No. 07-526

IN THE

# Supreme Court of the United States

DONALD L. CARCIERI, ET AL., PETITIONERS

*v.*

DIRK KEMPTHORNE, ET AL.

*ON A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIRST CIRCUIT*

## BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION and THE RISC FOUNDATION, INC. AS AMICI CURIAE SUPPORTING PETITIONERS


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## INTEREST OF THE AMICI CURIAE

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the First Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property which may be taken into trust all over the United States.

The RISC Foundation, Inc., incorporated in the State of Rhode Island, is headquartered in Charlestown, where the lands to be taken into trust lie. It is the purpose of the foundation to identify and address significant issues affecting the quality of life in Rhode Island. Allowing the Narragansett Indian tribe to assert sovereignty over fee lands taken into trust pursuant to 25 U.S.C. § 465 will adversely affect all citizens of Rhode Island.

Members of the RISC Foundation, Inc., further are resident citizens of the United States, Rhode Island, and the Township of Charlestown. They are homeowners in the residential area where the parcel at suit is located. They live in the immediate vicinity of the 31 acres. They share a common road; common underground water aquifer; and, common streams. They will be impacted as taxpayers by public costs

resulting from any proposed use of the parcel made by the Narragansett Tribe, including a casino. Any proposed use could affect their property values, character of the community and community safety if the civil and criminal jurisdiction of Rhode Island and the Town are not applicable to the parcel. They are impacted by the application of 25 U.S.C. § 465 and the Part 151 regulations that affect their rights to due process and equal protection of the law.

All parties have consented in writing to the filing of this Amici Brief.[1]

## SUMMARY OF THE ARGUMENT

The first section of this brief addresses the Rhode Island Indian Claims Settlement Act and how the proposed action of the Secretary of the Interior under 25 U.S.C. § 465 to take 31 acres into trust destroys state control over its lands, the key benefit of the mutual agreement with the Secretary and Tribe with the State and Town of Charlestown. The second section discusses federal case law and how the "Indian trust" was used to create unlimited Secretarial discretion to benefit Indians under 25 U.S.C. § 465. The last section explains how this Court can apply its prior decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) to restrict Section 5 of the Indian Reorganization Act (IRA) as Congress intended and under principles of equity to protect the intent of the

[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amici curiae, RISC and CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

agreement as agreed to by the parties and as enacted in the Settlement Act by Congress.

## ARGUMENT

The Rhode Island Indian Claims Settlement Act (Settlement Act), 25 U.S.C. § 1701, *et seq*., settled two lawsuits in 1978 asserting aboriginal title claims of the Narragansett Indian Tribe in the Town of Charlestown, Rhode Island. These claims followed the pattern created by this Court's decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) that allowed the Oneida Indian Nation to sue to reclaim aboriginal rights they claimed violated the Nonintercourse Act of 1790, 25 U.S.C. § 177. This Court in the *City of Sherrill* ruling, by applying the equitable doctrine of laches to *Oneida I* has attempted to limit the mischief caused by confusing the land status of land under state jurisdiction in the East with federal public lands reserved in the West for Indian tribes before statehood. While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it did not reach the issue of whether the "rebalancing of the equities" prevents the Secretary from undoing the benefit of the Settlement Act to the Rhode Island parties.

This brief explains why Section 5 of the IRA, 25 U.S.C. § 465, as Congress intended, must be confined to reservations of federal public domain lands that have never been subject to state jurisdiction. Under this standard, the Narragansett Tribe is not eligible to have lands placed into trust status under 25 U.S.C. § 465.

## I. THE INDIAN REORGANIZATION ACT IS A PUBLIC LAND LAW THAT SHOULD ONLY APPLY IN THE WESTERN STATES

### A. *The Settlement Act Did Not Create A Federal Indian Reservation In Rhode Island*

Sections 1705(a) and 1712(a) of the Settlement Act are very straightforward. They extinguish any and all aboriginal claims of the Narragansett Tribe in Rhode Island upon acceptance of the lands purchased and transferred under the settlement and at any other location in Rhode Island. It is uncontested that the Settlement Act was executed and that the Tribe's Indian title and Nonintercourse Act, 25 U.S.C. § 177, claims are extinguished. As the Rhode Island parties have argued, this case is about the authority of the Secretary of Interior to place additional lands purchased by the Tribe into trust for the Narragansett Tribe through 25 U.S.C. § 465. The Secretary asserts unlimited authority to take any lands purchased by any Indian tribe into trust status. The Secretary and United States assert that the Settlement Act does not apply to limit Secretarial authority to accept additional lands into trust status for the Narragansetts. The question of whether the Secretary has authority to accept fee lands purchased by or for the Narragansett tribe into trust depends on the intent of Congress in enacting the Indian Reorganization Act (IRA). This brief incorporates the reasoning of the State parties and adds to it by including the final tribal listing of Indian tribes that had accepted the IRA in 1939 and the contemporaneous writings of Commissioner of Indian

Affairs John Collier, the primary author of the bill that became the IRA.[2]

The Petition for Certiorari addresses this question by applying the definition of "Indian" in 25 U.S.C. § 479:

> Sec. 479. Definitions
> The term ``Indian'' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of **any Indian reservation**, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term ``tribe'' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians **residing on one reservation**. (emphasis added).

(June 18, 1934, ch. 576, Sec. 19, 48 Stat. 988.)

This definition by its express terms applies only to tribes on federal Indian reservations because these

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[2] The Amici like the State of Rhode Island do not agree with the conclusion that land taken into trust necessarily becomes Indian country. Amici further disagree that land taken into trust pursuant to 25 U.S.C. § 465 automatically restores the attributes of tribal sovereignty. As the State asserts, 25 C.F.R. § 1.4 allows the Secretary to restrict lands taken into federal trust to state jurisdiction as done for the 1800 acres encompassed by the Settlement Act.

were the only Indian tribes under federal jurisdiction in 1934. Tribes located on lands under state jurisdiction were subject to the laws of the state where they resided just as all off reservation Indians still are today. The definition in Section 479 is therefore critical to enforcing the IRA as Congress intended.

The IRA definition of "Indian" in Section 479 uses land status to determine whether an Indian tribe was recognized and was "now under federal jurisdiction" on June 1, 1934. Landless tribes were combined or consolidated with tribes that had a federal Indian reservation. Only Indian tribes on reserved federal territorial land were under federal jurisdiction. These were the only Indian tribes retaining their inherent sovereignty. Inherent tribal sovereignty is based on the retention of "Indian title" as defined in *Johnson v. McIntosh*, 21 U.S. 543 (1823) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Only tribes that held Indian title and exercised inherent sovereignty could have a government to government relationship with the United States. These were the tribes entitled to vote on whether to adopt the IRA under the original 25 U.S.C. § 478.

When more than half of these originally qualified tribes with federal Indian reservations rejected the IRA, the interpretation of the voting regulations promulgated under Section 478 was expanded to include any Indian tribe receiving federal assistance through a treaty obligation or federal statute. This qualified many of the Eastern tribes and California bands that had not originally been allowed to vote on

the IRA to vote before the deadline expired.[3] The Narragansett Tribe was specifically not allowed to vote on the IRA because it had never been under federal jurisdiction. J.A. 23a-24a. Not surprisingly, Congress reacted to the manipulations of the voting on the IRA. In January 1937, the Chairman of the Senate Indian Affairs Committee asked for a finalized list of tribes that had adopted the IRA in order to put a stop to further regulatory manipulations of the eligible Indian tribes as defined in Section 479 of the IRA. Amici located the original tribal listings of the Indian tribes "recognized under the IRA" prepared by Commissioner Collier as requested in January 1937 by Senator Elmer Thomas in the National Archives. These lists were revised into one final list after Congress threatened to repeal the IRA. This final revised list from 1939 is attached.[4] All of the Indian tribes on these lists are located on reservations of federal public domain land in the West.

