).

⁹ General Allotment Act of Feb. 8th, 1887, Ch. 119, 24 Stat. 388. For a scholarly view of this Act, see Judith Royster, *The Legacy of Allotment*, 27 AZSLJ 1 Spring, 1995.

¹⁰ See *Jones v. Meehan*, 175 U.S. 1, 24 (1899).

¹¹ Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C., repealed by the Indian Land Consolidation Act of 2000, 114 Stat. 2007).

In the Committee's prior hearing, S. Hrg. 111 —136, a chart at page two of the hearing transcript shows that in 1850 Indian people owned in excess of 330,000,000 acres of land. This acreage was reduced to 156,000,000 acres by 1881 according to that chart, a net loss during the later part of the treaty period of a bit over 50% of the Indian lands. According to information presented to Congress by Commissioner Collier during the hearings on the Wheeler-Howard Indian Reorganization Act, the administration placed the figure of tribal land ownership at the beginning of the allotment period in 1887 as 138,000,000 acres of land. By 1934, Indian land ownership had been reduced another two-thirds from 138,000,000 to 48,000,000 acres. But this did not tell the whole story. Even these shocking figures were misleading. Of the 48,000,000 remaining acres, some 20,000,000 acres were in unallotted reservations, another 20,000,000 acres were desert or semi-desert lands, and some 7,000,000 were in fractionated heirship status awaiting sale to non-Indians.¹² Between 1908 and 1934 ninety percent of the lands of the Five Civilized Tribes, some 13,500,000 acres, was lost when most of the restrictions against alienation and taxation of those lands were removed.¹³ Seventy-two thousand out of 101,000 Indians of the Five Civilized Tribes had been made landless by 1934, and were thrown in Collier's words "virtually into the bread line." The allotments which remained in Indian ownership were often held in a fractionated heirship where no owner of the land could use it. This resulted in a situation where the only administrative recourse was to sell the lands and divide the money, or lease the land to non-Indians and divide the lease money.

¹² S. Comm. on Indian Affairs, Hearings on S. 2755: *To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-government And Economic Enterprise*, 73rd Cong., 2nd Sess. Part 1, Pages 17 (Feb. 27, 1934). [hereinafter Hearing on S. 2755, Part 1]; S. Comm. on Indian Affairs, Hearings on S. 2755 and S. 3645: *A Bill To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes Of Local Self-government And Economic Enterprise; To Provide For The Necessary Training Of Indians In Administrative And Economic Affairs; To Conserve And Develop Indian Lands; And To Promote The More Effective Administration Of Justice In Matters Affecting Indian Tribes And Communities By Establishing A Federal Court Of Indian Affairs*, 73rd Cong., 2nd Sess. Part 2, Page 58 (April 28, 1934) [hereinafter Hearing on S. 2755 and S. 3645, Part 2].

¹³ H. Comm. on Indian Affairs, *Hearings on H.R. 6234: A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes*, 74th Cong., 1st Sess. 9 (April 22, 1935). [hereinafter House Hearings on IRA.]

Of course the impact upon tribal economies, social, cultural, and governmental systems was devastating. Coupled with the vast discretion which Congress had placed in the Indian Office, including legal authority to simply ignore bonafide tribal leadership and governmental structures – sometime even appointing “tribal leaders” hand picked by the Secretary of the Interior,¹⁴ tribal lack of resources led to a situation where tribes effectively had few rights that were enforceable.¹⁵ Tribes could not hire an attorney to enforce their rights without administrative approval (even if they could pay the legal fee), and the administrative policy regarding what tribal organization would be “recognized” and what authority that organization would be allowed to exercise depended upon the notions of the person in the Secretary's office.

Providing significant limitations upon this administrative authority in favor of Indian self-determination was the second primary purpose of the IRA. Commissioner Collier explained the reason the administration promoted this second major feature of the IRA which was intended to address the sometimes benevolent but generally problematic federal Indian policy which prevented long term tribal planning and self-determination because policy changed with each new appointee to the position of Secretary of the Interior or Commissioner of Indian Affairs:

Paralleling this basic purpose [of reversing the allotment system] is another purpose just as basic. The bill stands on two legs. At present the Indian Bureau is a czar. It is an autocrat. It is an autocrat checked here and there by enactments of Congress; but, in the main, Congress has delegated to the Indian Office plenary control over Indian matters. It is a highly centralized autocratic absolutism. Furthermore, it is a bureaucratic absolutism.

