

**Testimony  
of  
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To the Subcommittee on Indian and Alaska Native Affairs  
United States House of Representatives  
Hearing on  
Trust Land Acquisition  
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Good afternoon Chairman Young, Ranking Member Ruiz, and Members of the Subcommittee. My name is Christian McMillen, and I am associate professor of history at the University of Virginia. Thank you for the opportunity to testify regarding standards in trust land acquisition.

The Indian Reorganization Act (IRA) of 1934 was a monumental shift in Indian history that was the culmination of nearly two decades of Indian and non-Indian efforts to change how the United States government managed Indian affairs. Until the passage of the IRA the cornerstone of Indian policy had been the General Allotment Act of 1887—an Act responsible for allowing approximately 91 million acres of land to fall out of Indian hands. Alongside such things as Indian boarding schools and reservation agricultural programs, the Allotment Act was designed to foster the government’s interests in assimilating Indians into the non-Indian mainstream. By turning Indians into individual property owners the hope was that the “tribal mass” would be destroyed and that Indians would develop their own individual plots of land. The boarding and on-reservation day schools, along with the assistance from the government farmer assigned to the reservation, would insure that Indians had the necessary skills to make their land productive and a source of sustenance and income. What allotment and assimilation succeeded in doing instead

was to turn Indians into a class of people without a sufficient land base to sustain themselves. The schools were perpetually underfunded as well as an incubator of infectious diseases such as tuberculosis. Land allotted to Indians was often of poor quality or there was not enough of it. By the end of the 1920s, when the Institute of Government Research investigated Indian Country, Indians were among the poorest and most destitute people in the United States. Allotment was largely to blame.

All involved in drafting the IRA intended it to end the disastrous allotment policy and promote tribal self-determination. Recognizing that allotment had been devastating for tribes, the Bureau of Indian Affairs, in drafting the IRA, and Congress, in passing the IRA, elected to end the practice. At the same time, it was clear that allotment, and other forms of land loss, had left many tribes either landless or in possession of an insufficient land base. For this reason, beyond simply stopping allotment in order to prevent further land loss, those who drafted and passed the IRA intended it to be a mechanism by which tribes could acquire additional land.

As the IRA made its way through the Congress in the spring of 1934, John Collier, Commissioner of Indian Affairs, and other representatives from the Bureau of Indian Affairs (BIA) and the Department of the Interior (DOI), visited many Indian communities across the country to explain the IRA. When John Collier visited Pine Ridge Indian Agency in March he wanted to make clear just how central would the U.S. Government's change of land policy be. He said: "The question is—how can this allotment system be changed so as, first, to stop the futile loss of land by Indians; second, increase the amount of land owned by Indians; and, third, protect the rights and equities of those Indians who have not yet lost their land." To answer this series of questions Collier said the following: "Let me state again what we think it is necessary to do under some law to be enacted: First, that the further sale or loss of Indian lands to white

people must be stopped; second, that new land—more land—must be procured in large amounts in order to supply those Indians who have lost all of their land and in order to supplement the inadequate land of those who still have some land...”<sup>1</sup>

Collier and others from the BIA made similar statements at other meetings with tribes: they stressed the need buy land for landless Indians—those people left without anything in the wake of allotment—but also made very clear that the IRA would make it possible to purchase supplemental land for Indians who either did not have enough or whose land was poor.<sup>2</sup> At the Chemawa, Oregon conference, Ward Shepard of the BIA, said of the IRA, “The first purpose, the fundamental purpose of this legislation is to prevent the further loss of Indian lands. The second great purpose, here we come to the greatest difficulties of the bill—the second great purpose of the bill is to put into tribal or community ownership those lands and only those lands that can best be managed in tribal or community ownership. The third great purpose of the bill is to acquire additional lands either for the Indians who have no land and for Indians who have not enough land...”<sup>3</sup>

That purchasing more land for tribes was a major goal of the IRA is clear from the meetings held with tribes. It is also evident in the Senate and House Reports on the legislation. Both reports address the need to purchase land for landless Indians and/or for those tribes whose

