

**TESTIMONY OF ROSS O. SWIMMER, FORMER ASSISTANT SECRETARY OF THE
INTERIOR, INDIAN AFFAIRS - 1985-1989
PRINCIPAL CHIEF, CHEROKEE NATION OF OKLAHOMA - 1975-1985
CAPACITY AND MISSION OF THE BUREAU OF INDIAN AFFAIRS**

**PRESENTED BEFORE THE UNITED STATES SENATE COMMITTEE ON INDIAN
AFFAIRS**

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MISSION

The mission of the Bureau of Indian Affairs has changed dramatically from its intended mission 150 years ago to what it has become today. In fact, the mission of the Bureau has changed on average about every 25 years as American Indian policy has changed. Simply stated, the mission of the Bureau is to promote and execute the policy of the day of any given Administration and Congress dealing with American Indians and their governing organizations.

Many people believed that the “Indian Wars” would be the end of the Indian problem and that Indian reservations would isolate the few American Indians from the rest of the population so that the “savages” would be kept under control and, thereafter be of no harm to themselves or anyone else. The Bureau of Indian Affairs was established to be the overseer of these reservations, hence the name, superintendent, was used as the title for the Bureau managers. During this time, the mid-19th Century, the Indian tribes continued to govern themselves through traditional forms of governance, but superimposed over these traditional systems were the contemporaneous federal policies which generally controlled what did or did not happen on the reservations. Just as there was almost total assimilation of the tribes in the East, it was believed that assimilation would eventually subsume the rest of the Indian population once the West was fully colonized.

Many tribes such as my own, the Cherokee Nation, were subject to the removal policies of the early to mid-1800's. The intent was to relocate the tribes in one area of the country to make room for new developments in the East and West and provide a safe haven for the tribal members to live until they were gone or fully assimilated. Of course, this required uprooting people, moving them over great distances without adequate preparation, and locating them next to unfriendly groups in alien environments. But, the policy of removal was a campaign pledge by President Andrew Jackson and was not to be denied. As the military garrisons moved out, the Bureau of Indian Affairs moved in to provide the superintendency functions necessary to maintain the peace and help manage the affairs of the tribes.

Following the Civil War, great progress was made in closing the western frontier. Railroads were laying lines, the United States was giving away land to encourage settlers to move west and the tribes were still in the way. Also, nothing perceived as particularly good by federal policy makers

was happening on Indian reservations, so it was time for a change in policy. Speech after speech was given deploring the effects of reservation life and imploring Congress to make a change. That change did come in the form of the general allotment acts that were intended to complete the process of assimilation. By providing every Indian individual with an allotment of land, Indians would surely flourish, become farmers and ranchers and live in peace with their neighbors. At some point they could even buy and sell land and make choices like the rest of the people. The Bureau of Indian Affairs would change its mission to one of superintendency over the people instead of the tribes. It would now be certain that the allotments were fair and that those Indians of greater degree of blood (which indicated incompetency) would be protected in their estates from the greed and avarice of the non-Indians. In Oklahoma, allotment was carried out with but a few acres of land left to the ownership of the Indian tribes. In this instance, little regard was paid to tribal organizations because the assets had been transferred to individuals and the mission was to protect those assets. This clearly put the Bureau in the role of trustee as its primary function. In most areas outside of Oklahoma, allotment was stopped before it was completed and many tribes retained some land base, although tribal organizations were severely weakened. The primary beneficiaries of the allotment period were those who took advantage of the allottees' lack of knowledge about land ownership and managed to get the title transferred from the Indian allottee to a non-Indian. In Oklahoma, it is estimated that 80% of the land of some tribes was transferred from Indian ownership within five years of allotment. Since competency was generally based on one's degree of Indian blood, the Bureau was only "protecting" those of one-half degree of blood or more, and often unsuccessfully.

