



THE SENECA NATION OF INDIANS

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TESTIMONY OF ROBERT ODAWI PORTER PRESIDENT OF THE SENECA NATION OF INDIANS

before the

COMMITTEE ON FINANCE UNITED STATES SENATE

HEARING ON TAX REFORM: WHAT IT COULD MEAN FOR TRIBES AND TERRITORIES

May 15, 2012

INTRODUCTION

Nya-weh Ske-no. Chairman-and-Senator Baucus, Ranking Member-and-Senator Hatch, and members of the Committee, I am thankful that you are well and I am pleased to appear today to discuss briefly my written testimony on "the promise of tax reform" for American Indian Nations. I ask that my written testimony be placed in the record on behalf of the Seneca Nation of Indians, which I lead as its elected President.

BACKGROUND ON THE SENECA NATION OF INDIANS

The Seneca Nation of Indians ("Nation") is one of America's earliest allies, historically aligned with the other members of the historic Haudenosaunee (Six Nations Iroquois) Confederacy and living in peace with the American people since the signing of the Canandaigua Treaty over 217 years ago on November 11, 1794, 7 Stat. 44. Our Nation has entered into numerous treaties and agreements with the United States since that time and we have always sought to live up to our side of this relationship, despite repeated instances in which the United States has not done so.

The key promises made to us by the United States in the Canandaigua Treaty are that it would recognize the Seneca Nation as a sovereign nation, that it would ensure that our property and activities would not be taxed, and that it would forever secure our title to our lands. The United States expressly guaranteed that we would retain the “free use and enjoyment” of our lands. This promise has served as the basis for a level of freedom possessed by the Seneca people that is among the highest levels of all indigenous peoples in the United States.

Because of this treaty-protected freedom, our Nation has been able to achieve some success in recovering from nearly 200 years of economic deprivation inflicted upon us by the United States due to devastating losses of our lands and resources. Both our Nation government and individual Seneca citizens have benefited from the opportunity to trade with non-Indians during the last 40 years, focusing primarily on available business involving tobacco, gambling and ancillary ventures. We have fought hard for our recent economic success – just as we have fought hard to protect our lands – but the fact remains that we are under constant assault from hostile forces -- such as the State of New York and private sector predators -- who seek to deprive us of economic prosperity and return us to the poverty of a prior era.

TAX REFORM SHOULD ADHERE TO THE FIRST PRINCIPLES
OF FEDERAL INDIAN LAW AND POLICY: –
TRIBAL NATIONS ARE GOVERNMENTS WITH TERRITORIAL SOVEREIGNTY

We have long believed that our treaties with the United States require that the Seneca Nation, our people and our lands, be treated as immune from federal and state taxation. By legislation and agreement, the United States has generally recognized this tax immunity and our Nation's inherent, sovereign right to regulate all conduct within our Territories free of interference by all other governments. Moreover, the Congress has never expressly authorized the direct taxation of individual Indians.

However, many aspects of our treaty-recognized freedoms have been eroded over time, particularly those that originally protected our individual tribal citizens. All three branches of the federal government -- judiciary, executive, and legislative -- have directly caused or allowed this erosion to occur. Without any express Congressional authorization, over the last 60 years the Treasury Department has forced tribal citizens to become taxpayers in violation of our treaty status. Forcing us to pay taxes – such as income taxes, payroll taxes, and excise taxes – undermines our treaty-protected immunities. It must be remembered that our treaties with the United States reflect the payment of our “tax bill” in perpetuity – Indian people gave up nearly all of our lands in fulfillment of any and all obligations that might ever be owed to the United States in the future.

I recount this history for a reason. There is a direct link between the harsh poverty and devastating unemployment that has long existed in Indian Country and the taxation and regulation by other governments of activities in our tribal territories. While there are many factors that contribute to the economic underdevelopment of Indian Country, tax burdens

imposed by external governments contribute to making Indian Country in some cases the last place in America where meaningful capital investment and job creation will occur.

With this backdrop, I suggest that the promise of tax reform will have the most impact if it advances the first principles that are at the foundation of federal Indian policy at its best -- *tribal nations are governments whose exclusive authority to govern all economic activity on their territory is fully respected as a matter of federal law*. Resurrecting this *tribal territorial sovereignty* approach should be the focus of any new, bold tax reform efforts. If the goal is to increase economic growth in Indian Country, tribal territories must be recognized as places of economic opportunity for tribal governments and tribal citizens.

