



Nez Perce

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UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

TESTIMONY OF BROOKLYN D. BAPTISTE
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OVERSIGHT HEARING ON FULLFILLING THE FEDERAL TRUST
RESPONSIBILITY: THE FOUNDATION OF THE GOVERNORMENT-TO-
GOVERNMENT RELATIONSHIP

MAY 17, 2012

Honorable Chairman and members of the Committee, as Chairman of the Nez Perce Tribal Executive Committee, I would like to thank you for the opportunity to provide testimony on behalf of the Nez Perce Tribe to this Committee on the issue of the trust responsibility of the United States to Indian tribes. As you may know, the Nez Perce Tribe, and many other tribes, recently settled lawsuits with the United States over the government's mismanagement of the trust assets of the affected tribes. The settlement was the culmination of six years of litigation that had been preceded by scores of meetings and workgroups that had been formed to try and address the problem outside of a courtroom setting. This entire effort was a long and arduous process that consumed the time and resources of the tribes involved. I would like to thank the United States and the Obama administration for finally being willing to engage the tribes on this issue with a goal towards resolving the long standing dispute.

It is good that the settlement of the trust mismanagement cases provide for a path forward and a "clean slate" between the tribes and the United States with regard to its management of the trust assets of tribes and how future disputes over those assets will be handled. However, the settlement does not address the larger question of the current status of the trust relationship between tribes and the United States. The process itself was indicative of some of the issues that

are adversely affecting the important trust relationship between tribes and the United States. Although the Nez Perce Tribe was well represented in the litigation and settlement by the Native American Rights Fund and our own in-house legal counsel, at one point in the settlement process, I found myself in a room alone with approximately 20 governmental representatives working on finalizing an agreement. At that time I thought that this was very symbolic of how tribes sometimes feel when working with the government, outnumbered and facing an opponent with unlimited resources. A common phrase among tribal leaders when referencing the relationship with the United States is that tribes used to bring weapons to battle with the United States and now we bring a quiver of attorneys. That is a sign of a relationship that is not functioning properly, especially a trust relationship. So the issue I would like to discuss today is how to move the relationship between tribes and the United States forward to a better place. I believe we can use the remarkable achievement of the settlement of these lingering trust claims as momentum to focus the collective efforts of the tribes and the United States on truly fixing the trust relationship and eliminate the need for costly protracted litigation and the “Us versus them” mindset that exists.

The Nez Perce Tribe would propose several courses of action that it believes would help enhance and strengthen the trust relationship between the United States and tribes. These actions include: 1) clear and unequivocal affirmation of tribal sovereignty and the treaty relationships between the parties, 2) prioritization of funding for tribally related federal program and programs operated by tribes, 3) Congressional and Executive Branch supported efforts to protect long-standing Indian law concepts that are being eroded through the courts, 4) reaffirmation and support of Indian Self-Determination and 5) continued refinement of government to government consultation set forth in Executive Orders and Executive Memorandums of past and current administrations.

I. Reaffirmation of tribal sovereignty and treaty relationships

Based on the U.S. Constitution, treaties, statutes and the historical, political and legal relationship with the Indian tribes, the United States has assumed a trust responsibility to Indian people. Those laws and relationships serve as the backdrop for the government-to-government

relationship. Rep. Dale Kildee has long advocated that Congress, as well as the other branches of government, remember that Article VI of the United States Constitution states in part that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Despite this constitutional affirmation of the supremacy of treaties, many tribes continually face threats of diminishment or disestablishment of their reservations and lands reserved under their treaties with the United States as well as erosion of the rights and privileges reserved under those documents. This issue is very critical when it comes to the land base of tribes and how those lands are threatened through rights-of-ways or easements or various other means. For any government, land is a foundational block. However, the fee to trust process usually takes years or in some cases decades because of different policies of different administrations and concerns over gaming. This places tribes in the position of being a sovereign that is taxed by a subdivision of a state. This prospect is repugnant to tribal governments. Congressional action or an executive order from the President that clearly reaffirms those treaty relationships and the inherent sovereignty of those tribes and the rights reserved by those tribes would be a good start in helping preserve what was intended to be permanent relationships between the Tribes and the United States.

II. Prioritization of funding

In light of the foundational nature of the relationship between the tribes and the United States, it is frustrating to Tribes when each budget cycle presents the question of whether tribal programs or federally related tribal programs will be properly funded or funded at all. The fact that spending on tribal programs is discretionary in nature runs counter to the obligations and promises that arise from the trust and treaty relationship of the parties. Although progress has been made on increasing funding for agencies and programs that provide services in Indian country such as the Bureau of Indian Affairs and Indian Health Service as well as increased commitments to properly fund services provided by tribes such as housing and health clinics, it is time to move to a new paradigm in relation to federal funding of tribally related programs.