After statehood of Oklahoma, Indian tribes virtually vanished from the scene. All the reservations in Oklahoma had been terminated and the Five Civilized Tribes were subject to the 1906 Act, an act to wind up the affairs of the Five Civilized Tribes and terminate their governments. It also was during this time that the mission of the Bureau became more confused. In Oklahoma, it was almost exclusively for the protection of the individual Indian while other areas still had a superintendency function involving tribal estates as well as allottees. Yet federal policy was singular and did not distinguish between Indian areas. Although the state of Oklahoma assumed some of the legal jurisdiction over its Indian population, there was still federal control over certain aspects such as probating restricted Indian estates, approval of oil and gas leases, sale and leasing of land and accounting for funds derived from Indian lands. Not until the 1970s did Indian tribes begin to reassert their sovereignty in Oklahoma, aided in great measure by the federal funding policies toward Indian tribes and various U.S. Supreme Court decisions.

Policy again changed in the early part of the 20th Century. Too much Indian land was leaving Indian ownership and former reservations were beginning to be occupied by more and more non-Indians. The following excerpts from *The Historian, XLIII (May 1981)* reflects on the work of Lewis Meriam in his famous investigative report directed by the Secretary of Interior Hubert Work in 1926. "Fieldwork began on November 12, 1926, and the Meriam team completed its report in February 1928. It was hailed as "the most important single document in Indian Affairs since Helen Jackson published her *Century of Dishonor* fifty years ago." The report detailed the deplorable living conditions of the Indians. "An overwhelming majority of Indians are poor,

extremely poor,” the report began, “and they are not adjusted to the economic and social system of the dominant white civilization.” The Problem of Indian Administration went on to indict the Indian Service in 872 pages that reported many Indians literally dying because of neglect, Indian children abused in government schools, and tuberculosis and trachoma so prevalent that the survey members feared the risk of their spreading to whites. Contrary to the rhetorical statements of the Indian Service, the study concluded that with the Indians having an average annual per capita income of only \$100, there was “altogether too much evidence of real suffering and discontentment to subscribe to the belief that Indians are reasonably satisfied with their condition. The amount of serious illness and poverty is too great to permit real contentment.”

Meriam went on to say, “I have always regarded the complete reorganization of the headquarters the key to the whole situation because it controls everything else.” He understood at the very outset that the Indian Service would be extremely difficult to reform because of “its age, its size, its diversity of subject matters, its dispersion over twenty-six states with more than two hundred tribes, its political ties, and its low state of efficiency.” The Meriam Report was also critical of the allotment system established under the Dawes Act. “It almost seemed,” the study conjectured, “as if the government assumed that some magic in individual ownership would in itself prove an educating factor.” “Critical of the land allotment system, Collier (John Collier, later to be named Commissioner of Indian Affairs) and the Indian Defense Association urged a radical shift in Indian policy away from individual land ownership to corporate tribal ownership.”

The answer was to help tribes reorganize. Thus, the 1934 Indian Reorganization Act and the follow-up 1936 Oklahoma Indian Welfare Act were enacted into law. There was a process for adopting constitutions, forming economic development corporations and borrowing money from the Bureau of Indian Affairs. Within limits, the tribes were free to do as they chose and the Bureau would provide financial and managerial support. The mission had changed again. Overnight the Bureau was supposed to change from being the superintendent to an educator and promoter. Its goal was now self sufficiency of these newly reorganized tribes. Some even thought that this would be the end of the Bureau as it would soon no longer be needed. However, with new federal programs to administer to assist with tribal self sufficiency and the need to be ever vigilant for the individual restricted Indians, the Bureau became even stronger.

