

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

HEARING ON
“SETTING THE STANDARD:
DOMESTIC IMPLICATIONS OF THE UN DECLARATION
ON THE RIGHTS OF INDIGENOUS PEOPLES”

TESTIMONY OF

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Good afternoon, Chairman Akaka and distinguished members of the Committee:

My name is Robert Coulter and I am head of the Indian Law Resource Center, a non-profit American Indian legal organization. I am a member of the Citizen Potawatomi Nation and I am a lawyer. I want to express my thanks to the Committee on Indian Affairs for holding this much-needed oversight hearing concerning the United Nations Declaration on the Rights of Indigenous Peoples.

The UN Declaration on the Rights of Indigenous Peoples originated in 1976, when it was developed by Indian nations and leaders in the United States and in Central and South America. The initiative was prompted, so far as Indian nations in the United States were concerned, by the knowledge that federal law was very adverse to the rights of Indian and Alaska Native nations in many fundamental respects. Federal courts persistently refused to recognize that Native nations are entitled to constitutional rights and particularly to equality before the law, and the Supreme Court even in modern times has continued to invent new injustices. The situation in Central and South America was even worse, with a nearly complete absence of the rule of law so far as Indians were concerned. Leaders decided to turn to the United Nations and to international law in hopes of calling attention to the injustices of domestic law and using human rights law to improve federal law, policies, and practices.

The conditions that gave rise to the Declaration have not improved much. Indian and Alaska Native nations continue to live with a system of federal law that is discriminatory, unconstitutional, and oppressive. It is unworkable and unjust. It is a legal framework that makes it all but impossible for Indian nations to improve their economic and social conditions. It is analogous to the “Jim Crow” laws and the “Separate but Equal” legal doctrine that oppressed African Americans and other racial minorities in this country for almost a hundred years after the end of slavery.

For example, it is often incorrectly said that the “doctrine of discovery” gave ownership of all the land in this country, particularly all Native lands, to the European nation that

“discovered” the area. The unfairness of this concept is obvious, and this “doctrine” has never in fact been the law. Nevertheless, courts and government officials routinely apply this mistaken and discriminatory rule and believe it to be the law.

Major parts of the federal law dealing with Native tribes and individuals are plainly in violation of the United States Constitution. The chief example is the “plenary power doctrine” supposedly giving the federal government almost limitless power over Native nations. Another example is the Supreme Court’s ruling that the federal government may take aboriginally held Native lands and resources without any compensation and without due process of law.

Congress frequently deals with Native property by enacting legislation that would be forbidden by the Constitution if it affected anyone else’s property. The government also manages or controls most Native land, frequently mismanaging the land and resources, and fails to account properly for the resources and moneys owed to the Native nations and individuals that own the land and resources. Congress claims the power to terminate Indian and Alaska Native tribes and to abrogate or violate treaties with Indian nations, usually without any liability.

This legal framework is not only inconsistent with our Constitution and human rights standards world-wide, but it has enormous adverse consequences for Indian and Alaska Native nations throughout the United States. It is not likely that Indian and Alaska Native governments can solve the deep social, economic, and governmental problems that afflict them unless this present, unfair body of law is thoroughly reformed. Effective governance requires an infrastructure of law that is reasonably fair, consistent, and predictable. Changing, clarifying, and improving current federal law affecting Native tribes and Natives of Hawai’i are absolutely necessary if nations are to gain true and effective control of their homelands and improve their economic and social well-being.

The Declaration can be useful as a guide for bringing about positive change in these problem areas of federal law and practice. Achieving the rights of the Declaration will make possible a secure, reasonable, business climate that will encourage investment and will create the opportunity for serious long-term economic development.

American Indian leaders worked in the United Nations with all the countries of the world for more than 30 years to win adoption of the Declaration. Thousands of indigenous leaders from all parts of the world participated in the debates and working group meetings to build, eventually, worldwide support for the rights of indigenous peoples, including American Indian nations and tribes. The Declaration was adopted with overwhelming support by the General Assembly in 2007, and within a few years the four countries that voted against it, including the United States, changed their opposition to support. There is now global consensus supporting the Declaration among all countries of the world.

