PAST MEETS PRESENT: INFUSING THE TRIBAL FEDERAL
CONSULTATION PROCESS WITH VISIONS FROM ENCOUNTER
ERA DIPLOMACY AND PRESENT DAY INTERNATIONAL
INSTRUMENTS

TO: PROF. GLORIA VALENCEA-WEBER
FROM: MAUREEN HICKS
DATE: APRIL 30, 2001
NATIVE AMERICAN RIGHTS
TABLE OF CONTENTS

INTRODUCTION ........................................................................................................................................... 1

ORGANIZATION OF THIS PAPER .................................................................................................................. 8

I. ENCOUNTER ERA DIPLOMACY ...................................................................................................................... 8
   A. THE WORLD STAGE DURING THE ENCOUNTER ERA PERIOD ................................................................. 8
   B. EXAMPLES OF METAPHORS AND DIPLOMATIC TOOLS AT WORK IN ENCOUNTER ERA DIPLOMACY AND MULTICULTURAL TREATYMAKING ......................................................................................... 10
   C. THE AMERICAN REVOLUTION AND POST REVOLUTION TREATYMAKING PERIOD: Metaphors of the Covenant Chain and Two Canoes ................................................................................................................. 12
   D. WHY SHOULD ENCOUNTER ERA TREATY MAKING BE OF ANY IMPORTANCE TO TODAY’S CONSULTATION PROCESS? .............................................................................................................................. 14

II. US FEDERAL POLICIES, CASE LAW, AND EXECUTIVE ORDERS .......................................................... 16
   A. OGLALA SIOUX TRIBE V. ANDRUS ........................................................................................................ 20
   B. HOOPLA VALLEY TRIBE V. CHRISTIE ...................................................................................................... 22
   C. LOWER BRULE SIOUX TRIBE V. DEER ..................................................................................................... 23
   D. SUMMARY OF CASES AND EXPECTATION OF RIGHTS ........................................................................... 25

III. THE LAW OF DISPUTE SETTLEMENT AND THE CONSULTATION PROCESS IN INTERNATIONAL NEGOTIATIONS .................................................................................................................................. 27
   A. THE WTO AGREEMENT; "UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES" ....................................................................................................................... 28
   B. PROCESS FOR CONSULTATION IN THE WTO .......................................................................................... 30
   C. UNITED NATIONS INSTRUMENTS AND INTERNATIONAL CONVENTIONS ................................................. 34
   D. ILO AND RIO SUMMIT ............................................................................................................................ 35
   E. SUMMARY OF WTO AND INTERNATIONAL PROPOSALS ......................................................................... 37

IV. PROPOSALS FOR CHANGE AND MODELS OF MEANINGFUL CONSULTATION BETWEEN TRIBES AND THE FEDERAL GOVERNMENT ........................................................................................................ 37
   A. TENSIONS IN THE PROCESS OF CONSULTATION BETWEEN TRIBES AND FEDERAL AGENCIES .......................................................................................................................................................... 42
   B. INFUSING THE CONSULTATION SYSTEM WITH PREPARATION, VALUE CREATION, VALUE DISTRIBUTION AND FOLLOW-THROUGH ........................................................................................................ 44

CONCLUSION .................................................................................................................................................. 48

APPENDICES:
APPENDIX A: .................................................................................................................................................... I
APPENDIX B: ..................................................................................................................................................... III
APPENDIX C: ................................................................................................................................................... VIII
APPENDIX D: .................................................................................................................................................... XII
Thank you for being a president who understands that we have earned the respect shown our people and the world on this day, and your recognition that all 547 federally recognized tribal leaders had to be invited to call it truly a tribal leaders’ meeting. It has taken the United States and Indian nations 200 years to come to a point where we can begin again to deal with each other as sovereign nations. We will not retreat, Mr. President.¹ Mr. Gaiashkaibos President National Congress of American Indians at the Whitehouse, April 29, 1994.

Two other ideas we had - somebody in one of these meetings - you know, even the Democrats go too far sometimes on downsizing Government. One of them said we ought to turn the Pentagon into a triangle. And I said, no, I am going to hold the line with a veto threat for a rhombus. [Laughter] Then it was suggested that the greatest consolidation we could do is to consolidate the Bureau of Indian Affairs and the Joint Chiefs of Staff into the Joint Chiefs. [Laughter] You know, I was afraid that was politically incorrect, but it got by. It got by. [Laughter]² President Clinton Radio Remarks March 20, 1995.