The MEMORANDUM FOR THE PRESS, (PRESS MEMO, p.1c-6c) outlines the "sweeping bill" introduced by Representative Edgar Howard of Nebraska. This Memo and two other Collier documents attached to this brief make it very clear that all Indians and Indian Tribes were either considered "landless" or were physically located on lands subject to the federal

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[3] Section 478 as originally adopted by Congress as Section 18 of the IRA required the Secretary to call an election on whether to accept the IRA within one year of its passage. The tribal voting concluded on June 17, 1936.

[4] Amici located two lists and correspondence from the Committee on Indian Affairs in 1937. The third list that is attached is the final downsized list that adheres to the definitions as contained in 25 U.S.C. § 479. (p.17c-29c).

public land laws of the United States as required by Section 479. This bill was intended to create separate tribal municipal governments and claimed the authority in the United States Congress to do this. There is only one clause of the Constitution that contains authority for the federal government to establish local governments: the Property Clause, Art. IV, Sec. 3, Cl. 2. The Property Clause expressly sets the authority of the Congress to acquire new territorial lands and dispose of the territorial lands of the United States. The Property Clause also allows territorial land to be reserved for federal uses and to establish local governments to prepare the people in those areas for citizenship. *See United States v. Gratiot, et al*, 39 U.S. 526 (1840).

As this initial PRESS MEMO makes absolutely clear, this was the first purpose of the bill introduced on February 12, 1934 that eventually became the IRA. (p.1c, 3c). Therefore, this bill applied directly to Indians and Indian tribes located on federal reserved public domain lands that still held their territorial land status and inherent sovereignty rights. Pet. App. 23-4, 27. The second purpose of the Wheeler-Howard Bill was to end the allotment practices of the Dawes General Allotment Act. The bill was intended to be "along the lines of the subsistence homestead projects now being developed by the government for white communities." (p.2c) The only lands that could be allotted were federal public lands subject to disposal by Congress under the Property Clause. The irrefutable fact; the IRA was intended to apply only to Indians and Indian tribes located on federal public domain territorial lands. This fact, if overlooked by the federal courts, allows the

Secretary to expand the IRA beyond its constitutional limits.

As a settlement to the land claim suit brought by the United States in 1975 pursuant to *Oneida I* against the State on behalf of the Narragansett Tribe, the State of Rhode Island made a permanent cession by legislative act for the federal purpose of providing land for the Narragansett Tribe. See Joint Memorandum of Understanding (JMOU), J.A. 25a-30a, see also R.I. General Laws § 37-18-13 through § 37-18-14. Congress accepted this ceded land in the Settlement Act by defining "transfer" in 25 U.S.C. § 1702(j) as including a conveyance. The convoluted path through the land management corporation does not change this fact. The lands purchased by the United States with the assistance of the Governor of Rhode Island under 25 U.S.C. § 1704 were specifically included in this conveyance under the single transfer that occurred after the Tribe became federally recognized. J.A. 39a-42a.

Technically, the land encompassed in the Settlement Act is a federal enclave. The Enclave Clause, Art. I, Sec. 8, Cl. 17, allows Congress to obtain land in a state with state approval for the purpose of forts, arsenals and other necessary buildings. Ceding lands for a federal enclave allows the state to reserve to itself jurisdiction it wishes to retain. *See Collins v. Yosemite Park*, 304 U.S. 518 (1938). The State has consistently made this argument. The Interior Board of Indian Appeals (IBIA) concluded that it presented a constitutional question beyond its jurisdiction. J.A. 54a., Pet. App. 9, 50, 52-3. The jurisdiction of the IBIA was defined as 43 C.F.R. Part 4. J.A. 46a. Title 43 is for

federal Public Lands subject to the Property Clause. The ceded Narragansett land is not reserved federal public domain territorial land. As a federal enclave, Congress accepted specific jurisdictional rights for the State over the land reserved in its act of cession. *Id.* at 528. Although the United States now has primary jurisdiction to regulate the Narragansett tribe as a tribe, the State of Rhode Island retains civil and criminal jurisdiction as well as conservation authority over the land as reserved in 25 U.S.C. § 1709 enforceable against the tribal members individually. This is no different than what the United States did with Fort Varnum in 1958, a true federal enclave titled back to the state with express reservations. 72 Stat. 403.

Importantly, due to the express extinguishment of aboriginal title in the Settlement Act, no land in Rhode Island can be characterized as federal territorial land unless this Court is willing to apply the majority decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) today. This is not an exaggeration. Even the PRESS MEMO quoting Commissioner Collier says "It [this bill] seeks to give to the Indians the simple right -- the inalienable right of all men who are not slaves -- of establishing an elementary form of self-government, organizing for collective action, and taking part in the management of their own affairs." (p.1c) The *Dred Scott* decision is most remembered for its positions on slavery. What is not generally recognized is that the majority opinion of Chief Justice Roger B. Taney compared and contrasted the rights of Indians to the rights of slaves to justify its harsh statements that Negro persons could never become citizens. *Id.* at 404, 420. This Court using its equity jurisdiction has

preserved the *Dred Scott* decision as part of federal Indian common law. *See Elk v. Wilkins*, 112 U.S. 94, 99 (1884).

B. *The Secretary erroneously assumes that taking fee lands into federal "trust" ownership creates federal territorial land identical to reserved federal public domain land in the West.*

In order to apply 25 U.S.C. § 465 for the Narragansett tribe, the Secretary of the Interior is characterizing the Settlement lands of the Narragansett Tribe as a "federal Indian reservation." In 1980, the Secretary promulgated the Part 151 regulations expanding Section 5 of the IRA, 25 U.S.C. § 465, to allow fee lands purchased by Tribes to be defined as "Indian land" as a generic term under his authority as trustee. 25 C.F.R. § 150.2(h) and § 151.2(d)-(g). By equating all types of "Indian land," the IRA is converted from a federal public lands statute that only applies to increasing or using the land base of actual reserved federal territorial land in the West to all types of land still occupied by Indians, including state reservations in the East. See also 25 U.S.C. § 2202.[5]

[5] The Indian Lands Consolidation Act of 1983 says: "The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title: Provided, that nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits or restricts the acquisition of land for Indians with respect to any specific tribe, reservation or state(s)." 25 U.S.C. § 2202. This amendment to the IRA was passed the same year the Narragansett Tribe was given federal recognition and the Settlement lands were taken into trust under 25 U.S.C. § 465. Neither 25 U.S.C. § 465 or § 479 were amended by this act. Therefore, this act can be read as Congress intending to limit the Secretary's new Part 151 regulations to only those tribes

There is no federal public domain land in Rhode Island and no federal land was ever "reserved." This assumed secretarial discretion to change the definition of "Indian land" and assume all tribal lands confer the same tribal sovereignty rights as a real federal Indian reservation allows the unlimited territorial authority as defined in *Dred Scott* to apply to the people and State of Rhode Island. Allowing the word "reservation" in Section 479 to apply to any lands occupied by Indians whether the land was reserved federal public domain land or not expands the IRA and specifically Section 465 well beyond what Congress intended when it passed the IRA in 1934.[6] It also violates separation of power principles by allowing the Secretary discretion to define lands taken into trust pursuant to 25 U.S.C. § 465 as having the attributes of sovereign Indian land reserved by the United States with "Indian title."