KEEP IT SIMPLE WHEN CRAFTING TAX REFORM FOR INDIAN COUNTRY

Many of the good people in this room have spent the past several decades creating and reauthorizing a string of tax reform efforts with the best of intentions for improving the economies of Indian Country. These tax reform ideas may have worked for the hundreds of investors, bankers, lawyers, accountants, consultants and government administrators who sought to implement these efforts. But the fact is that these efforts simply have not worked -- for Indian Country in Montana, or South Dakota, or New York, or anywhere else:

- "Investment tax credits,"
- "Accelerated depreciation for qualified Indian reservation property,"
- "Employment tax credits,"
- "Renewal communities,"
- "Work opportunity tax credits,"
- "20% wage-credits-for-the-first-\$15,000-of-wages-in-new-jobs-in-empowerment zones,"
- "20%-of-the-excess-of-eligible-qualified-wages-and-health-insurances-costs-that-an-employer-paid-or-incurred-during-the-tax-year-over-the-amount-of-such-costs-that-an-employer-paid-or-incurred-during-the-prior-year,-but-only-up-to-the-first-\$20,000-of-aggregate-qualified-wages-and-health-insurance-costs-paid-for-each-qualified-employee-in-a-taxable-year."

With all due respect, these complicated schemes have not worked in Indian Country. Their complexity and minimalism have stifled all practical benefit. They may be motivated by good intentions but they have produced little earthly good for Indian Country. Drive through most Indian territories in the Great Plains or almost anywhere else in Indian Country and that's what you will see -- painful proof that all these good but complicated tax reform ideas have not amounted to much.

I urge you to once-and-for-all make tax reform work in Indian Country for tribal businesses and individual entrepreneurs. To do that, you have to keep it simple. Keep it simple so that it can be implemented without requiring Indian people to hire an army of expensive bankers, lawyers, accountants and brokers. Keep it simple so that local businesses can flourish, generate income

for Native people, and help move our nations away from the grinding rut of intergenerational poverty.

PURSUE SUCCESS WITH A DEMONSTRATION PROJECT
THAT NARROWLY TARGETS TRIBAL TAX EMPOWERMENT ZONES
WHERE THEY WILL DO THE MOST GOOD

The past two decades of federal tax policy failures in Indian Country make a compelling case for trying something different based on *tribal territorial sovereignty*. Can anyone point to any significant economic benefit for Indian Country that was derived from the Indian reservation employment and investment tax credits that Congress repeatedly has extended, often at the midnight deadline, for the past two decades? These wage and investment tax credits have not been large enough, or of long enough duration, or simple enough to administer, to induce the private sector to invest and locate new jobs in Indian Country.

Why hasn't Congress made these Indian tax credits larger? Because the employment and investment tax credit packages have made all of Indian Country -- tens of millions of acres and hundreds of Indian Nations -- eligible for tax relief.¹ This broad scope of eligibility has required Congress to water down the tax reform benefits to useless levels because the scoring rules, driven by the potential immunity of millions of acres and people, have generated far too costly scores to be included in any comprehensive tax incentive package.

Given the political and financial realities of the day, I suggest the Committee take a different, more targeted approach. One that better respects federal treaties with our nations and federal self-governance policy. One that promises real and meaningful economic benefit. And one that supports tribal territorial sovereignty.

Instead of dialing back potential tax incentive benefits to useless levels, I urge you to declare unlimited tax immunity within a limited number of footprints in Indian Country for a limited number of Indian nations. In other words, I suggest you shape tax reform law so as to restore complete tax immunity in a demonstration or pilot project that is constrained in order to make it cost feasible but with unlimited benefits to facilitate its success. Such a pilot project will demonstrate that a tribal empowerment zone immune from all governmental tax (other than tribal taxes or fees) has the greatest promise of creating a thriving, jobs-producing private sector in Indian Country where it otherwise would never occur. If it works, this policy could be expanded in the future. If it does not work, the outcome would be no worse than the application of the current failed policy.