Perhaps World War II was the greatest leveling event for Indian affairs. Many Indian people distinguished themselves during the War and there was a growing belief that these people did not need the protection of the U.S. government. In addition, the Cold War, anti-Communism era led to a backlash against what were perceived as socialist tribal governments and promotion of the termination/urban relocation movement. As a result of this and other changing circumstances, Indian policy changed again about 1950. The Bureau was tasked with the mission of assimilating individual Indians into every day life. Reservations were too isolated, the new governments that were organized were seen as unsatisfactory for solving problems and protecting individual rights, and they were too isolated. The answer was to promote an Indian relocation policy and encourage tribes to seek termination. Money was poured into the Bureau to subsidize anyone who wanted to leave the reservations and move to the cities. The jobs were in the cities and job training, housing,

and other assistance was available for those who would “buy in.” As a result, nearly one-half the Indian population took advantage of this opportunity and moved. Of course, many found more problems in the cities than they experienced on reservations, but most stayed. The Bureau’s mission also changed and was directed at urban Indians to help them survive in their new environment with the help of government programs largely administered by the Bureau.

The culture wars of the 1960's and the American Indian Movement brought the plight of the American Indian to the front pages once again. Indian people were not doing well in the cities and needed the culture of their tribes to nourish them and get them on their feet. For the most part, tribes and tribal land had been devastated by the federal policies in the West of damming rivers to provide water to people who wanted to farm, development of the energy business on many reservations and exploiting the other natural resources of Indian tribes. However, during the “Great Society” days, money from the federal government and private foundations began to flow in great quantities to Indian tribes and the tribes soon learned that government funding was a numbers game. The more people in need, the greater the funding. Indian people were discouraged from leaving the reservations; those who left were encouraged to return and the Bureau once again faced a changing mission. From the role of superintendent, it now became a role of provider. Housing, health care, education, economic development, trustee and social work became the new mission of the Bureau.

Soon, however, it was believed that tribes could better administer many of these functions. As a result, President Nixon and Congress enacted the “Indian Self Determination and Education Assistance Act.” Self determination for Indian tribes was to make tribes independent of the Bureau for the administration of social programs and many people believed we were finally seeing the twilight of the Bureau. However, something else had happened during the early 1970's. The most lucrative jobs on reservations were in the Bureau of Indian Affairs. Thousands of Indian people were now employed by the Bureau and it could not go away quietly. Anytime there was talk of dismantling the Bureau, the tribes would rise to be its greatest defender, while shortly before they were its greatest critic. Even when tribes “contracted” to manage Bureau programs, the Bureau remained available so that the programs could always be returned to the Bureau if a tribe tired of operating a program. Most often the people who worked in the Bureau continued working under tribal contract. The mission of the Bureau was now employment. The schools saw a dramatic increase in “teacher aides” and other nonprofessional staff and many training programs trained Indians for jobs that were nonexistent.

Many believed that self determination would provide tribes with the resources to establish sound fiscal controls and establish quality governments. This has been true only to a very limited extent. The mission of the Bureau in the last 20 years has been obfuscated. While some believe it should exercise more discipline over wayward tribal leadership, others believe it should leave the tribes alone to work out their own problems. Of course, all the tribes believe it should continue to send money to them unencumbered. When I was Assistant Secretary and had a situation regarding tribal leadership accountability, I was accused of heavy-handed tactics for letting the federal and tribal prosecutors do their jobs. The Bureau is often put in a “no-win” situation when these

controversies arise. Is the mission of the Bureau to protect tribal leadership, defend the tribal constitutions, protect federal assets, develop tribal assets or preserve tribal assets, or all the above?

