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Oversight Hearing on “the Indian Reorganization Act-- 75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination”

June 23, 2011

I would like to thank you Chairman Akaka, Vice Chairman Barrasso, and the other distinguished members of the Committee on Indian Affairs for the invitation to provide testimony on the Indian Reorganization Act.¹ I am honored to be here before you today. I have been asked to focus my testimony on the 1994 Amendments to the Indian Reorganization Act, which amended Section 16 of the Indian Reorganization Act to add subsections (f) and (g) to the Act.² Subsection (f) prohibits the Secretary of the Interior and other Departments and agencies of the United States from promulgating any regulation which “classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.”³ Subsection (g) provides that “[a]ny regulation, administrative decision, or determination of a Department or agency of the United States that classifies, enhances, or diminishes the privileges and immunities” of an Indian tribe relative to the privileges and immunities of other federally recognized Indian tribes shall have no force or effect.⁴ These provisions were added as a Senate floor amendment to S. 1654, the Technical Corrections Act of 1993, which became Public Law 103-263.

Early in the 103rd Congress, this Committee and the House Subcommittee on Native American Affairs determined that these amendments were necessary to curb efforts on the part of the Administration to classify or categorize Indian tribes as either “historic” and therefore entitled to the full panoply of inherent sovereign powers not otherwise divested by treaty or Congressional action or “created” and therefore possessing limited sovereign powers “derived from the primary federal interest in benefiting Indians, not from the historical status of the group.”⁵ The Committees became aware of the evolving practice of the Department of Interior

¹ 25 U.S.C. §461 *et seq.*

² 25 U.S.C. §476 (f)&(g), Public Law 103-263.

³ 25 U.S.C. §476(f).

⁴ 25 U.S.C. §476(g).

⁵ See page 12 of the April 30, 1993 Hearing Record of the House Subcommittee on Native American Affairs on H.R. 734, to amend the act entitled “An Act to Provide for the Extension of Certain Federal Benefits, Services, and

to classify federally recognized Indian tribes as either “historic” or “created” pursuant to Section 16 of the Indian Reorganization Act. This practice came to light as a result of the efforts of the Pascua Yaqui Nation of Arizona to amend their tribal constitution.⁶ In reviewing the proposed amendments to the tribal constitution, the Department of Interior took that occasion to review the status of the Pascua Yaqui Nation, a federally recognized Indian tribe, and made the determination that it was not a “historic” tribe but rather a “created” one. In making this determination, the Department applied the definition of a historic tribe set forth in the federal “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe”⁷ to the Pascua Yaqui Nation to determine whether it qualified as a “historic” tribe or a “created” one. It should be noted that the Federal Acknowledgement Procedures relied upon by the Department specifically exclude “Indian tribes, organized bands, pueblos, Alaska Native Villages or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs.”⁸ As a federally recognized Indian tribe, the Pascua Yaqui Nation is specifically exempt from these procedures.

Once the Department had made the determination that the Pascua Yaqui Nation was “created” rather than “historic,” the Department could then make a determination on whether the Pascua Yaqui Nation possessed the inherent sovereign powers set forth in its proposed amendments to its tribal constitution. In the Department of Interior’s response to the Pascua Yaqui Nation, the Department discussed the distinctions between “historic” and “created” tribes:

The Department of the Interior’s (Department) position on historic tribes versus adult Indian communities represents a longstanding interpretation of the law and historical factual differences between groups of Indians and the policies of the Department. Since the passage of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), the Department has held that adult Indian communities may not possess all of the same attributes of sovereignty as a historic tribe. ... A historic tribe has existed since time immemorial. Its powers derive from its

Assistance to the Pascua Yaqui Indians of Arizona, and for Other Purposes” for the prepared statement of Carol A. Bacon, Director, Office of Tribal Services, Bureau of Indian Affairs.

⁶ Both Committees also heard from a number of federally recognized Indian tribes in California, who had also been subject to the same administrative diminishment through reclassification by the Department of the Interior. See page 16 of the April 30, 1993 Hearing Record of the House Subcommittee on Native American Affairs on H.R. 734, to amend the act entitled “An Act to Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, and for Other Purposes” for the exchange between Chairman Richardson and the Acting Director of the BIA Office of Tribal Services.

⁷ 25 C.F.R. §83.1.

