

TESTIMONY OF RICHARD MONETTE  
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS  
on “The Indian Reorganization Act”  
June 23, 2011

Good morning Chairman Akaka and Members of the Committee. My name is Richard Monette. My colleague, Robert Lyttle, and I have drafted either single constitutional amendments or total constitutional revisions for over thirty different tribes. Also, I worked for this Committee when the 1988 amendments were being legislated. In addition, I served as Director of the Office of Legislative and Congressional Affairs in the BIA when the 1994 Amendment to the IRA was enacted.

Thank you for inviting me to provide my views, specifically the opportunity to provide my perspective on the 1994 Amendment to the IRA and its relationship to the Carcieri case and other recent legal developments. Today, sadly, we are struggling with the unfortunate political realities of how to fix Carcieri. I say ‘unfortunate’ because the 1994 amendment was intended to prevent Carcieri.

After Congress enacted the IRA, the Office of the Solicitor – DOI began to question the wording and intent of the Act, including the provision that it applied to Tribes “now under federal jurisdiction”. The Department concluded that Congress authorized reorganization of Tribes which had not historically been recognized in the same form and fashion. As a result, the Department labeled some Tribes as historic and others as not historic, or “created”, a distinction that cannot be justified, and should not be rationalized, by a Nation that purports to be the defender of democracy.

Over the years the historic versus created issue arose in four contexts in particular:

First, the IRA provided for the reorganization and recognition of adult Indians of half blood or more residing on the same reservation despite the fact that those adult Indians might actually represent many different tribes. This was the case with many reorganized California tribes where citizens of different tribes were settled onto single “rancherias”. Outside California, Tribes falling into this category were often labeled by the BIA as a Community or Colony. Obviously, given the unfortunate history of California in particular, these newly anointed IRA Tribes were not the same as the Tribe historically on those lands.

Second, the IRA contemplated reorganization and recognition for Tribes comprised of multiple pre-existing Tribes, where the entire population of two or more Tribes were settled onto one reservation. Examples include the Three Affiliated Tribes of the Fort Berthold Reservation, the Confederated Tribes of the Warm Springs Reservation, the Shoshone and Arapaho Tribes of the Wind River Reservation. As you can see, the moniker “Tribe of the such and such Reservation” identified these Tribes. Again, obviously these newly anointed IRA Tribes were not the same as the Tribe historically on those lands.

Third, the Secretary facilitated reorganization for Tribes split by America's unfortunate Removal policy and now living on two or more reservations. Examples included the Oneida Nation in New York and the Oneida Tribe in Wisconsin, or the Choctaw Nation of Oklahoma and the Mississippi Band of Choctaw, or the Wisconsin Winnebago and the Nebraska Winnebago. Over the years, as illustrated in the Supreme Court case *United States v. John*, the Department took the position that only one of the resulting Tribes, either the removed or the un-removed Tribe, could represent the Tribe historically dealt with by the United States. Again, obviously these newly anointed IRA Tribes were not exactly the same as the Tribe historically on those lands, although in this instance the Department would have to admit each consisted of distinct Tribes with which the Department historically dealt.

Fourth, the Department began to label or treat almost every newly recognized Tribe as "created" simply because the United States had not previously recognized them. Increasingly, in letters to the Tribes themselves and various papers, the Department resurrected the idea that a created Tribe had less sovereignty than an historic Tribe, particularly when it came to matters governing land.

In 1993 Robert Lyttle and I assisted in drafting the new current constitution for the Wisconsin Winnebago, wherein the Hochungra proudly changed their sovereign name from Winnebago – an Algonquin label – to their own name – the Hochunk Nation. The Tribe itself, now stable, progressive, and successful, will tell you the troubles it had prior to adopting a new constitution, so I will not labor the story here. Nonetheless, because the Hochungra peoples were subjected to official removal from Wisconsin, the Department threatened that the Hochunk Nation would be labeled "created", arguing the historic group had been removed to Nebraska. Thus, according to the Department, the Hochunk Nation would be recognized with less sovereignty, less jurisdiction, less democracy. One can't help but wonder if Nebraska Winnebago had reformed their constitution first, whether the Department would have labeled the Nebraska Winnebago created and the Wisconsin Winnebago historic. At best, the process was riddled with human intervention by career bureaucrats – at worst it was abuse of discretion.

This matter came to Congress' attention again in 1994 when the Department treated the Pasqua Yaqui Tribe as a created Tribe. Senator McCain and this Committee requested a list of so-called "created Tribes" from the Department, but the Office of the Solicitor-DOI refused, rationalizing that the distinction was made on a case by case basis. During the course of those discussions, as Director of the Office of Legislative Affairs, I sat in departmental meeting when a certain DOI deputy solicitor stated that the Three Affiliated Tribes of the Fort Berthold Reservation is a created Tribe – the Tribe of which the Director of the Office of Tribal Government was a member. So imagine his shock and personal consternation learning that the Solicitor's Office had concocted a legal theory leaving his own Tribe with less sovereignty than other Tribes.

As a result of those discussions the Department offered only irresolute testimony, but it could not bring itself to strike from its testimony a sentiment that some insisted it contain – that Democracy requires us to hold that government is by the governed, that sovereignty derives from those over whom it is exercised. That sentiment should have been the axiomatic end of story, eliminating the need for a Yaqui elder to testify, and I paraphrase: “Senator, my people have but one Creator, and in all due respect, you’re not it.”

Is Virginia an historic State but North Dakota only a “created” State? When the Union was formed was North Dakota “now under Federal jurisdiction”? Despite the obvious historical anomalies between States, North Dakota is an “historical State”, a full State of this Union. By virtue of the “Equal Footing Doctrine”, which applies the democracy and the 10<sup>th</sup> Amendment to after-admitted States, North Dakota is not “created”, but is imbued with the full breadth and panoply of sovereignty as any of the other State of this Union. Our democracy requires us to conclude that North Dakota’s 400,000 voters have as much sovereignty to provide their State as Virginia’s 4 million voters have to give their State.

In short, the 1994 amendment to the Indian Reorganization Act was a statement of the best that this Country’s democracy has to offer for Indian Tribes – a 10<sup>th</sup> Amendment and an equal footing of sorts. In defiance of the power of Congress, about one week after that amendment was signed into law the Offices of the Solicitor and Tribal Government sent out yet another “created Tribe” letter. So I repeat here today: Democracy requires us to hold that government is of, for, and by the governed; that sovereignty derives from those over whom it is exercised. Whose version of democracy allows us to reach any other conclusion when it comes to a recognized Indian Tribe?