The mission of the Bureau of Indian Affairs is to follow whatever policy is issued from the Administration and whatever laws are enacted by the Congress. In other words, the mission changes from year to year. Yet many Bureau employees have worked in the Bureau for a lifetime and are expected to be experts at whatever the mission of the day is. The trust activity of the Bureau has recently been under assault. It was never the mission of the Bureau to undertake the trusteeship for several hundred thousand individual Indian people. Nor was it intended that tribes would be investing billions of dollars through the Bureau. This mission of investment officer and advisor grew over 150 years with little or no guidance or resources from the Congress. As additional work load was added in the form of new dollars or Indian heirs, the Bureau tried to cope by using systems designed for a fraction of the work load to manage the new responsibility. My own initiative of privatizing the investment function of the Bureau during the late 1980's was met with intense resistance from Congress. We knew the Bureau did not have the resources to manage these funds and we also knew that by the time we were able to get through the federal procurement system to purchase the computers necessary to perform the tasks of tracking of hundreds of thousands of transactions, and the federal hiring system to bring on people with the expertise to run the computers, we would be long gone from office and not able to oversee the actual implementation of a workable trust funds management system. The best we could do was to encourage some innovation in the types of investments tribes could make to enhance the return on their deposits. The most obvious approach was to encourage tribes to withdraw their money and do their own investing. But fear of loss of the funds through inept tribal leadership was a greater fear of most tribes than the Bureau. However, when one tribal leader was recently asked if his tribe had any money in trust with the Bureau, he said he would not be the tribal leader if he did. Fractionated ownership of individual Indian lands has made the job an almost impossible task.

Today, most of the programs traditionally operated by the Bureau are also found in other agencies. The health care function was removed to the Department of Health and Human Services some years ago. The Department of Housing and Urban Development builds far more houses on reservations than the BIA repairs and replaces and the Department of Education provides greater funding for educational programs on most reservations than the BIA, with the exception of the boarding schools. The Department of Labor programs far outclass the BIA employment assistance programs in Indian country. In other words the BIA is continually in search of a mission. While some tribes are operating casinos and bingo parlors that generate tens of millions of dollars, they remain "entitled" to receive thousands of dollars in BIA program support. It is obvious that not all tribes are the same. However the BIA is expected to treat them the same even when the outcome is means more inefficiencies or worse.

I came to see the mission of the Bureau during the late 1980's and even today, as a buffer between Congress and Indian tribes. The Congress does not want to deal directly with these sovereign nations. The Congress enacts laws and mandates that the BIA execute these laws. In many

instances, the laws require regulations and the Bureau spends years drafting these proposed regulations. It then tries to implement the laws and regulations as though all tribes are the same. The tribes also view the Bureau as something to attack and often challenge the credibility of the Bureau before Congress, implying that the Bureau is not doing what it should to protect the resources of the tribes. In fact, tribes are often the ones who implore the Bureau to waive regulations that they perceive hamper the tribes' ability to use their resources. An example is when leasing regulations require that the BIA not lease surface agricultural land at less than appraised value. When no one is willing to pay appraised value the land goes unleased and the tribe receives no revenue, although the land could have been leased for an amount minimally under the appraisal. If the BIA were to lease for less than the appraised value, the tribe could sue for breach of trust and ask the government to pay the difference. Thus, by not leasing and losing revenue for the year, the BIA is actually fulfilling its trust responsibility. Why should the BIA be the middle man? If tribes are capable of making multimillion dollar decisions regarding casinos, why are they not capable of leasing their own land?

As described earlier, the mission of the BIA is wholly dependent on contemporary federal Indian policy. We cannot determine the BIA mission without a context which is the federal policy. My goal of bringing "self-government" to the front of the agenda was to allow tribes to withdraw from the BIA entirely by taking whatever money and resources that were being used by the BIA and attributable to that tribe away from the BIA budget and have it go directly to the tribe. In that way the tribes were not forced to operate the same failed programs but rather could use the money and resources in a more effective way to address whatever the need was on their particular reservation. The plan was simple. If all tribes exercised their right to do this, the BIA simply would no longer exist except in name. There is no function the BIA performs today that could not be performed by the tribes. But are all tribes alike? Are all tribes capable? What about a recently recognized tribe of 300 members who have a billion dollars of revenue from a casino as compared to the Navajo Nation of over 200,000 population who still live in third world country conditions? Should the same policies apply to both? Should the BIA fund programs for both? It is difficult to describe the mission of the BIA because federal Indian policy is in a state of transition.

