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TESTIMONY OF PHILIP BAKER-SHENK

ON TRIBAL SELF-GOVERNANCE (INTERIOR) AND S. 1715

BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

MAY 12, 2004 HEARING

I. HISTORY & BACKGROUND

Introduction. Good morning! My name is Philip Baker-Shenk. I am an attorney and partner in the Washington, D.C. offices of Holland & Knight LLP, a large law firm representing various Indian tribes and tribal organizations throughout Indian Country.

I thank you for the great personal honor it is to appear before you today in support of S. 1715. With this testimony I will attempt to address the philosophical and historical backdrop of tribal self-governance and discuss the rationale for the amendments proposed in S. 1715. At the end of this testimony is a brief section-by-section analysis of S. 1715.

Background. I have had the honor of working in the diverse field of federal Indian affairs since 1976, including several tours of duty on the staff of this Committee. In the late 1980s I, alongside Paul Alexander and the late Joe Tallakson, had the privilege of assisting many tribal leaders in giving shape to what became the federal Indian policy of tribal self-governance. Congressmen Mo Udall, Sid Yates and Ben Nighthorse Campbell, and Senators Dan Evans, John McCain, and Dan Inouye, among others, gave great leadership to this cause. The mission was to transform the historically dependency-ridden federal Indian services delivery system into a government-to-government relationship that would return power, authority, responsibility, accountability and funding to tribal governments at the local level.

Since then, I have had the good fortune to assist tribal clients in the negotiation of dozens of compacts and annual funding agreements from those first negotiated in 1991 to one negotiated just three weeks ago. Watching tribal leaders develop this initiative from the ground up has been one of my greatest professional joys. And the story remains unfinished -- I firmly believe the experience of tribal self-governance has much more to offer the field of federal-Indian relations.

Interior Self-Governance In a Nutshell. As of FY 2004, the Department of the Interior has entered into compacts with 227 tribes under 83 separate agreements covering an estimated $305 million. By all accounts, self-governance has been successful in improving both the quality and quantity of services provided at the tribal level and in assisting tribal governments in developing administrative and managerial skills and acumen that are transferable to other tribal efforts to create sustainable tribal economies.

Conceived in Idealism. The roots of Indian self-determination and tribal self-governance run deep and in different directions of American legal and political history. But its tap root was formed most dramatically by a somewhat unlikely American President, who said: "WE MUST MAKE CLEAR THAT INDIANS CAN BECOME INDEPENDENT OF FEDERAL CONTROL WITHOUT BEING CUT OFF FROM FEDERAL CONCERN AND FEDERAL SUPPORT." PRESIDENT RICHARD M. NIXON, JULY 8, 1970.

With these words some 34 years ago, President Nixon proclaimed a new era in Indian affairs, that of self-determination for Indian tribes and people. Self-determination was intended to reject the previous federal policy and practice of persecution, termination and paternalism.

Congress soon thereafter codified the principles of Indian self-determination, enacting the Indian Self-Determination and Education Assistance Act (Public Law 93-638) ("ISDEA") in 1975. In the years since then, “638” has guided federal Indian policy and shaped its strategic goals.

The “638” Act encourages the Secretaries of the Department of the Interior and the Department of Health and Human Services to “contract out” to tribes and tribal organizations the operation of federally-funded programs benefiting Indians.

The “638” Act has been amended numerous times, most significantly in 1988, 1991, 1994 and 2000. In each case, the stated intent of Congress in amending the Act was to support efforts by tribes to assume administrative responsibility for the delivery of federally-funded programs, functions, services, and activities. In some instances, this meant providing special authority to tribal governments. In most instances, it meant curbing the power and ability of federal agencies to interfere with tribal program authority.

Born in Federal Failure. Notably, Congress has always amended the Act in response to tribal requests, usually in the context of a specific failure by the federal agencies. In particular, the 1988 tribal self-governance amendments were a congressionally-imposed, tribally-driven set of authorities in reaction to a series of newspaper investigation reports that revealed rampant corruption, waste, inefficiency, and pointless regulatory burdens within the Bureau of Indian Affairs bureaucracy. When complaining tribal leaders were asked by congressional leaders what was an effective solution, the tribal leaders proposed a self-governance model by which tribes would have broad negotiation and operational authority to assume administrative responsibility for virtually all programs, functions, services and activities previously carried out for tribes by federal officials.

How Self-Governance Works. The self-governance provisions of the ISDEA authorize tribes to "compact" with the federal government, specifically the Departments of the Interior and the Department of Health and Human Services, to administer virtually all aspects of federal programs that are operated by those departments for the benefit of that tribe. The statute permits self-governance tribes to redesign the federal programs and, where necessary, redistribute funds among the different programs they operate. This flexibility, with authority transferred to the service-delivery level under the control of the beneficiaries themselves, is the hallmark of tribal self-governance.

The concept is similar to that of a block grant. Rather than the federal government micro-managing Indian tribes, it contracts with tribes to perform those functions. Like state governments, tribal governments tend to know best how federal programs and dollars can best serve their local communities and meet locally-determined priority needs.

Tribes are authorized in statute to plan, conduct, consolidate, and administer federally-funded programs, services, functions, and activities according to priorities established by tribal governments. Tribes have greater

control and flexibility in the use of these funds, streamlined reporting requirements, and authority to redesign or consolidate programs, services, functions, and activities. In addition, tribes receive lump sum funding and may reallocate funds during the year and carryover unspent funds to the next fiscal year. As a result, tribes are able to more efficiently and effectively use the funds to address unique tribal conditions and circumstances as they arise. Self-governance tribes are subject to annual trust evaluations to monitor the performance of trust functions they perform. They are also subject to annual audits pursuant to the Single Audit Act and OMB Circular A-133.

Underlying Philosophy of Tribal Self-Governance. The rationale for tribal self-governance has always been that the best government is the government closest to the governed, and the best service delivery is done by those closest to the served. Both rationales fit the situation of tribal governments.

It is a bitter irony that much of the federal funding appropriated each year does not reach the stark, socio-economic needs of many Native American Indian communities. One of the main reasons is that the lion share of those funds is spent far away from Indian communities. One thing can be sure, once a tribal government receives federal dollars under a self-governance agreement, those funds are spent and churned right there in the targeted Indian community rather than in some distant city bureaucracy or research park.

When a tribal government serves its own members –

- There are no cross-cultural or language barriers;
- There is common sense responsiveness to changing needs;
- There is greater potential for maximum flexibility and efficiency;
- There is direct accountability to those served.

Crippling Mis-Perceptions About Self-Governance. One of the biggest fictions that has dogged the expansion of tribal self-governance is that an expensive and time-consuming federal monitoring, reporting, and oversight bureaucracy is needed to ensure that a tribe does not squander the scarce federal dollars it administers. What this fails to acknowledge is the tribal logic that persuaded the Congress to birth tribal self-governance policy in the late 1980s – there is no greater accountability pressure than that of the tribal voters themselves. If tribal members are not satisfied with the services they receive, they are able to organize and vote out the tribal leaders who have failed them. Tribal elections are an ultimate and effective accountability tool. No such accountability exists when a federal government staffer fails to provide satisfactory service. Failing federal bureaucrats have the shelf-life of a nuclear fuel rod. They seemingly cannot be removed or disciplined. When the chain of

command is far from the reach of the Indian community served, the quality and quantity of the federal service often deteriorates to that of an afterthought.

Congress in enacting self-governance was convinced of the wisdom of a Russian dictum spotlighted in another context by former President Reagan – "trust, but verify". Self-governance tribes must annually report on their performance objectives and submit to a comprehensive Single Audit Act audit. This bare minimum reporting and audit oversight structure verifies that funds are applied appropriately. Anything more is a waste of federal dollars and diverts funds necessary for direct services.

Another fiction that has bedeviled the advance of tribal self-governance is that good ideas only come from the top down. This ivory tower approach to federal Indian service delivery has trapped Indian Country in a status quo that should be unacceptable. It has created federal careers. It has fueled a growth industry in consultants and study-makers. But, most critically, it has failed Indian Country. The answers must come from tribal leaders who answer to those on the front lines.

Still other crippling myths abound – most notably that a tribe's assumption of self-governance responsibilities must of necessity reduce the federal government's trust responsibilities. In the early days of self-governance, this notion was put forward by federal adversaries of tribal self-governance as a poison pill or as a shameless way to shirk a legal duty owed to tribes. Congress responded with a clear affirmation that nothing in the self-governance title "shall be construed to diminish the Federal trust responsibility to Indian tribes… ." 25 U.S.C. 458ff(b). This principle must be held inviolate in statute and in practice.

Relevance of Self-Governance to Trust Reform. Trust reform has been one of the hotter Federal-Indian policy debates in recent years. Left unheeded in this debate, however, are the lessons of more than a decade of tribal self-governance: the most effective and accountable service delivery is at the local level.

The trust reform plans of recent years seem to be driven more by adversarial litigation shadow boxing than by approaches that make sense at the service provider level in Indian communities. Federal plans lurch from magic bullet to bullet (remember TAAMS, the much-heralded now abandoned computerized BIA trust record system that crashed on startup and never recovered?), coming and going with greater frequency than Assistant Secretaries. Building a large, centralized superstructure to handle trust reform efforts has a certain appeal. But it reverses the direction proven to be so successful by self-governance tribes, which is to delegate down (not up) the

ladder enough authority to make trust decisions and enough money to do it right. It is far easier to grow a Central Office than it is to shrink it.

The experience of tribal self-governance would encourage the lion share of trust reform funding to focus first on building up capacities at the reservation and Native community levels. That level is where tribal governments most effectively administer programs. It is not the level where magic bullets are touted, powerful kingdoms are assembled and fancy acronyms are spawned. Instead, it is at the level where proper records are generated and kept. Squatters are ousted. Thieves are caught. Rightful owners are paid. Needy people are served. And decisions are made most efficiently because all of the interested parties are right there on the doorstep on a daily basis informing the action. In other words, the most effective trust reform, where the biggest bang for the federal trust reform dollar can be found, is in Indian Country in the hands of tribal governments whose record of successful self-governance on trust matters compares very favorably to the failures of the federal agencies.

Tensions In Negotiating a Transfer of Power. It should be no surprise that tensions arise when a tribe seeks to assume a program, function, service or activity previously carried out by a federal agency office. Federal officials are understandably reluctant to sit down at the table to negotiate away their own authority, sphere of influence, and at times, even their own jobs. Yet that is exactly how the negotiation of self-governance agreements typically plays out.

Tribes typically are faced with federal negotiating partners who act like their own jobs are at stake if the tribe succeeds in negotiating a self-governance agreement. Sometimes their jobs are at issue. This raises some very delicate challenges for both the tribes and the federal officials. The human dimensions of career paths, home mortgages, children's schools, and community ties overwhelm all thought of what is the most efficient and sound approach, which is tribal control of tribal service delivery systems. From personal experience with countless negotiations, I am convinced that this factor more than any other has contributed to federal intransigence in concluding agreements consistent with the letter and spirit of the Act. While federal workers' personal situations can and do engender great sympathy, change like this is a normal and expected part of life. The priority must be to get the job done in the best possible fashion. Federal job protection is not the priority. And like with trade adjustment assistance, the "638" Act has ample provision for protection federal workers who are right-sized out of their present positions because of tribal assumptions of programs under the Act.

II. S. 1715 – THE DEPARTMENT OF INTERIOR TRIBAL SELF-GOVERNANCE AMENDMENTS OF 2003

Like the "638" amendments codified in 1988, 1991, 1994, and 2000, S. 1715 is the product of a several year effort of tribal leaders and their staff to improve the statutory basis for tribal self-governance. A tribal leaders task force, led by the Honorable Ron Allen, Chairman, Jamestown S'Klallam Tribe, prepared version after version of the language that eventually was introduced as S. 1715.

The language of S. 1715 has been reviewed and revised after countless meetings of tribal representatives for the past three years. And it has been the subject of ongoing discussion and negotiation with representatives of the Department of the Interior.

Much of S. 1715 is informed by the experience and insight gained by tribal representatives in the development to enactment of the 2000 amendments that apply to the Department of Health and Human Services (Title V of the "638" Act, now codified at 25 U.S.C. 458aaa et seq.). In fact, over 90% of the actual text of S. 1715 is virtually identical to that found in Title V as enacted. Put another way, S. 1715 will amend Title IV in ways that will make it consistent with the provisions of Title V that were enacted in 2000.

S. 1715 amends Title IV of the "638" Act, the title that has dealt with the Department of the Interior since 1994. In addition to providing a very necessary update to Title IV, S. 1715 addresses problems with the sections of the statute governing non-BIA programs and construction. What follows is a brief overview of the provisions of the bill.

Section 403 would allow any tribe meeting the eligibility requirements to participate in self-governance.

Section 404 would require the Secretary to negotiate and enter into compacts with participating tribes.

Section 405 would facilitate tribes compacting for BIA and Office of the Special Trustee (OST) programs, functions, services and activities (PFSAs). Tribes would also, as in current law, be able, at the Secretary's discretion, to compact for non-Indian PFSAs in which the tribe has a special geographic, historical or cultural interest. The tribes have asked that an additional sub-paragraph (C) be added to Section 405(b)(1) after line 10 at page 15 of the printed bill introduced October 3, 2003, so as to read:

> Section 405(b)(1) (C) Programs described in subparagraph (A) shall include, at the option of a

> tribe, all programs (or portions thereof) that restore, maintain or preserve a resource (for example fisheries, wildlife, water, or minerals) in which a tribe has a federally reserved right: Provided, that the Secretary shall make available a proportional share of the funding of such a program (or portion thereof) that the Secretary would otherwise provide to restore, maintain or preserve such a resource in an amount equal to the proportional share of the resource that is associated with the tribe's federally reserved right.

After completing the work on S. 1715 in advance of introduction, the tribal drafting team realized that it did not adequately address some non-BIA programs that tribes should be entitled to include in funding agreements because those programs are related to treaty or federally reserved tribal rights. The foregoing language would resolve this issue.

Section 406 would require compacting tribes to have measures in place to avoid conflicts of interest, and would facilitate tribal consolidation and redesign of programs and reallocation of funds by eliminating the need for a joint agreement with the Secretary for such reconfiguration. These provisions track the authorities extended by Congress in Title V to the Indian Health Service (IHS).

Section 407 would 1) provide tribes with notice and an opportunity to correct problems before the Secretary may reassume PFSAs, 2) limit the grounds on which the Secretary can reject a tribe's final offer, 3) place the burden of proof on the Secretary to show the validity of rejecting an offer or reassuming a PFSA, and 4) require liberal interpretation of compacts and funding agreements for the benefit of tribes. Here again, these provisions track the authorities extended by Congress in Title V to IHS.

Section 408 would clarify the responsibilities and procedures for tribes undertaking construction projects under Title IV, including compliance with building codes, reporting requirements and prevailing wage laws. Here again, with some adaptation to the unique features of Interior responsibilities, these provisions track the authorities extended by Congress in Title V to IHS.

Section 409 would clarify a number of payment issues, authorizes multi-year funding agreements, and allows tribes to carry over unexpended funds without reducing their entitlement in the next year. Here again, these provisions track the authorities extended by Congress in Title V to IHS.

Sections 410, 411 and 412 track existing Title IV provisions.

Section 413 would provide tribes with the option of incorporating into Title IV compacts any provisions of Titles I or V.

Section 414 would revise the budget request process so that the President identifies all funds necessary to fully fund funding agreements authorized by Title IV, and the Secretary must ensure the request includes funds for planning and negotiation grants and identified shortfalls.

Section 415 would make more specific the required contents of the Secretary's annual Title IV report, including unmet needs and amount spent on inherent federal functions, and would require an annual report on non-BIA PSFAs eligible for compacting, including those PSFAs of special significance which tribes requested to assume under section 405(b)(3) .

Section 416 would repeal the current Title IV regulations at 25 CFR Part 1000 and authorize new negotiated rulemaking by a committee of federal and tribal representatives.

Section 417 would clarify that a tribe is not bound by any internal agency policy or guidance manuals, unless the tribe expressly agrees to be bound. Here again, these provisions track the authorities extended by Congress in Title V.

Section 418 would provide administrative and appeal procedures. Here again, these provisions track the authorities extended by Congress in Title V.

Section 419 provides an authorization of appropriations.

III. Conclusion

The Indian tribes actively participating in self-governance have urged the Congress to enact S. 1715. They have likewise thanked this Committee and its able leadership and staff for your longstanding commitment to making tribal self-governance an even greater reality.

This concludes my written testimony. I thank you for this opportunity to testify and I would be pleased to answer any questions the Committee may have.

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