The PRESS MEMO says that landless Indians were going to be assisted through the Wheeler-Howard Bill "through various devices of relinquishment, purchase and exchange, for restoring allotted and inherited lands to community ownership..."(p.2c). It was in the congressional discussion of these "various devices" that the expansive vision of Commissioner

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recognized and "now under federal jurisdiction" on June 1, 1934 as required by Section 479. This interpretation makes sense because it would allow Section 465 to apply to Indian tribes that had real federal Indian reservations that had voted and rejected the IRA in 1935-6.

[6] On May 20, 2008 the Secretary promulgated regulations for 25 U.S.C. § 2719, 25 CFR Part 292, 73 F.R. 29376, that include four definitions of "reservation." 25 C.F.R. § 292.2. Only the first of these definitions applies to actual reserved federal land. The other three definitions demonstrate the expanded interpretation of "reservation" explained above.

Collier was expressly limited by Congress. One of these "devices" was the idea of the Indians purchasing their own lands or having other persons or entities purchase lands for them that could then be added to existing federal reservations. This fee to trust device was originally in Section 5 of the IRA, but was deleted from the act prior to its passage. The BULLETIN of the Mission Indian Agency of April 16, 1934 (BULLETIN, p.7c-12c) in Paragraph 10 states:

> "The bill authorizes an appropriation of two million dollars of Federal funds each year for the purchase of land, which will be assigned to Indians who need land. In addition, any tribe or community may use tribal funds to buy new lands to be assigned or leased to needy members."

(underline added to words deleted from final act)(p.11c). This BULLETIN was released almost three months before the IRA was passed by Congress. The device we now call "fee to trust" in the original bill was expressly removed by Congress before it passed the IRA.[7] Therefore, as passed by Congress, the only way to create additional "trust" lands under Section 5 of the IRA, 25 U.S.C. § 465, is for Congress to make a specific appropriation to purchase specified lands for Indians or an Indian tribe.

Congress did not alter the nature of the Indian trust when it adopted the IRA. Under both the Dawes Act and IRA the Indian trust is based on the trust

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[7] The original bills of Collier's plan were S.2755 and H.R. 7902. These bills failed to pass after extensive hearings. The full bill substitute S. 3645 negotiated between Commissioner Collier and Senator Howard Wheeler that became the IRA did not contain any language for "fee to trust."

corpus of the Indian right of occupancy or Indian title. (p.9c) Payments for ceded lands and the remaining lands were deemed to be in trust to protect the lands from alienation and taxation. The IRA altered these individual land rights by extending the trust period indefinitely and by requiring tribal members to exchange trust patent allotments rather than to sell the allotments to non-Indians. This is exactly what this Court concluded in *United States v. John*, 437 U.S. 634, 645-46, 650 (1978).

When the IRA is properly viewed in this context, the act of the Secretary accepting additional lands for the Narragansett Tribe pursuant to 25 U.S. C. § 465 into trust status is a subsequent land transfer as if the originally ceded 1800 acres of land were federal public domain. As said in the concurrence by Justices Rehnquist and Powell in *Oneida I*:

> "The majority today finds this strict rule (mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case) inapplicable to this case, and for good reason. In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by **transferring** land rights to Indian tribes, has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of the Indians in their land. The Nonintercourse Act of 1790 manifests this concern in statutory form. Thus, the Indians' right to possession in this case is based not solely on the original grant of rights in the land but also upon the Federal Government's

> subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility." (parentheses and emphasis added).

*Id.* at 684.

Any subsequent land transfer pursuant to 25 U.S.C. § 465 literally **conveys** land specifically not included in the Settlement Lands that does not meet Justice Rehnquist's above definition from state to federal ownership in trust for the Narragansett Tribe twenty years after specific land parcels were selected and transferred under the express terms of the Settlement Act. (emphasis added). The Settlement Act does not authorize additional land purchases or transfers. The transfer to federal ownership of the ceded land extinguished all tribal aboriginal claims. See 25 U.S.C. § 1705(a)(2) and § 1712(a)(2). Under the Enclave Clause, the State and Congress would have to enact new specific legislation to cede and transfer additional lands to the United States.

In *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689 n.2 (1st Cir. 1994) the First Circuit confused the land status of the Settlement land. In footnote 2, the Circuit Court said:

> "The State Act amendments themselves suggest that congressional approval of the land transfer is "required and appropriate," … R.I.Gen.Laws § 37-18-14, and the case law is in accord, *see Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 667-68, …(1974) (explaining that, as a general rule, Indian tribes may not alienate their

> land without congressional consent). Yet, Congress never ratified the State Act amendments. Because the validity of the title transfer is not directly in issue in this litigation, and because appellants have not acknowledged, much less relied upon, the absence of ratification, we do not explore the consequences of this omission."

Congress cannot ratify a state law. Congress under the Enclave Clause can only accept lands ceded by a state sovereign by its own legislative act. As explained above, this is exactly what happened with the JMOU, Management Act and Settlement Act. See 25 U.S.C. § 1709. This mistake demonstrates the confusion created by *Oneida I* in the Eastern United States.

In the West, the Secretary may convey federal public land to private entities or transfer additional public lands into a federal Indian reservation pursuant to the Federal Lands Policy Management Act and other provisions of the IRA. See 43 U.S.C. § 1701 et seq., 25 U.S.C. § 463 and § 464. This authority should not be applicable in the East.

Rhode Island's sovereignty in retaining civil and criminal jurisdiction is nullified if the ceded lands are treated by the Secretary as federal public land. As a matter of federal land law, the Settlement Act transfer was the only federal acquisition allowed. To hold otherwise, destroys the intent of Congress in protecting the sovereign interests of the State of Rhode Island to maintain state jurisdiction over the transferred land. See 43 U.S.C. § 1715(c). The State of Rhode Island did not consent to any further lands being transferred to federal ownership under the Settlement

Act. As the First Circuit concludes, the Secretary is asserting a federal Indian trust responsibility beyond that delegated in the Settlement Act to place an additional 31 acres into trust. The Secretary claims this authority pursuant to Section 5 of the IRA. Pet. App. 38-49.

## II. THE EXPANSION OF THE INDIAN TRUST

How the IRA was put into affect by Commissioner Collier is crucial to understanding the profound impacts resulting even decades later. In 1937, Senator Wheeler attempted to repeal the IRA. In reaction, Collier released a Statement to the Associated Press (AP MEMO, p. 13c-16c) justifying his implementation of the IRA. Collier believed "that the powers vested in Indian tribes through their constitutions may be not only those specified powers named in the Act but 'in addition, all powers vested in **any** tribe or tribal council by existing law.'" (p.14c)(emphasis added).

The IRA was written to take full advantage of the federal Indian common law trust relationship. As the PRESS MEMO states:

> "The bill was drafted after months of intensive study of the complex field of law and administration covered by the bill, and with the advice of numerous Indian welfare associations which have unanimously endorsed the main principles of the bill. The proposed legislation embodies many of the major policies which Collier, previous to his appointment as Commissioner on March 4th last, championed as

> founder and director of the Indian Defense Association."

(p.5c) Collier intended the IRA to use the Indian trust to invoke the paramount sovereign authority of the United States. Although Congress struck out the most blatant parts of Collier's plan including the federal court for Indian claims and fee to trust, his fundamental goal was nevertheless met when this Court decided *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941).