Accordingly, I ask that you consider a demonstration or pilot project that is limited to several dozen Tribal Empowerment Zones, of limited acreage, established by the federal and tribal governments. Since, as a practical matter, tribal nations will seek to economically develop only

¹ There are 566 federally-recognized Indian nations who count as their homelands about 57 million acres of Indian Country in the continental United States, plus an additional 45 million acres in Alaska (although the U.S. Supreme Court has ruled that most of the Alaska acres are something less than Indian Country).

relatively small portions of their territories, why not limit the number of Tribal Empowerment Zones to 50 zones for 50 tribal nations and the number of acres in each zone to 50? In this way, the scoring could be focused on feasible development projects and the total pool of available credits not go unused. In effect, these tax-free economic islands will function like an oasis in a dry desert, importing and recycling money into Indian Country and giving economic life to tribal societies where it may not have existed for generations.

I can envision this tax reform idea inducing a manufacturing company to locate in Indian Country rather than relocating to India. I can also see this approach inducing a grocery store chain to relocate a store in Indian Country rather than avoid the perceived risks of doing business on Indian lands. Instead of the Indians having to live in poverty because there is no work, jobs can be created on the reservation. Instead of Indians having to drive long distances for basic food supplies, stores can be located near where people live. This is not an outrageous idea, but simply bringing to Indian Country much of what the rest of America already has at its fingertips.

It is worth mentioning that I believe that creating tax-immune development Zones will likely bring benefit to both Indians and non-Indians on and near tribal lands. Given some of the labor and capital deficiencies in Indian Country, non-Indian companies and workers can provide stable partners for developing tribal economies. I have seen in my own Nation – both from our gaming and tobacco businesses -- that it is hard for Indian Country to “go it alone” on the path of success; working in economic partnership with non-Indians is an inevitable reality of reservation re-development. If the United States can restore proper respect for the first principles of federal Indian policy – that Indian nations are governments with territorial sovereignty – all people can benefit.

I have attached some legislative language for your consideration and discussion. It builds upon my scholarship as a law professor for the last 15 years and my experience as my Nation’s President over the last year and a half in which I have traveled throughout Indian Country and back and forth to Capitol Hill to encourage my fellow tribal leaders and their supporters in Congress to take a bold step toward restoring economic prosperity for Indian Country other than through gaming.

You will see some similarity between this proposal and the New Market Tax Credit programs with which you are familiar. As to other proposals for tax reform, I commend to the Committee’s attention the excellent written testimony submitted by the National Congress of American Indians and the United South and Eastern Tribes. In order to enhance the promise of a greater impact, however, I have made my pilot proposal more narrow and more deep.

DETAIL OF PROPOSED LEGISLATION FOR
A TAX REFORM DEMONSTRATION PROJECT CREATING
TRIBAL EMPOWERMENT ZONES

Premise. Private sector economic development has by-passed much of Indian Country, especially that which is not engaged in tribal government gaming. The re-establishment of tax-free zones in selected areas of Indian Country will attract private enterprise to locate in Indian Country and bring economic activity that promotes entrepreneurship, creates jobs, and brings trade in goods and services closer to the local Indian community.

Eligibility. The bill would establish up to 50 Tribal Empowerment Zones of up to 50-acres each. Half of the Zones would be reserved for applicant Indian tribes with an unemployment rate exceeding 50% under the latest annual BIA workforce reports. The remaining half of the Zones would be awarded to applicant Indian tribes who competitively demonstrate the strongest available tribal institutions fostering effective and stable self-government, predictable legal infrastructure, and tribal policies facilitating entrepreneurial economic development and a business-friendly climate. The Secretaries of the Treasury and Interior would collaborate in establishing the zones.

Tax Benefit. The bill would declare each selected Tribal Empowerment Zone to be a tax-free territory immune from all federal, state and local income, sales, and excise taxes with the exception of so-called payroll taxes (e.g., social security, Medicare/Medicaid). The tax immunity would apply to all economic activity located within that Zone, and sunset after a period of ten years following which all federal taxes otherwise applicable would apply.

CONCLUSION

The shortcomings of the past and present tax policies justify a bold initiative in the area of tax reform to benefit Indian Country. The reasons for doing so are many.

There is no question that current federal tax incentive policies for Indian Country have not worked -- just look at the persistent poverty and unemployment statistics that enslave Indian Country. Aside from those few places where gaming has succeeded, Indian Country remains chronically underdeveloped and impoverished. Economic survival in Indian Country is largely dependent upon federal transfer payments.