⁸ 25 C.F.R. §83.3(b).

unextinguished, inherent sovereignty. Such a tribe has the full range of governmental powers except where it has been removed by Federal law in favor of either the United States or the state in which the tribe is located. By contrast, a community of adult Indians is comprised of simply Indian people who reside together on trust land....The authority of a community of Indians residing on the same reservation has been held generally not to include the power to condemn land of members of the community, the regulation of inheritance of property of community members, the levying of taxed upon community member[s] or others, and the [r]egulation of law and order.⁹

The position articulated by the Department of the Interior was based on two Solicitor's Opinions interpreting Section 16 of the Indian Reorganization Act.¹⁰ The first Solicitor's Opinion was issued on October 25, 1934 by Solicitor Margold in response to inquiries at the time regarding what sovereign powers are possessed by Indian tribes and which powers can be incorporated into tribal constitutions and by-laws pursuant to Section 16 of the Indian Reorganization Act.¹¹ The opinion surveys a number of court decisions which recognize the various sovereign powers of Indian tribes as well as various statutory authorities articulating the powers of self-government of Indian tribes. Solicitor Margold opines that Indian tribes possess "those powers of local self-government which have never been terminated by law or waived by treaty."¹² The Solicitor concludes that included in the sovereign powers of Indian tribes is the power to adopt a form of government and procedures for the election and removal of tribal officers; to define membership; to regulate domestic relations of members of the tribe; to prescribe rules of inheritance with respect to personal and real property; to assess taxes; to remove and exclude non-members of the tribe from the reservation; to regulate the use and disposition of property within the reservation; to administer justice regarding all disputes and offences among members of the tribe; and to prescribe the duties and regulate the conduct of federal officials provided such authority has been delegated by the Department of the Interior to the Indian tribe.¹³

The second opinion providing the legal foundation for the Department's practice of administratively diminishing the sovereign powers of federally recognized Indian tribes through

⁹ December 3, 1991 Letter from Carol A. Bacon, Acting Director, Office of Tribal Services, Bureau of Indian Affairs, to the Honorable Arcadio Gastelum, Chairman, Pascua Yaqui Tribal Council.

¹⁰ Id.

¹¹ Id.

¹² Page 36, Department of Interior Solicitor's Opinion issued on October 25, 1934, 55 I.D. 14; 1DOINA 445; 1934 DOINA Lexis 260.

¹³ Id. at page 37.

reclassification, is a one page memorandum to the Assistant Commissioner of Indian Affairs issued on April 15, 1936 regarding tribal elections on the proposed constitutions of the Lower Sioux Indian Community and the Prairie Island Indian Community in Minnesota.¹⁴ In its review of the proposed constitutions of both the Lower Sioux Community and the Prairie Island Community, the Solicitor's Office opines that:

Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical Indian tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and its carrying on of business, and those which may have been delegated by the Secretary of the Interior.¹⁵

The Solicitor concludes that neither tribe possesses the power to condemn land of its members; to regulate the inheritance of tribal members' property; and to assess taxes.¹⁶ It is this opinion that forms the basis for the Department's efforts to administratively diminish the sovereign authority of certain federally recognized Indian tribes by reclassifying such tribes as "created" tribes. It is the height of irony that the Department relies upon the authorities contained in the Indian Reorganization Act, an Act intended to strengthen and revitalize tribal governments and to reverse the impacts of the federal policy of assimilation, to administratively diminish the sovereign authority of certain federally recognized Indian tribes. The views of the Department in advancing this artificial distinction between federally recognized Indian tribes represents a significant departure from the congressional intent and purpose of the Indian Reorganization Act and is reminiscent of the very policies of assimilation that the Indian Reorganization Act was intended to address. Further, the Department's reliance on the Solicitor's April 15, 1936 memorandum was misguided since Section 16 of the Indian Reorganization Act was amended by Congress in 1988 to eliminate the references to Indians residing on a reservation and clarify

¹⁴ Page 1, Department of Interior Solicitor's Opinion issued on April 15, 1936, 1 DOINA 618; 1936 DOINA Lexis 436.

¹⁵ Id.