A. *The Indian Trust Under the IRA*

In the *Santa Fe* case, the United States asserted the right of the Walapai Tribe to all the lands it had occupied in 1866 within and without its present federal public land reservation. This claim was for all of the aboriginal lands ever occupied by the Walapai Tribe. The United States argued that their policy of enforcing the Trade and Intercourse Acts as prior to and controlling of the grant of federal public land to the railroad was based on the Indian trust relationship. The Trade and Intercourse Acts were applied to the Territory of Arizona in 1851. *Id.* at 347. The application of the Trade and Intercourse acts allowed Indian groups and bands that were just landless Indians under traditional inherent sovereignty principles to have federal lands physically occupied by them to be considered in "trust" status by the Secretary of Interior. *United States v. Cramer*, 261 U.S. 219, 227 (1923). This policy was clearly not based on making a specific reservation for the Walapai Tribe. The argument made in *Santa Fe* is that the "Indian country" territory of the Walapai Tribe was a separate

federal territory merely because the Indians occupied the area. This follows the federal common law separate Indian territory position of the *Dred Scott* decision.

In *Dred Scott*, Chief Justice Taney separated the Indians as a race from former slaves by concluding that all Indians Tribes were foreign governments.

> "These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other."

*Scott* at 404.

To be a foreign government, Chief Justice Taney assumed that each Indian tribe occupied its own sovereign territory.

> "The situation of this population (Negroes) was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they

> thought proper, and neither the English or the colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it."

*Id.* at 403-4.

Chief Justice Taney's assumptions were utterly untrue. For example, the Treaty of Fort Schuyler between the Oneida Indian Tribe and the State of New York ceded all of the Oneida Indians lands to the State in 1788 before the Constitution was in effect. *See Sherrill* at 203. In the West, many Indians had been enslaved under Mexican rule before the United States won the Mexican-American War. In California, the Spanish Missions had obliterated tribal affiliations leaving behind "Mission Indians" that were under the jurisdiction and protection of the State.

His incorrect assumptions did not prevent Chief Justice Taney from deciding as a matter of federal common law that the authority of the United States over all territories outside of the Northwest Territory was unlimited by any act of Congress or any clause of the Constitution. *Scott* at 432. This rewriting of the Constitution was done to prevent the Negro race from ever becoming state or national citizens. But the comparing and contrasting of the Indian rights in the *Dred Scott* majority opinion turned the protective Indian trust relationship of the Marshall trilogy into an unlimited federal weapon asserting the "political relationship" with an Indian tribe to challenge the authority of state governments. See Introduction by Nathan Margold. Cohen, F. S. (Ed.) (1940). Statutory

Compilation of the Indian Law Survey: A Compendium of Federal Laws and Treaties Relating to Indians. Washington, DC: Government Printing Office. p. x-xi. The Executive branch by reclassifying an area as "Indian country" can apply the separate unlimited territorial power. Federal Indian land was separated from the Constitution because the Indians were separated from the white society that comprises the Sovereign People. *See Elk v. Wilkins*, 112 U.S. 94 (1884). Therefore, the Indian trust is whatever the federal government decides it is without any Constitutional constraints if the *Dred Scott* opinion remains part of federal Indian common law.

This is why the definition of "Indian" contained in 25 U.S.C. § 479 is so important. Congress expressly defined the application of the IRA to Indians of recognized tribes now under federal jurisdiction on June 1, 1934. This specific definition in the IRA prevents the IRA from being construed as facially unconstitutional as a "race based" classification under the Fourteenth Amendment. Congress in adopting the IRA specifically chose a definition of "Indian" that complied with the Fourteenth Amendment rather than the broader race based classification adopted by Chief Justice Taney in *Dred Scott*. If the IRA applies to all persons of Indian descent no matter what their tribal land status and the concomitant preservation of their inherent tribal sovereignty as defined in 25 C.F.R. § 151.2(-), then it is not based on a continuing political relationship between the tribe and federal government as held by this Court in *Morton v. Mancari*, 417 U.S. 535 (1974). Instead, it is based on the racial classification used in *Dred Scott*.

After the *Santa Fe* ruling, there was no reason for the Secretary of Interior to restrict the claims of the United States on behalf of Indian tribes to federal lands actually reserved for their use. According to Collier, any tribal interest could be asserted against any state or local interest at any time because the recognized Indian tribes were separate territorial governments with direct powers of self-government. Under Collier's view this was not unlimited power because tribal recognition was only a temporary status until the Indians were able to become parts of white society. Collier acknowledged the Indian Naturalization Act of 1924 and did nothing to impair the constitutional rights of Native Americans. BULLETIN p. 8c-9c. His IRA was an early type of affirmative action program. PRESS MEMO p. 1c-6c. But instead of using Section 5 of the Fourteenth Amendment as later established through the Civil Rights Movement of the 1950's, his program relied on attempting to combine the reasoning of the majority opinion in *Dred Scott* with the war power Indian policy of 1871 as codified in the Revised Statutes into a policy promoting tribal sovereignty and Indian self-determination to help the Indians pull themselves out of poverty.

Within a very short time of its passage, the roots of the IRA as defined by Collier became apparent in cases like *Santa Fe* and Congress balked at providing funding to promote its expansive goals. See AP Memo, p.13c-16c. When this Court limited the IRA and the Secretarial expansion of the Indian trust in *Hynes v. Grimes Packing*, 337 U.S. 86, 123 (1949) by placing the federal Indian trust lands within the overriding context of the equal application of the law, only a very small amount of land was purchased for Indians by Congress

under Sec. 5 of the IRA. Besides assigning more marginal federal public domain lands to Indian reservations in the West, the IRA had very little impact after 1948. By the mid-1950's Congress was back to terminating tribal status and selling Indian lands.

B. *The Era of Unlimited Indian Trust Authority*

The IRA languished until the American Indian Movement began in the mid-1960's. With President Nixon's Message to Congress of July 8, 1970, the era of the Nixon Indian Policy began. It was based on making the unlimited territorial power permanent through preservation of tribal sovereignty. Because the Secretary claimed he could define which Indian tribes were "recognized" as a continuing power, the power claimed by President Nixon was unlimited by any constitutional restraints. J.A. 29a. As the first heading of the Nixon Message says: Self-Determination Without Termination. The policy goes on to articulate how any federal program can be delegated to tribal authority. This is unlimited Executive authority to define the Indian trust. No longer is there any deference to Congress required as this Court assumed in *United States v. Kagama*, 118 U.S. 375, 384-5 (1886). President Nixon took his newly declared "Indian trust" power without any act of Congress and proceeded to the federal courts to have his assumed power legitimized as federal Indian common law. And this Court began issuing opinions unleashing this "Indian trust" power on the States and people. Starting with *Mescalero Apache v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona*, 411 U.S. 164 (1973), this Court again allowed off reservation "trust responsibility." This

Court then directly allowed the Nixon Administration to reinterpret the IRA. See *Morton v. Mancari*, 417 U.S. 535, 545 (1974) and *Oneida I*. These decisions let the Nixon administration, and all subsequent administrations, reinterpret the "political relationships" that existed only on real federal Indian reservations of public domain land under Section 479 of the IRA to being any recognized "political relationship" the Secretary or President recognized at any time. Through federal Indian common law in the 1970's, this Court unleashed the twisted reasoning of *Dred Scott* at the States, local communities and every individual. This massive expansion of the Indian trust was applied to 25 U.S.C. § 465, to achieve the fee to trust power that Congress had expressly removed from the IRA in 1934.

For the Indian trust to become unlimited the federal courts had to assume that the Secretary could interpret the IRA and 25 U.S.C. § 465 to apply to any land classification, just as the First Circuit did in this case. Pet. App. 30-31. Applying *Chevron* deference to the Secretary's interpretation of Section 465 has allowed the Secretary to perpetuate a misinterpretation of the IRA. *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Stevens v. Commissioner of the Internal Revenue*, 452 F.2d 741 (9th Cir. 1971), a Gros Ventre tribal member with trust patent allotments exchanged his lands through the Bureau of Indian Affairs for other allotted lands. The Commissioner claimed the individual Indian owed back federal taxes on the income gained on the exchange of the lands because they were not of equal value and did not qualify as being tax exempt. The case turned on the discretion of the Secretary of the Interior to accept the trust patent lands and

exchange them for other individual allotment lands already held in trust by the United States. The Secretary argued that the exchange of lands was made pursuant to 25 U.S.C. § 465.