Just as federal law acknowledged tribal sovereignty and protected Indian gaming in the middle of non-gaming markets to allow billions of dollars of investment to flow into Indian Country, tax reform could likewise create islands of tax-free Tribal Employment Zones that attract private sector investment into Indian Country. Federal politicians have long sought ways to support non-gaming development in Indian Country and promote growth and diversification -- this tax reform initiative is a practical way to make it happen.

Basic morality and the standards of international law suggest that American Indians should not be consigned to live in the most impoverished places in America. Article 21 of the U.N.

Declaration on the Rights of Indigenous Peoples – which is supported by the United States – provides that “[i]ndigenous peoples have the right, without discrimination, to the improvement of [our] economic and social conditions” and that the United States “shall take effective measures to ensure continuing improvement of [our economic] and social conditions... ”

And lastly, federal law and treaties require that this Congress take action to respect our immunities from taxation and create conditions in which our “free use and enjoyment” of our lands can once again serve as the foundation of prosperity, not poverty. I suspect you may ask yourselves the question, “How can we favor this one group of people we call Native Americans from other groups of Americans?” Well, the answer, I respectfully suggest, is that we are citizens of our own sovereign nations with a treaty relationship with the United States. No other group of Americans can claim that simple, legal reality.

My hope is that you gather up all the effort and benefit for Indian Country that would otherwise be consumed by sophisticated investment tax credits, complex accelerated depreciation rules, and complicated wage credits -- all requiring elaborate legal superstructures that swallow most of Indian Country's benefit at desks in office buildings far from Indian Country -- and instead keep it simple. Just create tax-free Tribal Empowerment Zones in Indian Country and step back and let the private sector come into Indian Country in partnership with sovereign tribal governments and let the marketplace do its work.

Too often, we hear from Members of Congress only lip-service when it comes to truly helping our nations and our people. For the Seneca Nation, and I believe many others, we seek an economic future in which we are free to care for ourselves and our future generations without interference. If the Congress can resume the path of respecting our inherent and treaty-protected exclusive rights to control development in our lands, including the exclusive right to develop and regulate our own economies, I believe that the promise of our treaty relationship can be fulfilled. I strongly encourage you to pursue this bold initiative that will in a very simple way restore complete tax immunity to Indian Country and with it a real and practical opportunity for economic revitalization.

Thank you for this opportunity to provide testimony and I ask that it be made part of the record of this hearing.

Nya-weh.

Attachment: Proposed draft bill language for a demonstration project establishing tax-free Tribal Empowerment Zones

4 **RESTORING TAX-FREE TRIBAL EMPOWERMENT ZONES**
5 **ACT**
6

7 *A bill to establish a pilot demonstration project to restore tax-free tribal empowerment zones in*
8 *designated areas of Indian country, and for other purposes*
9

10
11 **SEC. 1.—SHORT TITLE.**

12 This Act shall be called the Restoring Tax-Free Tribal Empowerment Zones Act of 2012.

13 **SEC. 2.—DEMONSTRATION PROJECT TO RESTORE TAX-FREE TRIBAL EMPOWERMENT ZONES.**

14 (a) **SELECTION OF PARTICIPATING TRIBES.** — From among federally
15 recognized Indian tribes applying to the Secretary of the Interior and Secretary of the
16 Treasury, the Secretaries shall select up to 50 Indian tribes to participate, one-half of
17 whom shall be from among Indian tribes with annual unemployment rates of greater than
18 50% in the American Indian Population and Labor Force Report most recently published
19 by the U.S. Department of the Interior, Bureau of Indian Affairs, and one-half of whom
20 shall be from among Indian tribes who competitively demonstrate the strongest available
21 tribal institutions fostering effective and stable self-government, predictable legal
22 infrastructure, and tribal polices facilitating entrepreneurial economic development and a
23 business-friendly climate.

24 (b) **EXEMPTION FROM TAX.** — The Secretary of the Treasury shall
25 designate all activities on lands identified in subsection (c) to be free of and exempt from

1 all otherwise applicable excise, sales, severance, property, income, transfer, individual,
2 and corporate taxation by the United States or any State or subdivision thereof.

