

Written Testimony of Darrel Smith

September 24, 1996

Before the U. S. Senate Committee on Indian Affairs

Mr. Chairman and Members of the Committee, I'm Darrel Smith and I ranch near Mobridge, South Dakota on the Standing Rock and Cheyenne River Indian Reservations. I'm a third generation reservation resident and one of over three hundred and seventy thousand non-Indians that live on Indian reservations in this country. Both my Grandparents moved to the Cheyenne River Indian Reservation near Eagle Butte in the mid 1920's. Both Grandparents were farming when my parents met and were married in the early thirties. My Parents bought our present ranch in 1946. I inherited part of the ranch, bought some from other family members, and am buying the rest from my Mother.

The Dawes Act and the surplus land Acts explain why many of the hundreds of thousands of non-Indians live on reservations and what their expectations were. South Dakota became a state in 1889, two years after the Dawes Act was passed in 1887. Based on the Dawes Act, South Dakotans expected the entire reservation system to cease to exist within a short period of time. Congressional testimony for the Dawes Act said, "...by the bill we proposed to break up the reservations..." Speaking of this era the Supreme Court said in 1984, "Members of Congress voting on the surplus land Acts believed to a man that within a short time-within a generation at most-the Indian tribes would enter traditional American society and the reservation system would cease to exist." Why would the homesteaders expect less than the Members of Congress? I live in an area that was opened up to homesteading by a 1908 surplus land Act. A phrase in this opening Act refers to "the respective reservations thus diminished." Early homesteaders couldn't have anticipated or imagined that their descendants would ever be subject to tribal authority. Other non-Indians have been incorporated into reservations as these reservations have expanded or new reservations have been created.

The Indian Reorganization Act of 1934 reversed previous policies and reestablished tribal governments and the entire reservation system. Since 1934 tribal authority has grown in power and scope, slowly gaining the right to tax, license and regulate everyone and everything within reservations boundaries. A controversial Supreme Court decision put me back in the reservation in 1984. Tribal governments generally will not allow non-Indians to participate in tribal government and both Tribes and the BIA have the legal right to discriminate. Since tribes are governed by federal law, governmental powers that are granted to one tribe generally can be adopted by others.

In an article in the Rapid City Journal titled "TRIBES TOLD TO BROADEN TAXATION POWERS TO PROTECT SOVEREIGNTY" a tribal lawyer claimed that "Tribes have the power to tax income, property, sales, real estate and construction on reservations. An example is a tribal ordinance on the Standing Rock Indian Reservation that says, "All persons, except tribal members of the Standing Rock Indian Tribe, shall pay taxes for the privilege of doing business on the Standing Rock Indian Reservation by leasing or permitting of Indian lands as follows:..." This tribal tax that I pay is collected exclusively from non-Members. What limits taxes that can be discriminately collected from people that are excluded from the political process? How does this tax differ from the British tax on tea imports prior to the Revolutionary War? Tribal taxation also results in double taxation raising business costs for non-Member reservation businesses.

Neighboring businesses are required to have tribal business licenses. Tribes are forcing non-Member applicants to agree to comply with all applicable tribal laws including tax and preference laws. Applicants also must consent to the jurisdiction of tribal courts over any business conducted on reservations. These business licenses grant tribes regulatory and legal authority over non-Members. Inherent in the power to license is the power not to license. This power can be used to intimidate or force non-Members off reservations. Few reservation businesses can afford effective legal remedies.

This situation raises the most fundamental questions about our values and our country. The Declaration of Independence listed several colonial complaints. Among them were the observation that governments derive

“their just powers from the consent of the governed.” It claimed that “all men are created equal” and complained that colonists were being forced to “relinquish the right of Representation in the Legislature” and that the King had “combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation.” It objected to “imposing taxes on us without our consent” and warned of the negative consequences “when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism...” The Constitution guarantees “to every State in this Union a Republican Form of Government.” The right to vote and participate in government is the very foundation of a republican form of government. Fundamental civil rights like the right to vote, the right to the equal protection of the laws and a practical right to a jury of peers are lacking.

Sovereign immunity also protects tribes from being sued and contracts with tribes or tribal members can only be enforced in tribal court. Recently a tribal casino was built near me. Two contracts were entered into by the tribe and unilaterally canceled after considerable money was spent by the non-tribal party before a third contract was honored. The risk that contracts might not be honored greatly reduces economic activity on reservations.

Tribal Members can rightly participate in county and local government. Meanwhile, their sovereign immunity may protect them from paying the taxes or obeying the laws they participate in making, enforcing, prosecuting or judging. Local communities and whole counties can't enforce their regulations against tribal Members. This is a significant threat in towns and counties on reservations. A recent series of incidents in a neighboring town illustrate part of the problem. According to the written testimony of a County Commissioner:

On May 25,1991, the McLaughlin Public School was broken into and vandalized. The damage was amazing. Fire extinguishers were discharged into the school's computers severely damaging and destroying thousands of dollars worth of hardware and software computer equipment. Virtually all breakable items in the lab rooms were broken. The chemicals from the science labs and the fire extinguishers were extensively thrown on the ceilings and walls and circulated throughout the building in the air flow system necessitating the repainting of virtually the entire interior of the building. Four Indian male juveniles were apprehended inside the building. They ranged in age from kindergarten to sixth grade. They were turned over to the BIA police for prosecution in the Standing Rock Sioux Tribal Court. The damages were estimated between twenty and fifty thousand dollars.