The result is that if the Indians all over the country have had any rights it has been by the whim of the Indian Office or the Secretary of the Interior. If they are allowed to organize it is by our whim. That organization may be wiped out upon our whim. If they are organized, any authority they have is by our grace and particularly in the allotted areas our bureaucratic interference is carried up to the minutiae of life. They are embalmed in a fraternalism that does not do them any good. On the contrary, it poisons them.

Therefore we are seeking in title I of this bill statutory authority and direction to enable us to pass back to the Indians some measure of home rule and control over their own lives and domestic affairs. We recognize that that home rule cannot be accomplished through a blanket authority enacted by Congress, because conditions are infinitely diverse. Therefore, title I directs the Secretary of the Interior to proceed to issue a charter of self-government which may contain more or less power to the tribes; and what may be included within the charter is enumerated in title I.

But we do not leave to the Secretary of the Interior the final discretion to issue charters. No tribe takes a charter unless it wants to. If it wants to go on like it is going, it does so. If it does want a charter it petitions for it. . . .

¹⁴ Hearing on S. 2755 and S. 3645, Part 2, Pages 106-07 (April 28, 1934).

¹⁵ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

Such are the main purposes; the object in title I being to set up a graduated scheme whereby the Government may transfer its paternalism back to the Indians themselves; and unless something of the kind is enacted, all we can do at best is to go along as benevolent despots certain to be reversed by our successors who may be just as benevolent as we are, but who may have different ideas.

It is a condition of total insecurity in which we are holding the Indians, and they cannot be expected to build their life up in the proper way in the absence of firm rights. They are entitled to constitutional protection, and they cannot have it except by statutory grant by Congress.

.....

In a nutshell that is the bill. It has gone to the President, who has not sent a message about it but has authorized it to be stated that he will if it is necessary, and he has indicated his personal enthusiasm about it.¹⁶

The first target of the Wheeler-Howard Bill, then, was clearly the allotment system created by the General Allotment Act of 1887¹⁷ with its attendant evils of loss of tribal and allotted lands, fractionization of allotment titles, poverty, and political disunity.¹⁸ In order to protect the remaining Indian lands, Section 1 of the IRA prohibited further allotment of tribal lands, Section 2 extended the trust or restricted periods upon Indian lands until further action by Congress, Section 4 prohibited sales of lands except to the tribe or its members, and Section 16 allowed organized tribes to prohibit the sale or encumbrance of tribal lands or assets. In order to restore tribal homelands and provide a land base for the exercise of self-determination, Section 3 of the IRA authorized the Secretary to return surplus lands within reservations to tribal ownership, Section 4 encouraged transfers of allotted lands to the tribe or tribal corporation, and authorized exchanges of lands to consolidate Indian land holdings. Section 5 authorized the Secretary of the Interior to acquire land for Indians, and Sections 16 (by implication) and 17 (expressly) authorized organized and incorporated tribes to acquire land for Indians. According to the fourth paragraph of Section 5 of the IRA, title all these acquisitions was to be taken in the name of the United States in trust for the tribe or individual Indian, and all these acquisitions were to be exempt from state and local taxation.

¹⁶ Hearing on S. 2755, Part 1 at 31. A reading of these entire hearings clearly indicates that Collier's vision of "home-rule" for Indian tribes went beyond current "self-determination" and "self-governance" program management tools. The Constitutions and Charters of Tribes were to be binding on the Secretary, as binding as an act of Congress. See, S. Comm. on Indian Affairs, Hearings on S. 2047: *A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes*, 74th Cong., 1st Sess. p. 27 (April 9, 1935), President Roosevelt did send a message supporting enactment of the Wheeler-Howard Bill. House Hearings on IRA at 233-34, May 1, 1934.

¹⁷ Also referred to as the Dawes Act. 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-381 (1983)). See, Judith V. Royster, *The Legacy of Allotment*, 27 AZSLJ 1, Spring 1995.