INTRODUCTION

Historically, the capacity for working relationships between tribes and the United States national government has witnessed a series of dramatic changes since the years of the encounter era when tribes first negotiated treaties within the international community. During the past three hundred years tribes have witnessed eras in which their voices were heard actively and loudly during the first contacts with Europeans to a time of attempts to suppress those voices through forced assimilation and marginalization. However, since the late 1960's there has been a reemergence of indigenous voices of sovereignty in the United States, Canada, and on the world stage. In the United States, the impetus for this change in tide began during the self-determination era, heralded in by President Nixon, which repudiated past assimilationist policies

¹ President Clinton Meets with Native American Tribal Leaders: The White House South Lawn, FED. NEWS SERVICE (April 29, 1994). See Appendix A for full document of Memorandum entitled: Government-to-Government Relations with Native American Tribal Governments. Two months later, the Federal agency responsible for conserving fish and wildlife issued a policy directive describing indigenous peoples as "co-managers," and promised that they would enjoy "direct and continuing participation" in decision-making.
and forced courts to reaffirm the legal force of historical treaties made between tribes and the United States.

In a 1994 National Public Radio interview, Wilma Mankiller, principal chief of the Cherokee Nation remarked, "I think there’s general consensus, even among the most liberal democratic tribal leaders that President Nixon was almost visionary in Indian affairs, and not only did he articulate a clear policy and get some legislation passed, he actually helped return some lands, in some cases sacred lands, to tribes." The policy articulated by President Nixon firmly resolved to “break decisively with the past” and recognized the need to “build upon the capacities and insights of the Indian people.”

Nixon articulated a new era in which he announced, “this, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian’s sense of autonomy without threatening his sense of community.” Nixon proposed that the “Federal government and the Indian community play complementary goals.” In this assertion of partnership, Nixon opened the door to the possibilities of a new dialogue between tribes and a government that had not been seen since the Encounter era. With the unveiling of his historic message to Congress on

---


3 Bob Edwards, President Clinton to Meet with Tribal Representatives, NATIONAL PUBLIC RADIO (NPR) Transcript # 1335-3 (April 29, 1994 Morning Edition NPR 6:00 AM ET).


5 Id.

6 Id.

7 Id.

8 In a subsequent address, President Nixon recognized the "suffocating implications of paternalism" in his remarks regarding the return of Blue Lake Lands to Taos Pueblo on December 15, 1970. “This bill indicates a new direction in Indian affairs in this country…one in which there will be more of an attitude of cooperation rather than paternalism, one of self-determination rather than termination, one or mutual respect…of our working together for the better nation that we want this great and good country of ours to become.” Id. at 259.
Indian affairs, he launched the beginning of the Self-Determination era. It had been a long time since a United States President had allowed a door to the Whitehouse creak open with the possibility of inviting tribal nations into a peaceful partnership with the federal government.

President James Monroe invited Native American leaders to the White House in 1822 as part of a peace summit. The delegation was "forced to change out of their own garb and don military uniforms." The meeting only fed brewing tensions between tribes and the government and accomplished nothing. It was more than one hundred seventy years later before another invitation was extended to Native American leaders. On April 29, 1994, President Clinton invited 545 federally recognized tribal representatives to the Whitehouse to witness the signing of a memorandum to heads of executive departments and agencies to strengthen the government-to-government relations with Native American Tribal Governments, building on Nixon’s self-determination policy. It was the first time all the nation’s federally recognized tribes had been invited to meet with an incumbent president.

Promising to become full partners with Indian nations, Clinton said, “we must dramatically improve the federal government’s relationships with the tribes and become full

---

9 Jeffrey Wutzke ably describes self-determination in his comment entitled Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims. He notes that, “self-determination is closely linked to concepts of sovereignty; what sovereignty is to governments, self-determination is to peoples.” “Self means nation, whether defined by political tradition or ethnic characteristics, and determination means the capacity of those people to establish an independent government based on their own constitution.” Jeffrey Wutzke, Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claim, 22 AM. INDIAN L. REV. 509, 509-510 (1998).


11 Marla Williams, Native American Leaders Going to White House—First Meeting in 172 Years not just a Photo Opportunity, THE SEATTLE TIMES, A1 (April 26, 1994).

12 Id.

13 Id.

14 Janet Reno has also recognized the commitment to the consultation process similarly using words such as recapturing respect and creating a partnership relationship: "In our work with Indian tribes, we must respect these fundamental principles to move forward with the goal of justice for all Americans. But we must respect more than
partners with the tribal nations...This great meeting today must be the beginning of our new partnership, not the end of it. This theme of partnership echoed throughout Clinton's various addresses to indigenous peoples. Moreover, it was a theme alluded to by Presidents Nixon, Carter, Reagan and Bush.

The term partnership spawns an inquiry into whether it is merely a rhetorical semantic device or whether it is a term that invites a sharing and active participation of tribes as co-actors in shaping and formulating policies. This overriding theme remains a potent source of contention in the consultation process. For as one Tribal commentator has remarked, "the majority of agencies with which we are familiar do not distinguish between notification and consultation, and consider the former as adequate to meet their mandates for the latter. This neither meets the letter or spirit of the consultation requirements of the news mandating consultation."