On July 12,1991, unencumbered by any judicial restraint and because there was no prosecution, several of the same children broke into the Thorsensen Insurance Agency in McLaughlin and again extensively vandalized the facility. The damage included ransacking the file cabinets and destroying the contents of the office files and general breakage and other damage. However, in order that there be no question about who the vandals were, the children took pictures of each other with a polaroid camera that was available and left the photos for the investigators to find. The insurance agency incident was committed by several of the same children who vandalized the school. All of this information and the photos were turned over to the BIA police for prosecution by the Standing Rock Sioux Tribal Court. Again, there was no prosecution.

These young vandals, having successfully burglarized a school and an insurance agency and having not been prosecuted or disciplined by the tribal court system which is charged with that responsibility...struck again. On August 30, 1991, the Redeemer Lutheran Church in McLaughlin was broken into and desecrated.... The vandals defecated on the floor and rubbed it in with the floor buffer. Under the portrait of Jesus Christ the vandals left a special calling card which does require explanation. The initials NWA stand for NO WHITES ALLOWED.... The carpets were damaged by chemicals that were available. The copying machine chemicals were dumped in various places. The paints available for children's sunday school were dumped everywhere and rooms were flooded thereafter. All of the fire extinguishers were discharged into the furnace system and the organ. Then, to make sure there was no question about their identities, the children took pictures with the copying machine. They took photos of each other's faces and left those available for investigators. They also stripped naked and took pictures of their testicles and penises. All of the photos of the children were turned over to the BIA police in the vain hope that there would be some type of prosecution and some type of justice. Again, the church to date has no word as to any prosecution. The cost of repair is not yet known but will certainly exceed \$25,000. In addition, the newly appointed Lutheran minister had to receive his ordination at the Catholic Church because the Lutheran Church was unusable. This is not a case of persons stealing for food

or out of need. In all three of these instances virtually nothing was taken. This is a wholesale example of destruction and desecration for no legitimate purpose.

How can city or county government function when a segment of its residents are not subject to its laws because of their tribal immunity?

Economic prosperity requires certain conditions and is difficult in rural areas in the best of circumstances. These added problems and uncertainties devastate the economies of many reservations, negatively affecting everyone. It is no accident that my county is one of the poorest in the country. In addition, many potential purchasers of reservation assets are simply not interested when they find out they will be confronted with these problems. When purchasers can be found, asset prices are regularly discounted about twenty-five percent. These facts make it difficult for non-Indians to either stay or leave.

I have a beautiful ranch that is close to town and has miles of shoreline along Lake Oahe, but I have considered selling it just to avoid continuing problems for myself and my children. I heard about a potential ranch purchaser that was looking for a ranch like mine. When I contacted the realtor involved, he said that the “word was out about reservations” and that he didn’t feel it would be ethical to even talk to this potential purchaser about my ranch. I estimate that if my ranch were sold, I would have to discount it at least four hundred thousand dollars, making it very difficult to replace it somewhere else.

Non-Indians on reservations are treated very much like unwanted illegitimate children. Our rights are being denied and our very existence appears to be embarrassing and inconvenient. This treatment appears to be having a dramatic impact on our choices. According to the last census, over forty-five percent of those on reservations are non-Indians. There is a vast difference between the average age of Indians and non-Indians however. The average age of Indians is very young often under nineteen. The average age of non-Indians is much older indicating that many young non-Indians are leaving reservations and not returning. Non-Members are being forced to pay taxes and obey regulations of a government that they are excluded from, while tribal Members can participate in local governments that they may not have to support or obey. This effectively puts a slowly tightening legal noose around the necks of non-Indians. Current policies are moving reservations toward more racially segregated and isolated entities. Such a trend in the face of coordinated legal discrimination smacks of genocide.

What if the position of Indians and non-Indians were exactly reversed on reservations. Suppose tribes were governed exclusively by Whites. Imagine that they excluded non-Whites from participation in their government while they taxed, licensed and regulated them, often discriminately. Suppose these same Whites could participate in local government, while being excluded from many of the taxes and ordinances of that same government. If this were the case, how long would you tolerate the situation?

Sometimes basic, subtle, symbolic words can teach us much. You have invited me to present testimony about how tribal sovereignty impacts non-Indians. In presenting my testimony I have used that same term – non-Indians. It speaks volumes about our position on reservations. How would others like to be classified as non-Whites? The use of the term non-Indians accurately describes me as a non-somebody, as a non-person, and that is how I am treated on the reservation. As a “non-Indian.” I thank you for finally allowing my voice to, at least, be heard.