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<sup>1</sup> Remarks of John Collier in “Minutes of the Plains Indian Congress, Rapid City Indian School, South Dakota, March 2-5, 1934,” in *The Indian Reorganization Act: Congresses and Bills* (Norman: Univ. of Oklahoma Press, 2002), 28-29 (Hereafter: Deloria, *IRA: Congresses and Bills*)

<sup>2</sup> See William Zimmerman remarks in “Proceedings of the Conference at Chemawa, Oregon, March 8 and 9, To Discuss with the Indians the Howard-Wheeler Bill,” and Collier remarks in “Meeting of the Commissioner of Indian Affairs, Hon. John Collier, with the Indians of Western Oklahoma at Anadarko, Oklahoma, March 20, 1934, for the Purpose of Discussing and Explaining the Wheeler-Howard Bill,” in Deloria, *IRA: Congresses and Bill*, 107, 65.

<sup>3</sup> See remarks of Ward Shepard in remarks in “Proceedings of the Conference at Chemawa, Oregon, March 8 and 9, To Discuss with the Indians the Howard-Wheeler Bill,” Deloria, *IRA: Congresses and Bills*, 109.

current land base is inadequate. As the Senate Report, written by Sen. Burton Wheeler, put it: “To meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support, section 5 of the bill authorizes the purchase of lands by the Secretary of the Interior, title to be vested in the United States in trust for the Indian tribe for which the land is acquired. There is authorized to be appropriated not to exceed \$2,000,000 in any one fiscal year for such purchase of land.”<sup>4</sup>

Further, the original bill was made up of sixty sections; the final act, after no fewer than twenty nine hearings, was whittled down to nineteen. The fact that Section 5 survived the pruning process is a measure of its importance. The House Report, authored by the IRA’s co-sponsor Rep. Edgar Howard, noted that there was broad agreement that something needed to be done to aid Indians, but considerable disagreement over just what measures to take. For example, the revised draft no longer contained a provision for a Court of Indian Affairs nor “various other provisions which were highly controversial or not urgently required at this time were left for future determination.”<sup>5</sup> The IRA, in its final form, contained, again according to Howard, those “features most urgently needed, and eliminates controversial features upon which agreement could not be reached.”<sup>6</sup>

And one of those essential features was section 5. Section 5 was essential because putting an end to allotment was not enough; that would only stop further land loss. To shore up the Indian estate, Indians needed more land. Thus, Congress “must go further [than ending allotment] and actually restore some of the lost lands to the Indians. Section 5 sets up a land acquisition program

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<sup>4</sup> “Authorizing Indians to Form Business Councils, Corporations, and for Other Purposes,” S.R. 1080, 73rd Cong., 2nd Sess., May 10, 1934, p.2.

<sup>5</sup> “Readjustment of Indian Affairs,” H.R. 1804, 73rd Cong., 2nd Sess., May 28, 1934, p.6.

<sup>6</sup> Remarks of Edgar Howard, 78 Cong. Rec., June 15, 1934, p.11,727.

to provide land for Indians who have no land or insufficient land.”<sup>7</sup> For Howard, this was a wise investment: the best way to make Indian people self-sufficient, and thus not be the burden of the government, was to provide them the resources necessary to thrive economically. A sufficient amount of land was essential.

The Secretary of the Interior put Section 5 to work very quickly after the passage of the IRA. Section 5 provided a maximum of \$2 million per year to purchase land. Each year from 1936-1939 the Department of the Interior appropriated \$1-1.5 million to purchase land under Section 5. The appropriation from 1936, for instance, was being used to purchase land for “32 different bands, tribes, or groups.” The program was essential for the economic well being of Indians.