When President Obama announced the United States’ support for the Declaration last December, the Administration said in a written statement that the Declaration “expresses the

aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.”

The Declaration is a non-binding human rights instrument that expresses the most important legal rules that countries are expected to follow in their relations with indigenous individuals and peoples. It expresses the legal rights of indigenous individuals and also indigenous communities, tribes, and nations – or “peoples”, the term used by the Declaration. The goal of the Declaration is to protect the cultures and ways of life of indigenous peoples and to protect these societies and individuals from mistreatment, suffering, and threatened extinction.

The Declaration contains 46 articles covering civil and political rights, cultural rights, economic rights, and much more. Let me highlight some of the most important human rights proclaimed in the Declaration.

Article 2 is of over-arching importance because it provides that indigenous peoples or tribes and individuals have the right to be free from any kind of discrimination in the exercise of their rights, particularly discrimination based on their indigenous identity.

Article 3 recognizes the right of self-determination, including a host of particular rights of self-government over internal and local affairs. The right of self-determination is extensive and is detailed in many other articles. It includes the right to form governments and other social and political institutions, the right to make and enforce laws, the right to control and manage their resources, the right to determine their own membership, and many other such rights. The rights spelled out in the Declaration are very similar to the rights of self-determination recognized in federal law.

This is a right that certainly must be extended by federal law to Natives of Hawai’i and all indigenous peoples.

Article 7 provides for the right of indigenous peoples to exist and live in peace as distinct peoples. It forbids all acts of genocide or violence against them.

Article 8 forbids actions to dispossess indigenous peoples or individuals of their lands, and Article 10 recognizes the right not to be forcibly removed from their lands.

Article 12 proclaims the right to practice their spiritual and religious traditions and the right to have access to religious and cultural sites.

Other articles recognize (Art. 13) rights to oral histories, languages, customs and ceremonies; (Art. 14) the right to establish their own education systems; (Arts. 18, 19) the right to participate in the government of the country; (Art. 20) the right to their own subsistence economic activities; (Art. 16) rights to media; and much more.

Article 22 speaks to the epidemic of violence against Native women and children, and Article 44 broadly recognizes that the rights and freedoms in the Declaration apply equally to women.

Of special importance is Article 26 providing for the right to own and use land and resources. It describes a full right of ownership, not a diminished or subordinate form of ownership.

Article 28 recognizes the right to fair processes for seeking the return of land wrongfully taken or for seeking compensation or other relief. There is nothing here that calls for “giving back the country to the Indians” or anything unreasonable. The Declaration envisions a workable and fair system of legal rights for all.

Article 29 recognizes for the first time in any formal instrument a right to protection of the environment. American Indians proposed this right to protect the Earth, and the Declaration incorporates this innovative concept of human rights — a concept that has become widely shared among many people and countries.

Article 37 calls for the observance and enforcement of treaties made with indigenous peoples. This is an important step forward, one that has long seemed necessary.

As with all human rights, the rights in the Declaration are not absolute, but are to be exercised with due respect for the rights for the rights and freedoms of others.

The Declaration, as we can see, calls upon the United States (and all countries) to end the discriminatory and unjust laws and policies that continue to be applied to Indian and Alaska Native nations and to Natives of Hawai’i.

Much of what the federal government does is very much in accord with the Declaration, but there are important areas of policy and law that are not in keeping with our own United States Constitution nor in accord with the Declaration. What should Congress do?

- Congress must searchingly examine proposed legislation to see that it comports with the Declaration.
- The practice of enacting laws that take Native property without due process and fair market compensation must be stopped. This country does not need to go on taking Indian lands.
- There is no need to go on denying tribes and Native peoples the constitutional rights that are guaranteed for everyone in this country.
- Legislation that seeks to control or dispose of Indian resources and other property without

the consent of the nations or tribes that own them, must be stopped. This country does not need to control Native nations or their lands. Native peoples and tribes are perfectly capable of and entitled to self-determination – to govern their own property and affairs.