¹⁸ See, The Purpose And Operation Of The Wheeler-Howard Indian Rights Bill. (S. 2755: H.R. 7902) (A memorandum of explanation respectfully submitted to the Members of the Senate and House Committees on Indian Affairs by John Collier, Commissioner of Indian Affairs) reproduced at Hearing on S. 2755, Part 1 at 16. The discussion of the Allotment Act commences at page 17 of the hearing transcript.

The provision which became Section 5 of the IRA was originally found at Section 7 of Title III of the Wheeler-Howard Bill. In relevant part, original Section 7 of Title III provided:

SEC. 7. The Secretary of the Interior is hereby authorized, in his discretion and under such rules and regulations as he may prescribe, to acquire, through purchase, relinquishment, gift, exchange, or assignment lands or surface rights to lands, within or outside of existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians

There is hereby authorized to be appropriated, for the acquisition of such lands . . . , a sum not to exceed \$2,000,000 for any one fiscal year. The unexpended balances of appropriations made for any one year pursuant to this Act shall remain available until expended.

. . . .

Title to any land acquired pursuant to the provisions of this section, shall be taken in the name of the United States in trust for the Indian tribe or community for whom the land is acquired, but title may be transferred by the Secretary to such community under the condition set forth in this Act. (emphasis added.)¹⁹

Clearly, if this draft had been enacted as written, the plain language of this section would have made all appropriations authorized by the Bill available until expended, but would have authorized only lands acquired by the Secretary pursuant to this section to be taken in the name of the United States on behalf of Indians. There would have been no authority to take title to property in trust under any other section without a similar provision whether acquired by the Secretary, an organized tribe, federally chartered Indian corporation or anyone else. If this language had been enacted, the language of 25 C.F.R. § 151.3 stating that only the Secretary has authority to take land into trust for Indians would have been consistent with the statutory language.

But this language was not enacted.

Prior to enacting the Bill, Congress changed the scope of these two provisions by limiting the authorization for “carry-over” appropriations to the appropriation authorized within that section for land acquisition, and expanded the requirement that acquisitions be done in the name of the United States (and the corresponding tax exemption) to include all acquisitions authorized by the Act, in the following language:

Sec. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interests in lands, water rights or surface rights to lands, within or without

¹⁹ House Hearings on IRA, Part 1, Page 9 (Feb. 2, 1934); Hearing on S. 2755, Part 1 at , Page 9-10, (Feb. 27, 1934.)

existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, *for the purpose of providing land for Indians.*

For the acquisition of such, lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby appropriated, a sum not to exceed \$2,000,000 in any one fiscal year.

The unexpended balances of any *appropriations made pursuant to this section* shall remain available until expended.

*Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.*²⁰ (emphasis added.)

In other words, prior to enactment, Congress revised these two provisions. With respect to “carry over” appropriations, Congress changed the words “this Act” to the words “this section.” With respect to requiring that title to lands and other property be taken in the name of the United States in trust and non-taxable status, Congress expressly changed the words “this section” to the words “this Act.” There is simply no interpretive rule which allows administrative or judicial revision of the statute in order to change the words enacted by Congress back to the words Congress rejected in their revision of this language. The requirement of the fourth paragraph of 25 U.S.C. § 465 that title to all land or property rights “shall be taken in the name of the United States” applies equally to every entity authorized by the Act to acquire such lands or rights, including incorporated tribes and federally chartered Indian corporations, and to every section of the Act authorizing an acquisition.²¹

The initial implementation regulations and historical records retrieved from the National Archives also support the view that these federal Indian corporate entities were understood to have authority to take title to the lands and other property they acquired in the name of the United States in trust for their corporation, tribe, or tribal members. The first volume of the Code of Federal Regulations, published in 1938, contained the following provisions:

²⁰ Act of June 18, 1934, 73d Cong., 2nd Sess., Ch. 576. § 5, June 18, 1934, 48 Stat. 984-988, now codified as amended at 25 U.S.C. § 465.