In *Stevens*, the Ninth Circuit concluded that all Indian statutes should be construed in *pari materia* as evidencing one continuous federal Indian policy to allow this exchange of allotted lands to be tax exempt pursuant to 25 U.S.C. § 465. *Stevens* at 746-8. In the conclusion of the *Stevens* case the Ninth Circuit opined:

> "Bearing in mind that "doubtful expressions are to be resolved" in favor of the Indians (*Squire v. Capoeman*, *supra*) and giving weight to the interpretation of the various acts by Interior, we conclude that the Secretary of the Interior has the discretionary power under the Indian Reorganization Act to purchase land for Indians with funds supplied by them and when lands are so purchased they are subject to the implied exemption from income taxation contained in the General Allotment Act."

*Stevens* at 749.

Exchanging individual Indian trust allotments for other individual Indian trust allotments to preserve their tax exempt status was within the intent of Congress in adopting the IRA in 1934. Section 4 was the provision to restore "surplus lands" allotted under the Dawes Act. Section 4 of the IRA delegated the Secretary discretion to restore or exchange allotted lands within historical territorial reservation boundaries that maintained a reserved right in the United States under the Property Clause for the

protection of Indians. Section 4 of the IRA was codified in 25 U.S.C. § 463 - § 464. Section 4 of the IRA specifically allows the exchange of untaxed allotted lands still restricted from alienation to be exchanged for different untaxed allotments as done in *Stevens*. Instead, in *Stevens* the Secretary claimed the tax exempt status for the exchanged allotted lands was 25 U.S.C. § 465. The Nixon administration misconstrued the IRA in the *Stevens* case. The federal attorneys for the Secretary of Interior could rely on the fact that the federal attorneys for the defendant Commissioner of Internal Revenue were not going to question the statutory interpretation of the IRA made by the Secretary. This allowed the BIA to represent that the exchange of Indian allotted lands was made pursuant to 25 U.S.C. § 465 when the correct provision of the IRA was 25 U.S.C. § 464.

The Ninth Circuit's erroneous language in the conclusion of *Stevens* regarding 25 U.S.C. § 465 was almost immediately used in Washington State to acquire lands within the "historical boundaries of the Puyallup reservation" situated within the City of Tacoma into trust status. *City of Tacoma v. Andrus*, 457 F.Supp 342 (D.D.C. 1978). As in *Stevens*, these lands were also subject to acquisition pursuant to Section 4 of the IRA. Section 4 of the IRA, 25 U.S.C. § 463, specifically addresses the rights of non-Indians located within historic reservation boundaries and balances their interests to the asserted need to reacquire lands for Indians. By intentionally misapplying 25 U.S.C. § 465 to a type of land acquisition specifically addressed in 25 U.S.C. § 463, all of the safeguards incorporated in the IRA for non-Indians are removed from the Secretary's determination of

whether to acquire the additional land for individual Indians or tribes. The *City of Tacoma* case explains how the overbroad language of *Stevens* becomes the basis of the first fee to trust regulations promulgated by the Secretary of the Interior in 1978. *Id.* at 345-6.

Immediately following the *City of Tacoma* decision, the Secretary took lands into trust in the City of Sault Ste. Marie, Michigan. The City sued to stop the fee lands purchased by the tribe that were not situated within historic reservation boundaries from being placed into trust status. However, the City was not considered a person that could raise due process claims. *City of Sault Ste. Marie v. Andrus*, 532 F.Supp 157, 167-8 (D.D.C. 1980). This left the City with standing but no enforceable right against this assumed fee to trust power of the Secretary asserted under Section 5, Section 465, of the IRA. Because of this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974) that removed the Fourteenth Amendment defense that naturally went against this inequity, there was no means to argue against the asserted Secretarial authority.

The decisions in *Stevens*, *City of Tacoma* and *City of Sault Ste. Marie* are the basis of the fee to trust regulations, 25 C.F.R. Part 151, promulgated pursuant to Section 5 of the IRA, 25 U.S.C § 465. These cases found that 25 U.S.C. § 465 does not encompass interests considered to be within the "zone of interests" for prudential standing for any non-Indian opposing a fee to trust application. The Secretary examines only the interest of the Indian tribe when making a fee to trust decision. This decision making process rests on the misapplication of the IRA as explained above. It is

important to note that the *Sault Ste. Marie* case is cited by the First Circuit as the basis that the Rhode Island parties have no right to question the Secretary's authority under 25 U.S.C. § 465 to place the 31 acre parcel into trust for the Narragansett Tribe. Pet. App. 33-34.

Under the Nixon Indian Policy the Indian trust is unlimited. On January 4, 2008, Assistant Secretary Carl J. Artman, limited the policy of acquiring "off reservation" fee lands into trust status. *See* http://www.indianz.com/News/2008/006483.asp. This policy has been included in the new 25 U.S.C. § 2719 regulations. 25 CFR Part 292, 73 F.R. 29378. The Secretary has for the first time since 1970 interpreted the IRA as imposing a limitation on Secretarial discretion. However, this concession falls far short of limiting the IRA to only Indians and Indian tribes on actual federal Indian reservations as of June 1934 as required by 25 U.S.C. § 479.

## III. LIMITING FEE TO TRUST ENDS THE UNLIMITED TERRITORIAL AUTHORITY

It needs to be made clear that proposing to end the unlimited territorial authority of the Nixon Indian Policy does not terminate the Indian trust relationship. All Amici RISC and CERF are proposing to end is the ability of the Secretary of the Interior to apply territorial war powers solely at his discretion to transfer fee lands under state jurisdiction to federal jurisdiction by accepting them in trust pursuant to 25 U.S.C. § 465. As explained by Amicus CERF in its amicus brief for the *Sherrill* case, all federal Indian common law was based on the territorial war power.

(http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf). By applying the definition of "Indian" and "Indian tribe" in Section 479 of the IRA, only reserved federal public domain land can properly be classified as "Indian country." In other words, interpreting the IRA as Congress intended -- a federal public land law to grant tribal self-governance and to correct the Dawes Act-- prevents the Secretary from assuming that all types of Indian land if taken into trust status pursuant to 25 U.S.C. § 465 becomes "Indian country." Lands purchased by Congress by special act as for the Narragansett Tribe or using the express terms of Section 5 of the IRA for the Mississippi Choctaw would be unaffected by such a ruling because Congress itself has set the terms of tribal sovereignty. Such a ruling would terminate the threat of the Executive Branch being able to create federal territorial land anywhere in the United States.

A. *Indian Trust Land is not necessarily Indian Country.*

The federal courts in our early history struggled with how to characterize the land status of areas within sovereign states involved in Indian conflicts. As a matter of federal Indian common law, the federal courts interpreted these conflict zones as "Indian country." "Indian country" developed as a sort of temporary federal territory designation. *See generally United States v. Donnelly*, 228 U.S. 243 (1913). The Constitution contains two clauses that address federal land ownership but does not contain any definitions for land areas within States that are under the temporary control of the United States military to suppress an Indian uprising or rebellion. The Seneca uprising in

New York in 1779 required the federal courts to create a temporary federal common law designation to deal with New York's temporary loss of jurisdiction assumed by the United States Army. Acknowledging a temporary status of "Indian country" because of an Indian uprising did not change the underlying ownership or jurisdiction of the land. *See Fletcher v. Peck*, 10 U.S. 87 (1810). As a matter of federal law, the Seneca lands in the State of New York never left state jurisdiction. *See United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925).