¹⁶ Id.

that “any Indian tribe is entitled to organize for its common welfare, and may adopt an appropriate constitution and bylaws.”¹⁷

In hearings before the House Subcommittee on Native American Affairs the Department of Interior relied on the April 15, 1936 memorandum to support its determination that the Pascua Yaqui Nation, as a “created” tribe, does not possess the inherent power to regulate law and order, except where that authority has been delegated by the Secretary. The Department found that the Pascua Yaqui Nation did not possess inherent sovereign powers, including the power to condemn land, to regulate inheritance of tribal member’s property, and to assess taxes.¹⁸ In rejecting the position advanced by the Department of Interior that the Pascua Yaqui Nation was a “created” tribe, the Congress enacted P.L. 103-357 to clarify that the Pascua Yaqui Nation “a historic tribe, is acknowledged as a federally recognized Indian tribe possessing all the attributes of inherent sovereignty which have not been specifically taken away by Acts of Congress and which are not inconsistent with such tribal status.”¹⁹

This Committee and the House Subcommittee on Native American Affairs recognized that the issues confronted by the Pascua Yaqui Nation were not isolated, but part of a larger effort of the Department of Interior to apply this distinction of historic/created tribes to a large cross section of federally recognized Indian tribes. It had been the practice of the Department that when Indian tribes submitted proposed amendments to their tribal constitutions to the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act, the Department would first determine if the Indian tribe was “historic” or “created.” Those Indian tribes determined to be “created,” like the Pascua Yaqui Nation, were found not to possess the full panoply of sovereign powers of other federally recognized Indian tribes. In testimony before the Subcommittee on Native American Affairs, Department of Interior witnesses testified that in addition to the Pascua Yaqui Nation there were a number of other “created” tribes, however, when requested by the Subcommittee to provide a list of “created” tribes, the Department could not.²⁰ In his floor statement during the consideration of S. 1654, Senator McCain comments on the Department’s classification of “created” tribes:

At the same time, the Department insists that it cannot tell us which tribes are created and which are historic because this is determined through a case-by-case review. All of this ignores a

¹⁷ 25 U.S.C. §476(a), see P.L. 100-581.

¹⁸ December 3, 1991 Letter from Carol A. Bacon, Acting Director, Office of Tribal Services, Bureau of Indian Affairs, to the Honorable Arcadio Gastelum, Chairman, Pascua Yaqui Tribal Council.

¹⁹ 25 U.S.C. 1300(f)(a).

²⁰ See page 15 of the April 30, 1993 Hearing Record of the House Subcommittee on Native American Affairs on H.R. 734, to amend the act entitled “An Act to Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, and for Other Purposes.”

few fundamental principles of Federal Indian law and policy, Indian tribes exercise powers of self-governance by reason of their inherent sovereignty and not by virtue of a delegation of authority from the Federal Government. In addition, neither the Congress nor the Secretary can create an Indian tribe where none previously existed...The recognition of an Indian tribe by the Federal Government is just that – the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations. Over the years, the Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of Federal courts, acts of Congress, and administrative action. Regardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority.²¹

In enacting P.L. 103-263 Congress reasserted its plenary authority over Indian affairs by prohibiting any departments or agencies of the federal government from promulgating any regulation, rule or make any decision or determination pursuant to the Indian Reorganization Act “that classifies, enhances, or diminishes the privileges and immunities available”²² to federally recognized Indian tribes because of their status as Indian tribes. In his floor statement during the consideration of S. 1654, Congressman Richardson discussed the threat presented by the Department’s administrative diminishment of Indian tribes:

“Mr. Speaker, there is great danger in a policy wherein the Department of the Interior and the Bureau of Indian Affairs are allowed to limit the inherent sovereign authority of Indian tribes by the Solicitor’s pen. If carried to an extreme, the Solicitor could by fiat significantly erode tribal sovereignty through a series of opinions and carry out his or her own termination policy. With the exception of the framework imposed by the judicial branch, the formulation of Indian policy is virtually the sole province of the Congress and Indian tribes. The Congress has never acknowledged distinctions in or classifications on inherent sovereignty possessed by federally recognized Indian tribes. Tribal sovereignty must be preserved and protected by the

²¹ Statement of Senator John McCain on the consideration of S. 1654, 140 Cong. Rec. S6146, May 19, 1994.

²² 25 U.S.C. §476(f).

executive branch and not limited or divided into levels which are measured by the Bureau of Indian Affairs and the Department of the Interior. We must not revisit the darkest period of Federal Indian policy by allowing the termination of tribal sovereign authority through the implementation of the Bureau of Indian Affairs policy distinction between historic and created Indian tribes.²³

The Congress rejected the artificial distinction of “historic” and “created” tribes and made clear that any regulation, rule or administrative decision “that classified, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to other federally recognized Indian tribes..... shall have no force and effect.”²⁴ The Congress intended these provisions to “void any past determination by the Department that an Indian tribe is created and would prohibit any such determinations in the future.”²⁵