²¹ The discretion accorded the Secretary in the first paragraph of Section 5 of the IRA appears to extend only to the decision to acquire some interest in land for the purpose of providing land for Indians. Once that discretion is exercised and the decision is made to acquire a tract or tracts of property, the plain language of the fourth section accords the Secretary no discretion as to how to take title to said lands. The Secretary must take the title to such property in the name of the United States in trust for the Indian, tribe, or federally chartered Indian corporation. The same rule would apply to tribal and corporate acquisitions. The 1990 amendment authorized leasing by tribal authority for periods not exceeding twenty-five years, an increase from the original ten year lease authorization. Act of May 24, 1990, Pub.L. 101-301, § 3(c), 104 Stat. 207.

25 C.F.R. PART 21 — LOANS TO INDIAN CHARTERED CORPORATIONS

§ 21.21 Title to property. Except as otherwise provided for in the loan agreement between the corporation and the United States, all property purchased with credit revolving funds shall be purchased in the name of the United States in trust for the corporation.²²

PART 23-LOANS TO INDIAN COOPERATIVES, OKLAHOMA

²² 25 C.F.R. § 21.21 (1938). It should be noted that Section 21.9 of the regulations prohibited the corporate borrower from obtaining loans for relending, and Section 23.26 prohibited cooperative associations from borrowing from anyone but the United States while they had an outstanding loan from the revolving fund. This effectively required them to acquire all their property in trust status.

§ 23.20 Title to property. The cooperative may be required to agree that the title to all property purchased with the loan, except property purchased for resale, shall remain in the United States in trust for the cooperative until the loan is repaid.²³

The standard forms used by the Indian Office are consistent with these requirements. The “Indian Chartered Corporation's Application for Loan of Revolving Credit Funds” required that:

4. The corporation agrees that except as noted below, title to all property and increases therefrom, purchased with funds obtained under this application, will be taken or held in the name of the United States in trust for the corporation.”²⁴

This provision of the standard form of loan agreement appears to have been applied to loans to incorporated tribes throughout the United States and to cooperative associations in Oklahoma.

²³ 25 C.F.R. 23.20 (1938).

²⁴ Form 5-806 (Revised), Approved by the Secretary of the Interior (March 11, 1940). National Archives and Records Administration (hereafter “NARA”), RG-75, Ft. Worth record center, Anadarko, Entry E-49, Box 1.

By letter dated April 2, 1947, Walter Woehlke signing for the Commissioner of Indian Affairs confirmed to the Caddo Indian Tribe of Oklahoma that “The credit regulations and instructions under which you are operating permit loans for the purchase of land.... A portion of the revolving credit funds now available was justified for loans to tribes for the purpose of purchasing land, particularly heirship lands, in the name of the tribe borrowing the money.”²⁵ On October 13, 1948, Mr. Zimmerman as Acting Commissioner of Indian Affairs returned an application from the Cheyenne and Arapaho Tribes for a \$300,000 loan to Mr. Trent, the Western Oklahoma Consolidated Agency's Supervisor of Extension and Credit without approval.²⁶ In explanation, Mr. Zimmerman listed a number of deficiencies with the loan application, including: (1) using \$200,000 of the requested monies for land loans tied up too large a percentage of the money for long term debt, (2) the provisions describing the types of land loans to be made were too restrictive, and (3) “In section 4, provision is made that title to land purchased by the tribe will not be taken in the name of the United States in trust for the tribe. We do not know how title could be taken otherwise.”²⁷ Finally, the Kenwood Indian Cooperative Livestock Association was required to take title to the cattle it purchased in the name of the United States in trust for the Association,²⁸ and the Walters District Poultry Association took title to all of its property in the name of the United States in trust for the Association with the exception of “feed after fed.”²⁹

The only federal court decision revealed by research interpreting the fourth paragraph of 25 U.S.C. § 465 with regard to tribal and corporate property acquisitions supports the position that a tribe organized pursuant to the IRA, or an Indian corporation chartered pursuant thereto must take title to property it purchases in the name of the United States. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Mescalero Apache Tribe protested the application of a state use tax assessment on the purchase of materials used to construct two ski lifts at its ski resort on off reservation leased lands, and sought refund of sales tax paid on basis of gross receipts of the ski resort from sale of services and tangible property. The Court held unanimously that the leasehold interest of the Tribe in nonreservation lands was protected from state taxation. by 25 U.S.C. § 465 as were the materials the tribe had purchased and attached to the lands. A majority held that the State could impose its income tax against the profits of the business because that was not a tax on the land and the business was outside the reservation. In short, the court held this leasehold interest was not taxable by virtue of § 465. If that portion of the fourth paragraph of § 465 prohibiting state taxation applies when an incorporated tribe

²⁵ NARA. RG-75, Ft. Worth, Anadarko, Entry E-49 Box 1.