3 (c) IDENTIFIED LANDS. — The exemption from tax authorized in
4 subsection (b) shall apply to all activities carried out on up to 50 contiguous acres of land,
5 designated by the participating Indian tribe, in which the participating Indian tribe or an
6 Indian individual holds beneficial interest and which are located within the limits of the
7 Indian reservation of the participating Indian tribe as said Indian reservation is defined in
8 Section 1452(d), Title 25, United States Code.

9 (d) DESIGNATED TAX EXEMPT ACTIVITIES. — The exemption from
10 tax authorized in subsection (b) shall apply, on lands identified in subsection (c), to all
11 activities carried out thereon by the Indian tribe or Indian individual holding beneficial
12 interest in the land and by any other person or entity carrying out otherwise taxable
13 activities thereon with the express permission of, and under terms established in the sole
14 discretion of, the participating Indian tribe.

15 (e) SUNSET. — The authority provided in subsection (a), subsection (b),
16 subsection (c) and subsection (d) shall extend from January 1 of the year following the
17 date of enactment through December 31 of the year that is ten years after the date of
18 enactment of this Act.

19 (f) SAVINGS.— Nothing in this Act shall be construed to diminish the
20 Federal trust responsibility to Indian tribes or individuals nor to diminish the tax
21 immunity of Indian tribes or individuals under laws in effect on the day before the date of
22 enactment of this Act.

ROBERT ODAWI PORTER

Robert Odawi Porter is the President of the Seneca Nation of Indians. During his 20 year career as a attorney and legal scholar, he has focused on the protection and revitalization of Indigenous nations and peoples. Currently he is on leave as a Professor of Law and Dean's Research Scholar of Indigenous Nations Law at Syracuse University. He is also the founder and director of the Center for Indigenous Law, Governance & Citizenship and formerly the Senior Associate Dean for Research at the Syracuse University College of Law.

From 2004 until his election as Seneca president in November 2010, President Porter served as the Nation's Senior Policy Advisor and Counsel. In that role, he served as the Nation's chief counsel and oversaw all of the Nation's legal affairs and relations with foreign governments. He began his service in the Seneca Nation government in 1991 upon his appointment as the Nation's first Attorney General. During his nearly four year term, he developed an in-house legal department to administer the Nation's legal affairs and administered the Nation's law enforcement agencies. His representation of the Nation over the years has focused on protecting and defending the Nation's sovereignty and inherent treaty rights from encroachment by foreign governments, as well as promotion of institutional governmental development and economic growth. He has developed particular expertise in the area of tribal tobacco regulation and defense, having authored the Seneca Nation's Import-Export Law and represented the Nation against taxation efforts by New York State for many years.

President Porter also serves the Seneca Nation of Indians as the Chairman of the Management Committee of Seneca Holdings, LLC, the Nation's wholly-owned venture capital firm. In 2009, the Nation Council established Seneca Holdings for purposes of diversifying the Nation's governmental revenue stream and committed \$28 million in seed capital.

President Porter began his scholarly career in 1995 when he was appointed to the law faculty of the University of Kansas, where he earned tenure. In 2002, he joined the faculty of the University of Iowa and was recruited to Syracuse a year later. He has been an Adjunct Professor at the University of Buffalo, the University of Tulsa, and Haskell Indian Nations University and was the Founding Director of the Tribal Law and Government Center at the University of Kansas. He has taught and written extensively on Indigenous sovereignty and colonialism, tribal law and governance, and federal Indian regulatory law, including over 20 scholarly articles in leading law journals and a book, *SOVEREIGNTY, COLONIALISM & THE INDIGENOUS NATIONS*, published in 2005 by Carolina Academic Press.

President Porter has been a contributor to the mass media, including the New York Times, Buffalo News, and Indian Country Today. He has lectured widely and served as a consultant or counsel to a variety of American Indian nations and tribes, Indian-owned businesses, federal, state, and local governments, and Fortune 500 corporations.

President Porter is a 1986 graduate of Syracuse University with a Bachelor of Arts degree in political science and economics *magna cum laude* and Harvard Law School where he received his Juris Doctorate degree in 1989. He is admitted to the practice of law in the Seneca Nation, the States of Connecticut and New York, and the District of Columbia. He has worked at the international law firms of Dickstein, Shapiro & Morin in Washington, D.C. and Baker & Hostetler in Cleveland, Ohio. He is a Heron Clan Seneca and was raised on its Allegany Territory where he resides with wife, Odie, and their children.

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