During hearings in 1939 for the Interior Department Appropriation Bill it was clear that the need was great. Indians fell into two classes, according to the report from the BIA, those in “urgent need” and those with “deferred needs.” “Under ‘Urgently needed’ is included the land required to permit all, included [sic] enrolled and unenrolled landless individuals and bands, and individuals and tribes with insufficient land, to reach a subsistence level above the verge of starvation and the dole.”<sup>8</sup> Tribes all across the country began to benefit. In some cases the BIA investigated needs; in others bills came to Congress from tribes outlining specific needs. For example, in 1937, the Goshute of Utah hoped to use Section 5 to add several crucial tracts of land containing water rights to their present reservation in order to make it more sustainable.<sup>9</sup> In 1939 the Secretary purchased land for the Mississippi Choctaw to consolidate, bring under one

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<sup>7</sup> *Ibid.*, 11,730.

<sup>8</sup> “Interior Department Appropriation Bill for 1939,” Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives...on the Interior Department Appropriation Bill for 1939, 75th Cong., 3rd Sess., Part II, Indian Affairs, see 95 for figure; quote on 98.

jurisdiction, and enhance their land holdings.<sup>10</sup> As of August 1, 1939 a little more than 279,000 acres had been purchased for Indians under Section 5 in nineteen states at a cost of \$3.3 million.<sup>11</sup> Thus, it is clear that in the immediate aftermath of the passage of the IRA that Section 5 was being used for its intended purpose: the begin to restore the Indian estate and repair some of the damage done by allotment.

Since first being put into action in 1936 Section 5 of the IRA has been used to restore some of the land lost to allotment and as an aid in fostering Indian self determination and self government. From both a brief review of the legislative history and a look at how it was implemented following the passage of the IRA the intent of Congress regarding Section 5 is clear. In the decades since, Section 5 has been challenged several times in time federal courts. However, in all but one case from the Eighth Circuit—*South Dakota v. Department of Interior* (69 F.3d 878, 1995), which was overturned on various grounds after being remanded to the lower courts by the U.S. Supreme Court—its basic intent has been found to be lawful and easily discernible.<sup>12</sup>

As a historian who has spent considerable time working on this period of American Indian history—I have written one book on changes in Indian law between the World Wars and another

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<sup>9</sup> “Reserving Additional Lands for Goshute Indians, Utah,” S.R. 995 to accompany S 2671, 75th Cong., 1st Sess., July 22, 1937. Similar bills came to add to the Papago Reservation and the Rocky Boys Reservation, and to consolidate lands on the Sisseton Reservation.

<sup>10</sup> “Defining the Status of Certain Lands Purchased for the Choctaw Indians, Mississippi,” H.R. 194, 76th Cong., 1st Sess., March 13, 1939.

<sup>11</sup> Interior Department Appropriation Bill for 1941” Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives...on the Interior Department Appropriation Bill for 1941, 76th Cong., 3rd Sess., Part II, Indian Affairs, figures on 100-101.

<sup>12</sup> See Frank Pommersheim, "Land Into Trust: An Inquiry Into Law, Policy, and History." *Idaho L. Rev.* 49 (2012): 519-546; Leah J. Carpenter, "Policy Analysis of the Land Into Trust Acquisition Provisions of the Indian Reorganization Act: Tribal Opportunities, Obstacles, and Opposition.," *Wicazo Sa Review* (2000): 29-47. The matter of Section 5's validity vis-a-vis tribes not recognized in 1934 is beyond the scope of this testimony but I am aware of the issues post-*Carciere*.

that spends a great deal of time detailing monumental shifts in health policy in the 1920s, 30s, and 40s—I am confident in my assessment of the intentions of Congress and the Bureau of Indian Affairs regarding the aims of the Indian Reorganization Act generally and regarding Section 5 specifically.<sup>13</sup> This period of American Indian history was like no other: never had so many fundamental ways of doing things been changed; never had the BIA and the Congress acted so decisively in favor of Indian self-determination and well-being.

Thank you very much for inviting me to testify.

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<sup>13</sup> Christian W. McMillen, *Making Indian Law: The Hualapai Case and the Birth of Ethnohistory* (Yale Univ. Press, 2007), idem. *Discovering Tuberculosis: A Global History, 1900 to the Present* (Yale Univ. Press, 2015).