²⁶ NARA, RG-75, Ft. Worth, Anadarko, Entry E-49 Box 1.

²⁷ *Id.* at page 2, paragraph 4. Since the plan to take title in fee was one reason to reject the application, the only reasonable interpretation is that title had to be taken by the incorporated tribe in the name of the United States in trust for the Tribe.

²⁸ NARA RG-75, Ft. Worth, Muskogee/5 Tribes, Entry E-579, Box 3, Extension and Credit, Hist Loan Cards 1945-65.

²⁹ NARA, RG-75, Ft. Worth, Anadarko, E-49 Records Relating to Indian Credit Assoc & Tribal Committees 1939-57 Box 3.

acquires a lease, then the rest of that sentence requiring trust title must also apply to the tribe's acquisition of land. There is a strong argument that regardless of whether title is taken in the form required by the fourth paragraph of 25 U.S.C. § 465, title is held in the required form by operation of law regardless of the words on the instrument of conveyance.³⁰

Section 477 of Title 25 of the United States Code provides that “Any charter so issued shall not be revoked or surrendered except by Act of Congress.” Therefore, there does not appear to be any authority for the proposition that the Secretary may limit, rescind, or revoke any charter or power contained therein by regulations such as 25 C.F.R. § 151.3 or otherwise. The Secretary has recognized this as the law:

The attached Constitution and By-laws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, adopted by popular vote on October 4, and approved by the Secretary of the Interior on October 28 has the force of law, superseding all departmental regulations and instructions that may be in conflict with any of the provisions of this document.

³⁰ *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir., 1938); 25 U.S.C. § 177. Mescalero, *supra*.

This document embodies the solemn pledges of Congress and of the Department of the Interior to the Indians of the Flathead Reservation, and all the activities of the Department affecting the Flathead Reservation must be carried out with firm regard for these constitutional provisions and by-laws.³¹

And, again:

Tribal constitutions and charters, when they have been adopted by popular vote and approved by the Secretary of the Interior in accordance with the Acts of June 18, 1934 (Indian Reorganization Act), May 1, 1936 (Alaska Act), or June 26, 1936 (Oklahoma Indian Welfare Act), have the force of law, superseding all Departmental regulations and instructions that may be in conflict with any of the provisions in those documents.³²

Commissioner Collier stated the fundamental proposition with respect to the authority of such constitutions and charters to Congress:

Commissioner Collier: Now, the act is extremely simple in this detail. It says that when they organize under the act, under the Thomas-Rogers bill, and adopt a constitution and bylaws by a majority vote, by a vote of the majority of the votes cast at a referendum, and when thereafter the constitution and bylaws are O.K.'d by the Secretary of the Interior, from that time forward, the Secretary may not change the constitution and bylaws except with the consent of the tribe itself through a majority vote. He is bound by the constitution and bylaws. *They are binding upon him, as binding as acts of Congress.* The tribe may change its constitution and bylaws. The tribe may abandon its constitution and go back to the old way. Of course, Congress may change them, but not the Department.

It means that the Indian organization will have dignity, stability, and power.

.....

Mr. Donahey. Is this the first time there, has been an act to embody that principle of Indian home rule?

Mr. Collier. The Wheeler-Howard Act (act of June 18, 1939 [sic], 48 Stat. L. 984) embodies it, and this act carries the same thing over to the Indians [in Oklahoma].³³ (Emphasis added.)

³¹ John Collier, Commissioner of Indian Affairs to Division Chiefs of the Indian Office and to the Indian Service Employees of the Flathead Reservation, March 26, 1936, NARA, D.C. Branch, RG75, Entry 132-B Circulars, Orders, and other Issuances, 1877-1947, Box 25, Notebook 1.

³² Interior Department Order No. 556 on "The Conduct of Tribal Government," Approved by Commissioner Myer, August 8, 1950, superceded in 64 IAM 1, Oct. 3, 1955, Page 1 of 14 reasserting the same language. NARA, RG-75, Ft. Worth, Anadarko, E-47, Box 1, Central files, Records Relating to Credit, 1948-62.

³³ S. Comm. on Indian Affairs, *Hearings on S. 2047: A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for other Purposes*, 74th Cong., 1st Sess., p. 27 (April 9,

1935).

The Oklahoma Indian Welfare Act³⁴ extended the benefits of the IRA to all organized Indian Tribes in Oklahoma which choose to accept its provisions except the Osage.³⁵

As the foregoing shows, the historical record supports the proposition that the incorporated tribes have legal authority independent of the Secretary, and one could reasonably assert are required, to take title to their property in the name of the United States in trust for the proper beneficiary. Thereafter, those tribes by statute and constitutional or charter provisions would have full authority to own, hold, manage, operate, and dispose of such property within the limitations imposed by § 477 and any additional restrictions negotiated in a constitution or charter of the incorporated tribe.

³⁴ Act of June 26, 1936, c. 831, 49 Stat. 1967 (25 U.S.C. §§ 501 et. seq.

³⁵ *Sac and Fox Nation v. Norton*, 585 F.Supp.2d 1293 (W.D. Okla., 2006). “Since its approval by the President on June 18, 1934, the Indian Reorganization Act has been modified and extended on four occasions: . . . 4. By the Act of June 26 1936 (49 Stat. L. 1967), 'An Act to promote the General Welfare of the Indians of the State of Oklahoma, and for other purposes,' virtually all the features of the original legislation, from which the Oklahoma tribes were excluded by section 13 of the Indian Reorganization Act, were made to apply to Oklahoma, along with additional supporting legislation.”

Report of Acting Secretary of the Interior to Senator Thomas, Chair of the Senate Committee on Indian Affairs dated April 28, 1937, National Archives and Records Administration (hereafter “NARA”), D.C. Record Center, Record Group 75, Entry 132-B Circulars, Orders, and other Issuances, 1877-1947, Box 25, Notebook 1. The only provision of the IRA not extended to the Tribes in Oklahoma was the right to vote to reject the IRA under Section 18. See generally, Sections 3,4, 5 of the OIWA, and numerous references and explanations in the legislative history of the OIWA. S. Comm. on Indian Affairs, Hearings on S. 2047: A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes, 74th Cong., 1st Sess. (April 8, 9, 10, and 11, 1935) [Hereafter “Senate Hearings on OIWA”]; H. Comm. on Indian Affairs, Hearings on H.R. 6234: A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes, 74th Cong., 1st Sess., (April 22 through May 15, 1935) [Hereafter “House Hearings on OIWA”]. See, Section 8 of the OIWA, 25 U.S.C. § 508 with respect to the exclusion of the Osage Nation.

Simply stated it is not absolutely necessary that Tribes and individual Indians have “trust lands” in order for their lands to be “Indian lands” in the classical sense but federal recognition and protection of Indian lands is a key element. In order to rebuild tribal homelands and exercise the self-determination and self-government therein that this Committee supports, and which is clearly called for by the Declaration on the Rights of Indigenous Peoples, what is needed is ownership of the tribal homeland, jurisdiction over it, and exclusion of the jurisdiction of others to the extent necessary for Indigenous self-determination. This concept should by no means eliminate any number of cooperative agreements, joint projects or activities, and other relationships with federal, state, and local jurisdictions or other tribes based upon principles of mutual respect and free, prior, informed, and continuing consent. Whether this ownership is to be thought of as “trust lands” owned, held, controlled, and managed by the tribe or corporate entity under the IRA, or a recognized, compensable aboriginal title, or some form of restricted fee seems to be irrelevant.³⁶ It is the result which counts. The IRA and OIWA provide a tool by which progress may be made toward restoring sufficient tribal homelands for the restoration of vibrant sound sustainable tribal communities.