Funding for these programs should not be dictated by political party affiliation or which party is in office but rather it should be a baseline spending obligation that the United States committed to long ago in return for the development of this country.

III. Support of Indian Law Principles under scrutiny by courts

Many of the principles and tenets of the trust relationship have been affirmed, developed, and refined through the United States court system. However, tribes believe this trust relationship is currently being eroded in the courts today. A 2009 empirical study done by Matthew Fletcher of Michigan State University College of Law entitled: "Factbound and Splitless: Certiorari and Indian Law" shows that since the Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians* in 1987, the Supreme Court has decided against tribal interests in more than 75 percent of cases. This rate of success is lower than the success rate of criminal defendants. With this trend, Tribes are relying more on the Executive Branch as well as Congress to be aware of, protect, and uphold the longstanding principles of Indian law. The *Carcieri* decision is a perfect example of this dynamic but it is by no means the only example. In addition, there are several cases that are before or could come before the United States Supreme Court that could have negative consequences for Indian Country in a way similar to the *Carcieri* decision. If the courts are not going to protect these long-standing principles, the Executive and Congressional branches of the government must take up the issue. Discussion is needed on ways to address these issues through other avenues such as Congress exercising its plenary power in support of tribal issues and in honoring the federal government's trust responsibility.

IV. Reaffirmation of Self-determination

Another aspect of the trust relationship that deserves congressional attention is the policies on self-determination. There is need for work by the United States in formulating strategies to provide effective reaffirmation and support by the Executive Branch and Congress of the policy of Indian Self-Determination. Stephen Cornell and Joseph P. Kalt recently published a paper entitled: "American Indian Self-determination : The Political Economy of a

Successful Policy”. The authors believe that there is an alarming trend away from support for tribal self-determination which has been a success. They state: “The policy of self-determination reflects a political equilibrium which has held for four decades and which has withstood various shifts in the party control of Congress and the White House. While Republicans have provided relatively weak support for social spending on Indian issues when compared to Democrats, both parties’ representatives have generally been supportive of self-determination and local self-rule for tribes. Analysis of thousands of sponsorships of federal legislation over 1970-present, however, finds the equilibrium under challenge. In particular, since the late 1990s, Republican congressional support for policies of self-determination has fallen off sharply and has not returned. The recent change in the party control of Congress calls into question the sustainability of self-determination through self-governance as a central principle of federal Indian policy.” It is important to begin to discuss strategies to reverse this trend and continue forward with the major progress in promoting self-determination that has been made on this issue since the administration of President Nixon.

V. Government to Government consultation

Finally, and maybe most importantly, there needs to be continued emphasis and attention paid to the consultation process that occurs between tribes and the United States. When the United States makes decisions and implements those decisions through the Executive Branch, there can be an impact. Tribal issues are not confined simply to the Bureau of Indian Affairs. Tribes work with many agencies on many issues. For example, the Nez Perce Tribe is a natural resource intensive tribe having connections with over 11 national forests. The relationship between the Nez Perce Tribe and the United States Forest Service is extremely important. The Nez Perce Tribe has a connection through its treaty with one out of every 20 acres of forest service land or 6% of the entire national forest system. In addition, the Nez Perce Tribe works daily with the Bureau of Land Management, the United States Park Service, the Department of Energy through our work on the Hanford Nuclear Reservation, the Bureau of Reclamation, the Department of Commerce, the Department of Health and Human Services, the Army Corps of Engineers, the U.S. Fish and Wildlife Service and many others. The Nez Perce Tribe relies on its government to government relationships to ensure that the rights and privileges of the Nez

Perce Tribe are protected and preserved. However, despite the best education efforts of tribes, many decisions are made by federal agencies without thoughtful consideration of the impact these decisions will have on a tribe and without proper consultation with the affected tribes. In truth, consultation should be a foundational component of decision making by any federal agency because of the trust relationship that exists. Tribes believe there is a lack of accountability in this area when agencies make decisions and the decision to consult is too individually driven. If the will of the persons in charge are to consult, consultation happens. If the will is not there, tribes have to fight to force proper agency consultation when consultation should just be how business is conducted regardless. President Obama has worked to increase meaningful consultation and accountability during his tenure. Those efforts need to continue and be supported by Congress through legislation and oversight.

Thank you for the opportunity to speak here today on this issue. Although this is a vast topic that cannot be covered in one hearing, the Nez Perce Tribe does believe that there are ways that Congress and the Executive Branch can work in coordination to reaffirm and improve the trust relationship it has with tribes.