Twenty years of self-determination and self government are just about up, so it is probably time for a change in policy. The recent movement has been toward tribal sovereignty, more independence and more tribal government. The courts continue to rule in favor of tribal sovereignty and tribal courts and legal systems appear to be coming of age. The recent headlines over trust fund management would mitigate in favor of more people taking their funds out of trust as well as tribes moving to do their own investing. If Congress chooses to support these initiatives with legislation, it would appear that the mission of the Bureau should or will be greatly reduced if not eliminated. As mentioned previously, its program function has been usurped by other agencies and it is viewed by many as a hindrance to economic development on reservations rather than a help. Businesses would rather work directly with tribes and not have to wait for the lengthy approvals needed from the BIA after the agreements have already been negotiated. So as not to fall into the one-category-fits-all trap, there are tribes that do not have the population, resources or skills to provide all the governmental services the law requires on their reservations. In these

instances, some presence of the Bureau will be needed until such time as the tribe is able to contract for services from other units of government - state, local or federal - for such things as law enforcement, education and health care.

The trustee mission will have to be phased out over time. The principal reason for many individual Indian people to remain restricted is to avoid income tax on their earnings from tribal land. This could be changed by simply removing this kind of income from taxation. The greater problem caused by remaining restricted is fractionated ownership of land and minerals. Congress could eliminate this problem by enacting a law that would streamline probates and allow individual heirs to go into state and tribal court as well as before Administrative law judges to get the probates completed. As for tribes, there is no excuse for a tribal government to have money invested through the BIA. The laws requiring this can and should be changed and some basic guidelines such as those used by federal, state and local governments should be sufficient to protect the assets. This is an excellent opportunity for Indian people to become involved in the investment industry and to organize firms to support the transition from Bureau investing of tribal funds to private investing. One such firm, Native American Investment Advisors, located in Tulsa, Oklahoma is Indian owned and has already developed an excellent track record of exceeding returns achieved by the largest investing houses.

CAPACITY

Most of this testimony has to do with the mission of the BIA. Without knowing the mission now and in the future, it is difficult to assess the capacity of the BIA to meet its mission. As it stands today the mission is to promote self-government, be a trustee for natural resources, defend the tribes from intrusions of other Department of Interior agencies, jointly oversee programs such as education and law enforcement on reservations, maintain land record titles, enforce mineral and surface leasing regulations, make loans to tribes, individuals and tribal businesses, recognize new groups desiring to become Indian tribes, oversee gaming on reservations, collect and invest monies from tribes and individuals and promote a host of conflicting policies governing Indian country.

What is the Bureau's capacity to do these things. One thing that stands out in the Bureau of Indian Affairs is its employees. During my tenure at the head of the Bureau, I was extremely impressed with the quality and dedication of an overwhelming majority of Bureau employees, most of whom are American Indian. As I explained to many of the employees at that time, my only regret was that they were not working directly for the tribes they were serving. When tribes achieve the confidence level to manage their own affairs, they should look first to Bureau employees for their work force and incorporate these seasoned veterans in everything they do. Educators are performing miracles in buildings that should have been demolished twenty years ago and with resources that are dedicated to everything but teaching. Land men are trying to help tribes generate income from tribal lands by administering laws and regulations that are out of date and the Bureau continually is forced to deal with the complexity of trust funds management with equipment and systems that became obsolete years ago. Reorganization will not help this

situation. A gradual downsizing of the Bureau with specific targeted planning as to how and when its authorities and operations will be transferred to tribes is needed. The tribes are not encumbered by antiquated purchasing and procurement systems or personnel systems as the federal government experiences. Decisions can be made more quickly and if the expertise of the Bureau employees can be transferred to tribes it is likely that tribes will do much better. Eventually, individual Indian people have to become sufficiently educated and employed so as to have choices about where they live. If tribes are doing their job, many of their members will remain on the reservations because of the strength of culture, language and family. If tribes are not able to provide a quality environment on reservation, these people will be forced to move.