As explained previously, Congress expressly removed the fee to trust language in Section 5 of the IRA. Congress held to its previous decision to prevent the Executive from creating any more Indian reservations of federal public land. See Indian Appropriations Act of 1919, Section 27, 41 Stat. 3, 34. The Secretary cannot be allowed to evade the plain language of Section 5 by equating all types of Indian land to reserved federal public domain land for an Indian tribe as done in 25 C.F.R. § 150.2(h) to interpret 25 U.S.C. § 465 as including fee to trust authority.

Prior to 1970, the Secretary of the Interior had five main classes of Indian land. Each of the 5 categories had its own legal description and concomitant finding of how much sovereignty the Indians residing on that land actually retained. All 5 types of Indian land could be held in trust status under the IRA because "trust status" did not mean anything other than the United States protecting its property tax exempt status. Placing lands into "trust" did not mean altering state jurisdiction over the property. By the plain language of the statute the only change of

jurisdiction created by 25 USC § 465 is to make the land exempt from property taxes. Indian land taken into trust before the Part 151 regulations were promulgated kept its underlying status. Privately owned Indian land, tribal land under state jurisdiction and state reservation land did not retain Indian title and was therefore not within the scope of the IRA. These lands were taken into trust under the act of February 14, 1931 (46 Stat. 1106) not under 25 U.S.C. § 465.

By arbitrarily deciding to treat all Indian lands as having the same rights to tribal sovereignty, all Indian land becomes "Indian country" subject to the IRA. This Court rejected this very expansion of the definition of "Indian country" as applied to the land status of the Indian tribes under the Alaska Native Claims Settlement Act in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). The State of Rhode Island has a stronger position than did the State of Alaska that any lands taken into trust for the Narragansett Tribe are not "Indian country." The Settlement Act allowed only one transfer of lands expressly agreed to by the State rather than the after the fact selections of the Native Villages still going on today. If those subsequently selected lands are not "Indian country" surely the same analysis applies in Rhode Island to the 31 acre parcel.

B. *Applying the Sherrill Decision*

The Rhode Island parties have consistently claimed that allowing the Narragansett Tribe to have an additional 31 acres of land taken into trust 20 years later destroys their bargained for benefit of the Settlement Act. The *Sherrill* court found that it had

the authority to protect the "justifiable expectations" of the non-Indian community as a matter of equity. *Id.* at 215-6. Requiring adherence to the terms of an agreement are enforced by principles of equity. This Court should apply its ruling in *Sherrill* to limit the authority of the Secretary to take these 31 acres into trust.

This Court in *Sherrill* expressly rejected the "unification theory" of the Nixon administration that allowed a merger of Indian title and fee ownership to create tribal sovereignty. *Id.* at 213-4. Fee to trust as currently interpreted in the Part 151 regulations is just another version of the same "unification theory." In the original thirteen colonies there never has been any federal territory or federal public domain land to make a "federal Indian reservation." Yet, the Secretary now asserts the authority to take 13,004 acres of fee land into trust for the Oneida Indian Nation of New York. See Record of Decision, May 20, 2008. 73 F.R. 30144-30146.

This Court must begin placing the Indian trust back under the Constitution of the United States. If this Court allows the Secretary to continue to exercise the unlimited fee to trust power, the Indian trust trumps the Constitution and our whole scheme of self-governance. See dissent of Justice Harlan in *Arizona v. California*, 373 U.S. 546, 603-5 (1963). This internal threat to our right to self-governance is more threatening than the loss of rights of prisoners held at Guantanamo Bay Naval Station. Yet, those prisoners currently have more rights to due process of law than the American citizens who are threatened with having tribal sovereignty rekindled in their immediate vicinity.

*See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Rasul v. Bush*, 542 U.S. 466, 471 (2004). This Court can limit the disruption and protect the constitutional rights of all the People by restoring the intent of Congress and limiting the IRA to only those Indian tribes on federal Indian reservations of public land as defined in Section 479.

This Court has already asserted its judicial review authority to rebalance the federal common law equities in *Sherrill*. *Sherrill* at 218-20. By correctly interpreting the IRA as a federal public lands statute as defined by Section 479, this Court can rule that the Secretary is beyond his authority to apply Section 5 of the IRA, 25 U.S.C. § 465, for the Narragansett tribe in Rhode Island. This would end the unlimited territorial power assumed by the Secretary of the Interior after this Court's decision in *Oneida I*. The Petitioners have continuously argued that the Settlement Act prevents these 31 acres from being placed into "trust" to create sovereign Indian land in Rhode Island. By extending the rebalancing of the equities from the *Sherrill* decision, this Court can limit the "Indian trust" and restore the interpretation of Section 465 to the original intent of Congress. Congress then can grapple with federalism and separation of powers issues while balancing local community and tribal interests if it chooses to enact fee to trust legislation. Congress is accountable when it balances the competing interests. The limits of tribal sovereignty must be defined by Congress and not by the unaccountable discretion of the Secretary of Interior.

## CONCLUSION

The Court should reverse the decision of the First Circuit.

Respectfully submitted,

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DEPARTMENT OF THE INTERIOR

MEMORANDUM FOR THE PRESS

FOR RELEASE IN AFTERNOON PAPERS OF Tuesday, February 13. 1934.

Washington, D.C., February 13. A sweeping bill, drafted in the Office of Indian Affairs and the Office of the Solicitor of the Interior Department, for the economic rehabilitation of the Indians and for Indian self-government, was introduced in the House of Representatives today by Rep. Edgar Howard of Nebraska. The bill is aimed primarily at stopping the rapid draining of Indian lands and other natural resources into white ownership through the allotment system, and at curbing the hitherto almost autocratic powers of the Office of Indian Affairs over the persons, property, and institutions of the Indians by granting to them the elementary powers of self-government.

"This 'bill of Indian rights', Commissioner Collier stated today, "is the most far-reaching measure of legislation in the whole history of our dealings with the Indians. It is not radical legislation: on the contrary it is conservative. It seeks first of all to stop the shocking waste of Indian lands and natural resources which the government has permitted and encouraged for more than half a century. It seeks to give to the Indians the simple right - - the inalienable right of all men who are not slaves – of establishing an elementary form of self-government, organizing for collective action, and taking part in the manage-ment of their own affairs, This bill thus strikes a double blow at the two fatal weaknesses of Indian administration across a whole century: first,

the dissipation of the Indian estate and the progressive pauperization of the Indians, and second, the suppression of Indian tribal and social and religious institutions and the steadfast failure of the Government to organize any effective plan of collective action by which the Indians could advance in citizenship and protect their rights."

"The allotment system has been disastrous to the Indians," Collier continued "because it has taken away from them the only means of self-support which most of them are equipped to use, namely, the land. The allotment act of 1887 is largely responsible for the existence of one hundred thousand landless Indians, most of whom are paupers."

In the economic field, the bill proposes to repeal the allotment law of 1887, through which the Indians have lost two-thirds of their lands to the whites, to prevent any further alienation of Indian lands outside of Indian ownership, to put allotted lands, especially grazing and forest lands, back into community ownership, to prevent overgrazing, to place the Indian forests, of which there are eight million acres, on the basis of continuous productive forestry management, and to develop Indian farming, livestock raising, and other land use along the lines of the subsistence homestead projects now being developed by the government for white communities. While the bill provides various devices of relinquishment, purchase and exchange, for restoring allotted and inherited lands to community ownership, it carefully safeguards the vested rights of Indian allottees and heirs.