- The violation of treaties must not be permitted, and where treaties are violated, there must be just compensation or another fair remedy for the wronged party.
- Congress must change federal law and policies to allow tribes to adequately police and prosecute violent crimes in their communities. Native women are more than twice as likely to be victims of violence, because tribes lack criminal jurisdiction to prosecute outsiders.
- Termination of tribes must never again be considered, and abuses of the government's trusteeship must be not be tolerated.
- Legislation that singles out tribes or Indians for harmful treatment must be given strict scrutiny and must be rejected where it denies equal protection of the law.
- And Congress must abandon the 19th Century idea that it has powers over Indian and Alaska Native tribes that go beyond the enumerated powers in the Constitution. This idea is itself discriminatory and subjects Native peoples to disadvantages not inflicted on others.

The chief problems in federal law that need to be corrected are examined, and specific proposals for change are outlined in a major study by the Indian Law Resource Center. The study suggests some of the principles of law that could clarify and correct these legal problems and create a workable and just framework of federal law. These proposed legal principles are attached to my testimony, and I ask that they be included in the record. These proposals are now being considered by Native leaders, and they will decide what proposals to make to Congress and to the Administration. I do not pretend to speak for any tribes today, but I have spoken to many tribal leaders, and I can assure you that the desire for change is strong, it is widely shared, and the Declaration is proving to be a guide and an agenda for that change.

Most important, Congress must give the most urgent attention to the proposals that Native leaders make for changing and improving federal law.

In considering tribal proposals, Congress should embrace the Declaration as a guide, because it is as American as can be. It originated here, and it contains the same values of freedom, democracy, limited government, equality of rights, and the rule of law that formed our own Constitution.

The Administration, too, has assumed an enormous responsibility to conform its practices and its policies to the Constitution and to the Declaration.

President Obama's commitment to action, given to tribal leaders at the White House on December 16th last year, creates an extraordinary and very favorable opportunity to consult with federal agencies and departments and to seek concrete actions to improve the law and to improve federal policies and practices. This opportunity extends to the indigenous peoples of Guam and American Samoa, and Natives of Hawai'i, as well as to Indian and Alaska Native tribes. The Administration's statements are very encouraging and forward looking. The promised consultations have already begun in some quarters, and the opportunity for making proposals and seeking needed changes is enormous. Far more action is probable when Native leaders have informed themselves about the Declaration and begin to act on a nationwide level.

Much can be done by the administrative branch to achieve the rights in the Declaration without legislation. Regulations, policies, and practices have long needed to be improved and reformed to comply with the Constitution – not to mention the Declaration. I think, for example, of the need to reform and improve the processes for federal recognition of tribes.

Congress must continue to exercise oversight to examine the extent to which the Administration is living up to the standards of the Declaration, especially the standards that are set in our own Constitution.

Turning to the judicial branch, our federal courts have been responsible for some of the worst and most damaging legal rules and decisions concerning Native tribes, and Congress must conduct oversight hearings concerning the practices and decision of courts that impose rules upon tribes that are contrary to the Constitution and that deny tribes equality before the law. Such decisions include those that permit the taking of Native lands and other property without compensation or due process of law and that deny tribes criminal jurisdiction over all those committing violence against Native women on Indian lands. Moreover, federal courts and state courts as well have increasingly adopted the practice of ignoring precedent and established law in Indian cases and making up new rules that apply only to tribes — thus denying Native tribes the “Equal Justice Under Law” promised on the front of the Supreme Court building. Congress, through appropriate enactments and resolutions, should help to correct these court-made stains on America's legal system and the country's honor.