The Bureau probably has the resources to operate credible schools on reservations, but it does not have the capacity to do that in the context of a jobs program. It is my belief that the Bureau has done an adequate job of collecting and investing money belonging to tribes and individuals, but it has not done a very good job of records management. It does not have the capacity to manage accounts for hundreds of thousands of individual Indians. It is lacking in resources - both people and technology. But people and technology are readily available in the private sector and should be utilized for this task as long as the task is there. I was once presented with a dilemma from an area director who was being called upon to use his judgement in approving or disapproving a major coal lease. The tribe had retained several experts as well as lawyers and had engaged in intensive negotiations over several months. The tribe and the company had come to terms and were presenting a very long and complex deal to the area director, as the law required, for his approval. His question to me was how can I or my staff possibly evaluate this agreement? To do this properly, he would need to hire the same kind of experts that the tribe had already retained and spend several months evaluating the deal. He had no money in his budget for this kind of activity and the deal might be jeopardized by the length of time it would take for his decision making. On the other hand, if he approved it without this kind of diligence, the United States would likely be sued by the tribe for breach of trust by the BIA if it did not get what it anticipated from the deal.

The Bureau, like all federal agencies, is subject to the same employment and procurement laws as everyone else. When we assessed our technology need in 1988 to upgrade the trust funds management accountability, we were told by our procurement staff that purchasing the computer equipment and software necessary to get the job done would take a minimum of two to three years. Since 1988, we all know that equipment purchased then would have been replaced at least twice with the technological advancements that have been made in the last ten years. The government simply does not move that fast. We have seen the same thing happen with Bureau schools on reservations. The condition of many schools is deplorable. If these were state schools, they would have been demolished and new schools built. However, the Bureau must wait for congressional funding and is fortunate to get one or two new schools or school improvements a year when the need is several dozen. In the private sector and non federal governmental sector, there are innovative ways of financing school projects. Unfortunately, this innovation has not caught on with the federal government yet.

In summary, the mission of the Bureau is constantly changing. In today's environment one has to question seriously whether the BIA should continue to exist, at least as it has in the past. Tribes are much more sophisticated, courts have given more autonomy to tribal government and the federal Indian policy is leaning toward more independence of tribal action. Programmatic functions of the BIA could easily be moved to other agencies. The trust function for investment of funds should be phased out and in the interim, private institutions should be retained to manage the funds left with the BIA. The budget of the BIA should be allocated by some formula to the tribes with strict accountability standards. New laws allowing greater flexibility with tribal compacting between tribes, states and local governments should be enacted and more flexibility created by new laws regarding use of Indian and tribal land and other resources. As an aside, the Indian health care system also needs similar attention. Funding always lags behind need and as a consequence, Indian people never have the resources to meet current need. Indian people need to have access to quality health care from any source available, not just Indian health service.

As Indian people have choices, the face of Indian country will change. This means establishing some form of economic capacity on reservations. This is not done through the creation of more federal jobs. The private sector can be brought to Indian country with the right incentives, but these incentives must be directed at the private sector businesses that tribes want to have on their reservations and not simply to job creation programs of the BIA or Department of Labor. A simple change to the tax code allowing direct subsidies to American and foreign businesses that establish satellite businesses on reservations could end unemployment on reservations and give Indian people the choice of staying or leaving. If that need is satisfied, government intervention from the BIA or other agencies will not be needed. It is not enough, however, to suggest an end to the BIA. That is too simplistic and irrational. Not all tribes are the same or have the same needs. New tribes are created every year and need support to develop governing systems. Instead of looking at the problems of the past, my suggestion is to look forward to a five, ten and twenty-year plan for the evolution of the BIA into what it should be (once that is decided) and stay on course. It is a plan that should be developed jointly by Congress, tribes and the BIA with a review of where it is today and where it needs to be tomorrow. Such a plan could be a blueprint for the future of not only the Bureau but Indian policy.

I thank you for the opportunity of speaking to you today and I wish you great success in your quest for enlightenment as to the BIA's capacity and mission.

Submitted by:

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