As pointed out by Commissioner Collier, the white man's system of fee patent ownership has not worked with the Indians, for the reason that most of them, once they received title to their allotments, could not resist the temptation to sell it to a white man for a little ready cash.

In the field of self-government, the bill proposes to curb the hitherto autocratic powers of the Office of Indian Affairs over the Indians and to substitute in its place a cooperative and advisory relationship. In addition, the bill, in conjunction with the Johnson-O'Malley bill previously introduced, provides a definite system of financial cooperation between the Federal Government and the states whereby many function of health, education, and other Indian services may be taken over by state or local communities, the cost to be reimbursed by the Federal Government. Under the proposed plan of Indian self-government, Indian municipal corporations will be chartered by the Secretary of the Interior, subject to ratification by the Indian community, and those corporations will be endowed with the powers which, in the opinion of the Secretary of the Interior, they are competent to discharge. The bill proposes a progressive and experimental delegation of powers, including police power, public health, establishment of Indian courts, the management of Indian community property, and such other powers as local government ordinarily embraces.

Many of the local functions of the Indian Service may, under the proposed bill, be transferred to the Indian community and carried on by qualified Indian employees: but the Secretary of the Interior is directed

to enforce suitable standards of fitness for such Indian employees.

Moreover, the Indian community may appoint a qualified Indian to any vacancy in the Indian Service if such candidate is found to possess the necessary qualifications.

Indian communities would henceforth, under the terms of the bill, take formal part in preparing budget estimates and making recommendations to Congress for appropriations to assist the communities, and the future expenditure of appropriations covering services transferred to the Indian community would be by its bonded Disbursing Officer, subject to the laws of the United States.

The Indian Service would continue to administer all functions not transferred to the community, would assist the community in developing its self-government, and would require the observance of the charter, protect the rights of minorities, and assure the effective conduct of the community government. Functions which prove not to be efficiently conducted by the community may be retransferred to the Indian Service.

In order to equip the Indians to take over increasing powers of self-government. and business management, the bill sets up a program of educating Indians as administrators, judges, public health officials, foresters, grazing experts, engineers, nurses, accountants, and experts in other fields.

A novel feature of the bill is the provision for compulsory transfer of unsatisfactory local officials of

the Indian Service on charges brought by the Indian community, under rules and regulations by the Secretary of the interior to prevent abuse of this power.

The bill also provides for the creations of a United States Court of Indian Affairs, consisting of seven judges appointed by the President, to have jurisdiction over all cases involving federal crimes committed in Indian reservations, cases to which an Indian tribe or community is a party, and other cases growing out of relations between Indians and whites or out of property rights of Indians. It also provides ten special federal attorneys to assist and advise Indian communities in matters of law and equity.

The bill was drafted after months of intensive study of the complex field of law and administration covered by the bill, and with the advice of numerous Indian welfare associations which have unanimously endorsed the main principles of the bill. The proposed legislation embodies many of the major policies which Collier, previous to his appointment as Commissioner on March 4th last, championed as founder and director of the Indian Defense Association.

"This legislation is important to the Indians," Commissioner Collier said, "because for the first time it gives them a chance to achieve economic and social security, to shake off the deadening clutch of irresponsible bureaucratic domination, and to achieve the freedom and dignity which their history and qualities entitle them to. It is important to the whole country because it offers an opportunity to clean house in the long maladministration of Indian Affairs and to

save vast sums of public money by setting the Indians at last on the road to self support.

"We have no illusions," Collier continued. "about the difficulty of the task ahead. But we know that the Indians all over the country have awakened and are thinking as they have never thought before. We know too that Indian Welfare Associations and individuals who have given years of study to the Indian problem strongly support the two great purposes of this bill. From long years of direct experience with the Indians I personally know that they are capable of working out economic independence, of fulfilling the civic responsibilities of American citizens, and of preserving their own distinctive culture and tradition while taking a rightful place in the midst of a white civilization. They have never had a chance to do those things. This bill gives them the chance."

(P.N. 81316)

# B U L L E T I N

MISSION INDIAN AGENCY,
Riverside, California,
April 16, 1934

## THE WHEELER-HOWARD BILL – QUESTIONS AND ANSWERS

**1. Q. Will the Wheeler-Howard bill take lands away from Indians who have kept their allotments and divide it up among those Indians who have no land?**

A, No. land for landless Indians will be purchased out of Federal appropriations totaling two million dollars per year authorized by title 2, section 7, of the bill, and also, if any tribe so desires, out of tribal funds. Any Indian who now owns land can keep what he has, or sell part of it to the tribe if he wishes. The provision now contained in title 3, section 8, paragraph 2, allowing the Secretary of the Interior to sell individual allotments to a tribe or community is to be amended so that such sale can take place only with the consent of the individual allottee.

**2. Q. Will the Wheeler-Howard bill destroy the right of an Indian's heirs to inherit land?**

A. No. on the contrary, it is the allotment system and the inheritance laws of the past which have prevented a hundred thousand Indians, now landless, from inheriting a single acre of the land which their fathers owned. Under the Wheeler-Howard bill heirship lands will no longer be sold to whites.

Where they cannot be economically divided among the Indian heirs they will be consolidated in large tracts and each heir will have his proper share in the use and rental of these tracts, his share evidenced by a corporate certificate. Improved lands, however, will not be consolidated, and the individual ownership will be undisturbed. The transfer of title to the tribe or community which is provided for in section 11 of title 3 simply prevents the sale of the land to outsiders.

It does not abridge any Indian's right of possession any more than does the retention of legal title by the United States Government.

**3. Q. Does the Wheeler-Howard bill prejudice any treaty rights or claims against the Government?**

A. No. Its only effect on treaty rights or claims is to insure (through section 6 of title 1) that any funds collected by a chartered Indian community can no longer be spent by the Federal Government without the consent of the tribe, as has been done with moneys recovered under treaty claims in the past.

4. **Q Does the Wheeler-Howard bill attempt to send the Indian"back to the blanket?"**

A. No. The bill helps the Indian to make real progress in securing for himself the greatest benefits of the white man's civilization, increased education, efficient democratic government, sound business organization, and a higher standard of living.

5. **Q. Does self-government mean the segregation of the Indian?**

A. No. the Indian member of a chartered community retains all rights of American citizenship, including the right to vote in Federal and State elections. Participation in an Indian community would not interfere with religious, educational, business or personal relationships outside the community any more than would a white man's participation in a village, a club, or a corporation cut him off from such religious, educational, business or personal relationships.

6. **Q. Will this bill end Federal guardianship of Indians?**

A. This bill specifically provides, in section 11 of title 1, that Federal guardianship of Indians and tax exemption of Indian lands shall be continued. It does offer a way in which Indians may, if they wish, bring an end to objectionable features of the present Federal guardianship by gradually assuming local control over matters which the Indian Office now handles.

7. **Q. How would a chartered Indian community be able to pay its employees?**

A. Where such employees perform tasks similar to those now performed by Federal employees, it is contemplated that present Federal appropriations will be continued, with only this difference: They will be paid to the Indian community instead of the Indian Office. Where employees of a chartered Indian community perform now jobs, such as the promulgation of local ordinances or the management of cooperative marketing, the Indian community will have to pay those employees out of its own income. This bill seeks to increase that income by making credit facilities

available to chartered communities, by increasing Indian lands, by giving Indian communities control over tribal funds and Federal property on the reservations, and by making it possible for such communities to engage in business and trade on an efficient and profitable basis.