In this period of history, it is almost mandatory to address the fears of those who would object to Indians purchasing property because they dislike Indian gaming and economic development. While I do not think a full discourse on this question is called for here, I would make two simple points. First, the Supreme Court has already said in the *Mescalero* case that while off reservation interests in lands acquired by tribes under this authority are tax exempt, tribal activities upon such lands remain subject to significant state authority – which would preclude off reservation gaming on such lands absent additional federal action. Of course, on reservation acquisitions would be Indian country as defined in 18 U.S.C. §1151(a) which includes within the definition of Indian country all lands within the boundaries of any Indian reservation notwithstanding the issuance of any patent. The second point to make is that with respect to Indian gaming, Congress has already severely limited gaming on newly acquired properties to the extent necessary. 25 U.S.C. §2719. There is nothing in the IRA or OIWA which would change or affect the balance already set by Congress on acquisitions for gaming purposes.

Because of the historical termination era of the 1950s, Commissioner Collier’s implementation of the IRA was administratively abandoned without Congressional authority, and forces opposed to the IRA changed the BIA manual to refuse to recognize the right and obligation of the incorporated entities and tribes to take title to their property as provided in the IRA.³⁷

³⁶ 25 U.S.C. § 477 can also be thought of as creating a restricted fee by those who insist upon reading the fourth paragraph of Section 5 of the IRA as it was proposed instead of as it was enacted. 25 U.S.C. § 177 can also be interpreted to create a restricted fee title whenever land is bought by any recognized Indian tribe.

³⁷ Theodore H. Haas, Chief Counsel, United States Indian Service, TEN YEARS OF TRIBAL GOVERNMENT UNDER I. R. A., United States Indian Service Tribal Relations Pamphlet 1 at 5-6 (January 1947); Bureau of Indian Affairs Bulletin 335, Supp. 1, December 16, 1953. NARA RG-75, Ft. Worth, Muskogee/ 5 Tribes, E-579, Box 2, Extension and Credit, Hist Loan Cards 1945-65; Memo Dated June 11, 1954, Review of Indian Affairs Manual, see Volume IV, Part VII, Chapter 5, Revolving Credit and Tribal Funds, Section 506.04A (9). NARA RG-75, Ft. Worth, Anadarko, Entry E-47, Box 1, Central files, Records Relating to Credit, 1948-62.

This termination era policy still prevails in the regulations of the Department, 25 C.F.R. § 151.3. To my knowledge whether that regulation may divest a tribe of its chartered powers has not yet been litigated. So, what is it that Congress can do to make progress toward the goals of the Declaration on the Rights of Indigenous Peoples, the aspirations of numerous Indian tribes, and resolving some of the issues facing the government and Indian people?

First, I would suggest that Congress encourage the Interior Department to return to the practice of the Roosevelt-Ickes-Collier administration who developed, enacted, and implemented the IRA by recognizing and supporting the authority of organized tribes and corporations to take title to their property in the name of the United States, and to control, manage, and operate it themselves within the limits set by 25 U.S.C. § 477. Should the tribe or corporation exceed its authority, the proper response would be for the government to sue to cancel the offending instrument, unless additional limited oversight authority has been freely agreed to by the tribe in its charter.

Second, Congress could provide authority to finally confirm the promise of the Self-Determination Act and Self-Governance Act that Tribes would in fact be able to negotiate real political and legal changes with a view toward recovering legal and political rights which they have been denied, or preventing the application of legislation which they deem inimical to their needs or way of life. This is the way of America – that legitimate government requires the consent of the governed. In the context of Indian tribes that first meant a treaty relationship. To the extent possible, the Declaration calls for the establishment once again of a consensual relationship, if not by treaty then by some other available means. The Indian Child Welfare Act's provisions authorizing tribes to reassume jurisdiction over Indian child custody proceedings, and the IRA's provisions which allowed each tribe to vote as to whether the IRA would apply on their reservation are examples of legislation that has provided a mechanism for tribal people and their leaders to have a direct and important say in the legal and political structure of the tribal homelands. Negotiation of tribal constitution and charter provisions would provide a mechanism for accomplishing such changes. I would encourage Congress to consider this opportunity.

Once again I thank you Mr. Chairman, Mr. Vice Chairman, and Members of the Committee for the opportunity to testify today, and look forward to any questions you may have.

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