Chairman Akaka and members of this Committee, thank you again for holding this much-needed oversight hearing concerning the UN Declaration on the Rights of Indigenous Peoples.

I am happy to answer any questions whenever the time is appropriate.

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Attachment: Native Land Law Project, Draft General Principles of Law Relating to Native Lands and Natural Resources, written and edited by the Indian Law Resource Center and sponsored and published by the Indian Land Tenure Foundation (February 2010)

ATTACHMENT
TO
TESTIMONY OF ROBERT T. COULTER,
EXECUTIVE DIRECTOR,
INDIAN LAW RESOURCE CENTER
June 9, 2011

**Draft General Principles of Law Relating to Native Lands and Natural Resources¹
With a Non-Technical Version**

Written and edited by the Native Land Law Project, Indian Law Resource Center
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©February, 2010

1. The legal rights of Indian or Alaska Native nations to the lands and resources they own by reason of aboriginal ownership, use and occupancy are the full rights of ownership, management, control, and disposition recognized in law without any diminishment or discrimination based on the aboriginal origin of these rights.

Native nations have complete ownership of their aboriginal lands - not some limited or partial right.

2. The doctrine of discovery gave the “discovering” nation particular rights under international law as against other European or colonizing nations, namely the exclusive right to acquire land and resources from the Native or indigenous nations. The “doctrine of discovery” gave the “discovering” nation no legal right as against the Native nations or peoples.

“Discovery” did not give the discovering country any ownership of Native lands. It only gave the discovering country the exclusive right to buy the land from the Native owners

3. Legal doctrines such as *terra nullius*, the doctrine of discovery, and other such doctrines are inconsistent with the United States Constitution to the extent that they are mistakenly applied to diminish or impair the rights that Indian and Alaska Native nations hold with respect to their lands and resources.

Legal rules that deny, take away, or reduce Native ownership of their lands and resources are invalid, because they violate the United States Constitution.

¹For additional information or to request a copy of the complete study, *Draft General Principles of Law Relating to Native Lands and Natural Resources*, including extensive Commentaries on each of the Principles, please contact the Indian Law Resource Center, 602 North Ewing Street, Helena, MT 59601, by email at mt@indianlaw.org.

4. The ownership of land and natural resources, including rights of use and occupancy, of Indian and Alaska Native nations and individuals, including interests in lands and resources held by aboriginal title, is entitled to the same constitutional protections as the ownership and other interests of others in their respective lands and resources, and in addition Indian and Alaska Native nations and individuals may have other rights and legal protections arising from treaties, statutes, and other sources of law.

Native lands of all kinds are protected against taking and other harm by the government - just the same as all property is protected. And, in addition, some Native land is protected by other legal rules that have been created by specific treaties, acts of Congress, or common law. In other words, Native lands and resources have at least as much legal protection against taking or other harm as other lands, and sometimes will have additional legal protections as well.

5. Congress, by reason of the Fifth Amendment to the Constitution, may not take the property of Indian or Alaska Native nations and individuals, including aboriginal property, except for a public purpose, with due process of law, and fair market compensation with interest.

Congress cannot take any Native lands or resources, including aboriginal title lands, unless it is done with fair compensation, for a public purpose, and in accordance with law.

6. The United States has trust title to land owned or beneficially owned by a Native nation or individual only if the United States has acquired that title through a valid legal process, such as a treaty, agreement, or statute, and only if that trust title had or has the consent of all the Native nations or individuals concerned.

The United States holds trust title to Native land and resources only where the United States has gotten that trust title through some genuine legal process and only where the Native owner consents to the United States holding trust title. In other words, trust lands exist only where the United States has become trustee in a lawful way and only where the Native nation agrees to this.

7. The federal government has no power as a putative or supposed trustee to control or dispose of lands owned by an Indian or Alaska Native nation or individual unless the United States acts with the express, free, prior, and informed consent of the Indian or Alaska Native nation or individual concerned.

Unless the United States has genuine trust title, the federal government has no authority as "trustee" to sell, lease, or do anything with Native lands without the consent and authorization of the Native owner.