8. **Q. How will this bill affect the Indian who has retained his trust allotment?**

A. This bill will protect the trust patent Indian by taking away the power of the Secretary over to grant a fee patent rendering the land taxable and alienable. The trust patent Indian can continue to possess any land he now possesses, but if he prefers he can cast his land into a larger unit and receive a share in the ownership of the whole unit, which would be profitable to all concerned, in the case of most grazing and timber lands. Not only will his possession of land continue, but the bill will make available proper credit facilities for improving and using the land, which he is now often forced to rent to outsiders for an inadequate rental. Moreover, the bill will offer him the legal protection he needs to secure, redress against trespassers and lessees who default in rentals. When he dies, his heirs will inherit special rights to his trust patent land, but the title will be placed in the tribe or community so that his heirs may not lose the land.

Where the land cannot be economically used by the various heirs, it will be put into large units, and the heirs will receive their proper shares in these units.

9. **Q. How will this bill effect the Indian who retains fee patent land?**

A. the Indian who has fee patent land, like the Indian with trust patent land, is under no compulsion to sell the land to an Indian tribe or community. He may, if he desires, if the Secretary of the Interior agrees, and if the land is unencumbered, surrender his fee patent and receive in exchange a trust patent under which his land will not be alienable or taxable, or a proportionate interest in such restricted land.

10. **Q. How will this bill affect the Indian who has no land, or only a small amount of land?**

A. The bill authorizes an appropriation of two million dollars of Federal funds each year for the purchase of land, which will be assigned to Indians who need land. In addition, any tribe or community may use tribal funds to buy new lands to be assigned or leased to needy members. Part of the loan fund of five or ten million dollars provided by section 13 of title 1 of the bill, as amended, will be available for improving these lands.

**11. Q. How much time can the Indians take to decide whether or not to accept the self-government features of the bill?**

A. If the bill is passed, each Indian tribe or community can take as much time as it wants to decide whether to accept self-government. Under the terms of the bill no charter can be forced on a group of Indians that does not want a charter.

Each group of Indians can consider the question at its leisure, with the help of private attorneys or officials of the Indian Department, before deciding

whether a program of self-government will be advantageous to the group and what kind of program it wishes. On the other hand, if the bill is not passed, Indian tribes will not be able to secure self-government if they desire it, because the Secretary of the Interior will not have the power to issue a charter of self-government.

12. **Q. What can the Indians do to help or hinder the passage of the Wheeler-Howard bill or to secure changes in it?**

A. Indians who want to see this bill passed should write to their Congressmen and Senators or to the sponsors of the bill, Congressman Howard and Senator Wheeler, or to the Commissioner of Indian Affairs, stating their opinion of the bill. Indians who object to the passage of the bill may help to defeat it by sending their objections to those individuals – or by keeping silent while the white opponents of the bill attack it.

Indians who object to certain part of the bill should work out suitable amendments and forward them to any of the individuals named above, giving the reasons for the proposed amendments.

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STATEMENT BY COMMISSIONER JOHN COLLIER, OF THE OFFICE OF INDIAN AFFAIRS TO THE ASSOCIATED PRESS, ON THE ATTEMPTED DESTRUCTION OF THE INDIAN REORGANIZATION ACT BY SENATE BILL 1736

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Washington, D. C.

March 3, 1937

Senators Wheeler and Frazier have been good friends to the Indians and their cause. For this reason, their action in sponsoring an attempt to repeal the Indian Reorganization Act is mystifying. Their reasons, as reported by the Associated Press, are even more mystifying.

Neither of them has a word to say about the main positive features of the Act, which both of them voted to make into law. The Act stops the further wastage of Indian lands through allotment. It sets up an agricultural credit system for Indians. It gives Indians a preference in government employment. It establishes opportunities for advanced education for Indians. It requires protection of their lands against destructive uses resulting in deforestation and soil erosion. It sets in motion a process of re-vesting the landless Indians with land on which they can subsist. These are only some of the main positive features of the Indian Reorganization Act which Senators Wheeler and Frazier propose to destroy.

The Associated Press, interviewing them, apparently obtained no statement from either one or the other as to any of these positive features of the Act, or of the accompanying Oklahoma Indian Welfare Act, whose enactments have brought a new era to about 80 percent of the Indians. Respecting the Oklahoma Indian Act, which carries to Oklahoma the main benefits of the Indian Reorganization Act, they have nothing to say and they do not seek its repeal. But if they are to be consistent, they will attempt likewise to repeal the Oklahoma Act.

Their reasons, as quoted by the Associated Press, are partly irrelevant and partly inaccurate.

Senator Wheeler is quoted as objecting that features stricken from the original Wheeler-Howard Bill are nevertheless being put into effect by the Secretary of the Interior through constitutions granted to the tribes which have organized under the Act. But the Act expressly states that the powers vested in Indian tribes through their constitutions may be not only those specified powers named in the Act but "in addition, all powers vested in any Indian tribe or tribal council by existing law." The "existing law," as it stood before the Indian Reorganization Act was signed, gave to the Department certain powers to vest authority in tribes, and directly vested certain authorities in tribes. The Indian Reorganization Act extended these authorities and limited the authority of the Department. Why has it been wrong for the Secretary of the interior to obey the express language of the Indian Reorganization Act, and to vest the tribes with all those authorities given by prior acts as well as by the Reorganization Act?

Senator Frazier, as quoted by the Associated Press, voices a criticism which seem to be exactly the opposite of Senator Wheeler's. He is quoted as stating that a majority of the Indians have complained that instead of getting more self-government through the Act, they were getting less self-government. This could only mean that the constitutions granted to the tribes, instead of going beyond the scope of the Indian Reorganization Act in their grant of powers, as alleged by Senator Wheeler, have withheld from the tribes even those powers contained in the Reorganization Act. The allegation is not supported by the facts, nor is it accurate to state that the majority of the Indians, or even any substantial minority of them, have complained that they were being dictated to. Actually, out of 230 tribes, 170 adopted the Act by majority votes, and are subsisting under it; none of them has asked that it be repealed; and many of the tribes which voted not to accept the Act are now desirous of being permitted to vote once more upon it, in order to get its protections and benefits.

Senator Frazier makes another statement, as quoted, to the effect that Indians who did not accept the Reorganization Act have been discriminated against and specifically, have been punished by being removed from relief rolls. Senator Frazier states that there have been such complaints. He does not state that they are true. Such complaints, if made, are in fact grossly untrue.

The expenditure of emergency funds for Indian tribes has been carried out with no relation whatsoever to the Indian Reorganization Act., The expenditures of regular funds have been carried out as specifically

directed by congress. Tribes not under the Act have received in many instances greater quotas of the emergency moneys of all sorts than tribes under the act. Indian relief has been expended according to available funds, human need, and the opportunity to expend the funds usefully upon Indian-owned land.

Even were Senator Frazier's allegations, as quoted, supported by fact, they would provide no reason whatsoever for seeking repeal of the Indian Reorganization Act. There would be criticisms directed against administration, and correction logically would be sought through demanding administrative reforms.

The existence of the facts is denied. But if they did exist, they would furnish no justification for an attempt to destroy the Indian Reorganization Act with its grants for protection of Indian property, new land, credit, improved education, and all those other benefits which have made the Act the foundation of a new and more hopeful life among the Indians.

In my opinion there is no chance that the bill introduced by Senators Wheeler and Frazier will be passed by Congress or if passed, signed by the President

JOHN COLLIER

Commissioner of Indian Affairs.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of Indian Affairs
Washington

10/16/39

The following list shows Indian tribes, grouped by states, which are under Constitutions and Charters, as approved by the Secretary of the Interior in accordance with the provisions of the Indian Reorganization Act, the Oklahoma Indian Welfare Act, and the Alaska Act. The listed dates show when the Constitutions and Charters went into effect.