The work of this Committee and the House Subcommittee on Native American Affairs during the 103rd Congress was not over as the Committees were presented with yet another effort by the Department to terminate and/or diminish tribal sovereign authority. The Secretary of the Interior is required to publish a list of federally recognized Indian tribes in the Federal Register. It had been the practice of the Secretary to publish the list at irregular intervals and leaving a number of federally recognized tribes off the list. In some cases this practice of leaving certain federally recognized tribes off the list was inadvertent and in others it was by design.²⁶ When an Indian tribe was not on the published list of federally recognized Indian tribes, it was no longer eligible for a range of federal programs and benefits not the least of which is program funding and services from the Bureau of Indian Affairs. In addition, most other federal agencies utilize the published list to determine tribal service populations and funding eligibility. Indian tribes left off the published list were denied federal benefits and services and their governmental status called into question. In response to the denial of services to federally recognized Indian tribes, the Congress passed the “Federally Recognized Indian Tribe List Act of 1994.”²⁷ This Act amended the Indian Reorganization Act to require the Secretary to publish a list of all federally recognized Indian tribes annually in the Federal Register.²⁸ The intent of the Congress underlying these amendments to the Indian Reorganization Act are set out in the

²³ Statement of Congressman Richardson on the consideration of S. 1654, Cong. Rec. H3803, May 23, 1994.

²⁴ 25 U.S.C. §476(g).

²⁵ Statement of Senator Daniel Inouye on the consideration of S. 1654, 140 Cong. Rec. S6147, May 19, 1994.

²⁶ The Committees heard from a number of federally recognized Indian tribes in California as well as the Central Council of Tlingit and Haida Indian tribes of Alaska that had been left off the published list and were being denied federal services.

²⁷ 25 U.S.C. §479a & 479a-1; P.L. 103-454.

²⁸ 25 U.S.C. §479a-1(b).

findings which recognize Congress' plenary authority over Indian Affairs and the federal trust responsibility to all federally recognized Indian tribes.²⁹ The findings also state that a federally recognized Indian tribe may not be terminated except through an Act of Congress.³⁰ The Act requires the Secretary to ensure the that list reflects all of the federally recognized Indian tribes eligible for the special programs and services provided by the United States to Indians because of their status as Indians.³¹ In his floor statement during the consideration of the Federally Recognized Indian Tribe List Act of 1994, Congressman Thomas expressed concern that the measure did not go far enough to prevent continued efforts by the Department to "de-list" or administratively terminate Indian tribes:

Mr. Speaker, I predict that our lack of action today will come back to haunt us. Although the findings section of the title makes clear that only Congress has the authority to derecognize a tribe, findings are not legally binding. Until we make the prohibition unequivocal and give it the force of law, we will continue to be faced with the prospect of the BIA usurping our authority.³²

The concerns expressed by Congressman Thomas regarding the Administration usurping Congress' plenary power are reflective of the "read & react" interplay between the Congress and the Administration in the articulation of federal Indian policy, where Congress is regularly called upon by Indian tribes to exercise its plenary authority over Indian affairs in response to an overreaching administrative action. A further example of this interplay between the Congress and the Administration occurred during the 108th Congress when Congress adopted amendments to the Indian Reorganization Act to make clear that Indian tribes retain their inherent sovereign authority to organize and adopt governing documents outside the authorities of the Indian Reorganization Act.³³

In the 75 years since its enactment, the Indian Reorganization Act has stood as an enduring bulwark against efforts to infringe upon and diminish the sovereign powers of Indian tribes. While Congress has had to periodically revisit the Indian Reorganization Act to shore up and clarify certain provisions of the Act as evidenced by the various amendments enacted in the 103rd Congress and again in the 108th Congress,³⁴ the Indian Reorganization Act continues to stand for the principles articulated by the Congress those many years ago: to revitalize tribal

²⁹ P.L. 103-454, Section 103(1)&(2).

³⁰ P.L. 103-454, Section 103(4).

³¹ P.L. 103-454, Section 103 (8).

³² Statement of Congressman Thomas on the consideration of .R. 4180, Cong. Rec. H10490, October 3, 1994.

³³ P.L. 108-204, Section 103.

³⁴ See P.L. 103-263, which added subsections §476(f) & (g); P.L. 103-454, which added subsection §479a and §479a-1; P.L. 108-204, which added subsection §476(h).

governments, to encourage tribes in the exercise of their inherent sovereign authority and powers of self-government, to assist tribe in the restoration of their tribal land base and to promote tribal economies.

This concludes my prepared statement. I would be happy to answer any questions the Committee may have.