8. Where the United States holds property in trust for an Indian or Alaska Native nation or individual, or where the United States has, by reason of events or circumstances of whatever

nature, assumed control or possession of lands or resources belonging to or beneficially owned by an Indian or Alaska Native nation, or individual, the United States has all the responsibilities of a trustee as prescribed by law generally applicable to trustees or constructive trustees: including but not limited to the obligation to conserve the trust assets, to manage the assets for the benefit of the beneficiary, the obligation to account to the beneficiary, the obligation to avoid every conflict of interest, and the obligation to end the trusteeship and return the trust asset to the beneficiary when so required by the beneficiary.

Where the United States holds land or other property in trust for a Native nation, no matter how that came about, the United States has all the responsibilities and duties of a trustee that are required by law generally, without exceptions or limitations that reduce the government's responsibilities or duties.

9. A treaty with an Indian nation is a treaty within the meaning of the United States Constitution, the violation of which gives rise to liability and the right to redress.

The United States cannot freely violate treaties without providing full redress for the Indian parties, including compensation, restitution, or other appropriate, just remedy.

10. Congress has only such powers in the field of Indian affairs – particularly with respect to Indian and Alaska Native lands and resources – as are conferred by the United States Constitution. The Constitution does not accord Congress “plenary power” – in the sense of additional or unlimited powers – over Indian and Alaska Native nations and their property.

The United States Congress does not have “plenary” or unlimited power to enact laws dealing with Native nations and their property. Instead, Congress has only those powers that are stated in the Constitution, and those powers must be used within the limits set out in the Constitution – especially those in the Bill of Rights.

11. Indian and Alaska Native nations have the inherent right to form, maintain, and change their own governments and to create, maintain, and alter their own laws and legal institutions for the purpose, among others, of governing their own affairs and particularly for controlling, using, and managing their own lands and resources.

Native nations have the inherent or sovereign power to create their own governments and laws for all purposes, including for the purpose of using and controlling their lands and resources.

12. Native governments have the right to freely use, exploit, manage, and regulate lands and resources owned or beneficially owned by the nation, and they have governmental authority over allotted lands owned by Indian or Native persons within the reservation or subject to the jurisdiction of the Native government.

Native nations have the right to use, control, and benefit from their lands and resources without interference by the federal government that is not authorized by the Constitution or by the Native government itself.

13. Congress has no power under the Constitution or otherwise, with respect to any Indian or Alaska Native nation, to terminate its legal existence or to terminate its legal rights and status as a nation without the free, prior, and informed consent of that nation.

Congress cannot terminate any Native nation.

14. Land and other property owned by an Indian or Alaska Native nation in its sovereign capacity as a government is not taxable by any state or local government, whether or not that land is held in trust, in fee, or in any other form of tenure.

Native lands and resources cannot be taxed by any government, no matter whether the land is held in trust or otherwise.

15. The United States is bound by international law to respect the human rights and other rights of Indians and Alaska Natives both as individuals and peoples.

The United States must respect and abide by international law, especially international human rights law concerning indigenous peoples.

16. The United States must provide prompt and effective judicial remedies for the violation of the rights of Indian and Alaska Native nations and individuals in relation to their lands and resources. Such remedies must be non-discriminatory and otherwise consistent with the United States Constitution, applicable treaties, and generally accepted principles of fairness and due process of law.

The United States must make it possible for Native nations and individuals to go to court and get relief, or some kind of corrective action or compensation, whenever they suffer harm concerning their lands and resources or any other violation of their rights. These court remedies must be fair and effective.

17. The United States has a legal obligation to prevent abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals in relation to their lands and resources through the enactment and enforcement of reasonable legislation. This obligation of the federal government must be discharged in conformity with applicable treaties, the United States Constitution, international human rights principles, and these General Principles.

The United States has the duty to protect Native lands and resources by preventing abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals.