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## Memorandum from the Solicitor of the Department of the Interior to the Commissioner of Indian Affairs Regarding Proposed Elections on the Fort Berthold Reservation, June 20, 1956

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UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D. C.

M-36350

July 21 1956

Memorandum

To: Commissioner of Indian Affairs

From: The Solicitor

Subject: Fort Berthold--Proposed election order to submit proposed Amendment I to Constitution and Bylaws to a vote

Your memorandum of March 19, 1956 raises two questions (1) whether absentee balloting may be permitted in an election for the amendment of the Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation and (2) whether the Secretary of the Interior has the authority to call an election for the purpose of permitting the tribal members to vote on the election of councilmen on the basis of the community boundaries as now defined in Article III of the Fort Berthold constitution.

The question of absentee balloting was discussed and disposed of in our memorandum opinion (M-36346) dated June 8, 1956.

With regard to the question of whether the Secretary of the Interior has authority to call special elections for tribes incorporated under Section 16 of the Indian Reorganization Act (25 U.S.C. 476, 48 Stat. 987) to elect councilmen, the answer must be found either in the tribal constitution and bylaws or in the statutory law. The constitution and bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota govern the calling of elections to choose tribal councilmen. Article IV, thereof provides that regular elections shall be held on the first Tuesday of September in even numbered years and that special elections may be called by a two-thirds vote of the council or by petition signed by at least ten per cent of the qualified voters of each tribal community. Section 5 of said Article IV further provides:

"All elections shall be held under the supervision of the Tribal Business Council or an election board appointed by that Council, and the Tribal Business Council or the election board appointed by it, shall make rules and regulations governing all elections, and shall designate the polling places and the election officers."

It is clear from a reading of the tribal constitution that no provision is made for the calling of elections for tribal council members by the Secretary of the Interior.

There being no authority retained in or given by the tribal constitution to the Secretary of the Interior to call or supervise elections of tribal council members, does such authority exist outside the tribal constitution? This question has been raised in your memorandum to the Solicitor and on many other occasions. The question of the right of the Federal Government to intervene in tribal governmental affairs is one of long-standing importance. This is true not only of tribes incorporated under the provisions of the Indian Reorganization Act of 1934, *supra*, but also of the many tribes which have not availed themselves of the privileges of this Act. The Act of July 9, 1832 (4 Stat. 564), provided for the appointment of a Commissioner of Indian Affairs, then under the Secretary of War, and now under the Secretary of the Interior, "who shall \* \* \* agreeably to such regulations as the President may from time to time, prescribe, have the direction and management of all Indian Affairs, and of all matters arising out of Indian relations \* \* \*". (25 U.S.C. 2). The Supreme Court just previously in January of 1832 had had occasion to construe similar language in a treaty with the Cherokee Indians, *Worcester v. Georgia*, 6 Pet. 515. Chief Justice Marshall had before him the ninth article of The Treaty of Hopewell which had been entered into by the United States and the Cherokee Indians on November 28, 1785.

"The ninth article is in these words 'for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper.'

"To construe the expression 'managing all their affairs,' into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade; the influence it gave, made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was 'the benefit and comfort of the Indians, and the prevention of injuries or oppressions.' This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these are the cession of their lands, and

security against intruders on them. Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable, that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. \* \* \*

In view of the fact that language was used in the statute similar to that construed in Chief Justice Marshall's decision, it is apparent that the scope of this wording was well understood. The language "management of all Indian affairs" is thus limited to the supervision of the commercial and trade relationships of the Indians and not to management of their internal government.

The Indian Reorganization Act (25 U.S.C. 461, etc.) had as one of its many purposes the strengthening of self-government in the Indian tribes. Commissioner John Collier testified at the hearings called in connection with the consideration of the act that the Indians "want an arrangement by which they can buttress their self-government by a statute of congress \* \* \*." Although it is true that the Secretary of the Interior has no authority to call special elections to elect councilmen, there is no reason to doubt that he has adequate statutory authority to call special elections to consider amendments to tribal constitutions and bylaws. And further the Commissioner is not without authority to deter abuses of tribal authority by virtue of his control over the expenditure of tribal funds, which authority stems from treaty and statute. The United States generally acts as guardian of the funds and assets of Indian tribes and as such trustee not only is held to a high degree of care in the handling of the funds and property of the Indians but exercises the ordinary supervisory restraint incident to such guardianship.

Under the Indian Reorganization Act, 1934, supra, there are several types of elections which may be called by the Secretary of the Interior "under such rules and regulations as he may prescribe." Section 18 of the act sets out that a special election shall be called by the Secretary of the Interior to determine whether a majority of the adult Indians desire to vote against the application of the act itself to the reservation with which they are connected (25 U.S.C. 478). Section 17 of the act provides that the Secretary has the duty of calling a special election upon a petition by at least one-third of the adult Indians living on the reservation to determine whether they desire to ratify a charter of incorporation which has been issued for

the conduct of business enterprise on the reservation (25 U.S.C. 477). Section 16 of the act authorizes the Secretary of the Interior to call a special election to permit the adoption and ratification of a tribal governmental constitution (25 U.S.C. 476). This section also may be construed to provide that the Secretary of the Interior shall call a similar special election, open to the same voters and conducted in the same manner as the original election, to determine whether such constitution shall be revoked. Finally section 16 of the act must be construed to permit the Secretary of the Interior to call a similar special election to determine whether the constitution and bylaws can be amended.

Your memorandum of March 19, 1956, states that a great many tribal members of the Three Affiliated Tribes of the Fort Berthold Reservation are dissatisfied with the manner in which the Tribal Business Council has been conducting its affairs and are most anxious that they be given an opportunity soon to vote on the election of council members. At present there is no authority given in the tribal constitution nor any express statutory authority to permit the Secretary to call such a tribal election. Inasmuch as the Secretary has authority to call an election to amend the constitution of the tribe, it is appropriate at this time to suggest that the tribal constitution be amended to permit the Secretary or his Delegate, upon the written request of a certain number of tribal members, to call special elections to elect councilmen and other tribal officers.

If it is determined as a matter of policy by your office that such amendments be submitted to the tribal electorate the following two additional provisions are set forth in draft form for consideration:

#### Article IV Nominations and Elections

Section 2. Add: Absentee ballots will be furnished to any enrolled non-resident member of the tribes upon request to the tribal secretary made 10 days before the election. The ballot must be returned to and reach the tribal secretary on or before the date of the election in order that it may be counted.

Section 3. Add: Notice of regular elections shall be given by the secretary of the Tribal Business Council who shall give to all enrolled members of the tribe 30 days notice of the time and place of the regular election. In the event the tribal secretary shall fail to give the appropriate notice, or in case a regular election has not been held, the Secretary of the Interior shall call such election and give 25 days notice, setting the time and place.

*Paul Armstrong*  
Solicitor

## PORT BERTHOLD TRIBAL AFFAIRS

## Indian Tribes: Constitutions--Indian Reorganization Act

The Secretary of the Interior has authority, under the Indian Reorganization Act (25 U.S.C.A. sec. 476, 477; 48 Stat. 987) to call special elections to (a) determine whether a majority of the adult Indians desire to vote against the application of the act itself to the reservation with which they are connected; (b) to determine whether a proposed constitution and bylaws shall be ratified; (c) to ascertain whether such constitution and bylaws shall be amended; and (d) to determine whether such constitution and bylaws shall be revoked. Otherwise in the case of Tribal Governments incorporated under section 16 of the Indian Reorganization Act, supra, the Secretary, unless granted authority by the tribal constitution or Act of Congress, may not call tribal elections to elect councilmen. )