Notice does not create a partnership and the use of this term as mere rhetoric needs to be erased from the process. Partnership should be pursued in its purest definitional sense as, "one

the fundamental principles; we must respect the heritage, the tradition, the art, the science, all that they have contributed, and think of what they can contribute in the future if we meet our responsibilities under those long-lost treaties, and what we must do to build not just a sovereign-to-sovereign relationship, not just a trust relationship, but a relationship of respect and regard and affection." Janet Reno, Delivers Remarks at Native American Heritage Month, US Attorney General, FEDERAL DOC. CLEARING HOUSE (Nov 24, 1998).

Stuart M. Powell, Clinton Vows to Respect Indians; Tribal Leaders Fight Service Cut, THE TIMES-PICAYUNE, A2 (April 30, 1994).

Carter in the Establishment of the Assistant Secretary of Indian Affairs on September 26, 1977 affirmed Nixon's policy by establishing the need to "administer the laws, functions, responsibilities, and authorities related in Indian affairs matters." Reagan offered in his Indian Policy Statement on January 24, 1983: "This administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen Federal control over tribal governmental affairs." In the Statement of George Bush on Indian Policy, June 14, 1991, Bush promised, "This is now a relationship in which tribal governments may choose to assume the administration of numerous Federal programs pursuant to the 1975 Indian Self-Determination and Education Assistance Act. This is a partnership in which an Office of Self-Governance has established in the Department of the Interior and given the responsibility of working with tribes to craft creative ways of transferring decision-making powers over tribal government functions from the Department to tribal governments." PRUCHA, Supra note 4 at 285, 303, 335.

C. Timothy McKeown, The Meaning of Consultation, COMMON GROUND, 18 (Summer/Fall 1997).
who shares or is associated with another in some shared action or shared endeavor\textsuperscript{18}. This definition must be respected before there will be any meaningful sincerity in consultations between tribes and the federal government.

Furthermore, at the historical meeting with President Clinton, Duane Beyal a spokesman for the Navajo Nation described the scene as, “under the law, we are at the same level as the governments of foreign countries...In a way, this meeting is going to be like Clinton going before the United Nations.\textsuperscript{19}’’ Marsha Harlan, a spokeswoman for the Cherokees remarked, “just the fact that he’s making a big deal of meeting with us is something we have not seen before. I guess everybody is waiting to see what will happen when the meeting is over and everyone goes home.\textsuperscript{20}’’ The waiting to see what happened is over. The response to this historic gathering generated a new buzz phrase called the consultation process.

Thus, while Tribal/Government negotiations have taken place since the Encounter Era, the term consultation process has only recently become part of United States Federal agency lexicon. It spawned the insertion of this phrase in over 150\textsuperscript{21} federal agency internal and formal policies, executive orders, and congressional actions from 1994 to 1997. It has also sparked confusion because depending on the source of authority, consultation may be seen as an absolute duty to consult or it may be seen as merely procedural. This tension is additionally overshadowed by the trust responsibility of the federal government.\textsuperscript{22}

\textsuperscript{18} \textsc{The Random House Dictionary of the English Language: Unabridged} 1052 (3rd ed. 1969).
\textsuperscript{19} M. Williams, \textit{Supra} note 11.
\textsuperscript{20} Id.
\textsuperscript{22} The roots of the federal trust responsibility doctrine may be found in the cases of the Marshall Trilogy. Vine Deloria, Jr. sums up the emergence of this doctrine from those cases as two fundamental underpinnings "upon which the federal responsibility for Indians is based." Both of which are contradictory. First, that tribes are domestic
Moreover, the changing of hats among bureaucrats, agency employees, agency heads and the intermingling of federal agencies provides a constant stream of tension in the consultation process. Such tensions have fueled Clinton’s directive that each agency, “consult to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribes...[and that] all such consultations are to be open and candid."

On November 6, 2000, President Clinton expanded on the historic 1994 directive when in Executive Order number 13175, he promised to reaffirm the “commitment to Tribal sovereignty, self-determination, and self-government by issuing [this] revised Order on dependent nations and secondly, "the relationship between tribes and the federal government resembles that of a ward to a guardian." Deloria explains: "Most important for our purposes is the fact that both the federal government and the Indians have used the contradictory aspect of these ideas whenever it suited their aims. Tribes have claimed to be both domestic dependent nations and wards of the government to whom the United States owes the highest fiduciary duty." Additionally, "all branches of the federal government have at one time or another labeled Indians as both wards and nations independent except for certain aspects that have been surrendered to the United States by treaty. Predicting the outcome of litigation, the legislative process, or discretionary administrative actions is therefore perilous since it cannot be predicted which set of interpretive tools will be chosen to characterize and resolve the controversy." Vine Deloria, Jr., Clifford M. Lytle, American Indians, American Justice 33 (1983).

Charles Wilkinson provides an anecdote that illustrates this dilemma: in a conversation with an "experienced, conscientious, and able official who is a strong advocate for wildlife protection and no agenda against Indians, said "Well, I’ll abide by it [referring to final secretarial order], but I can’t be expected to carry out Indian policy. My job is to administer the Endangered Species Act." “For him, implicitly, Indian policy is cabined and subordinate.”


24 See Appendix B for full text of Executive Order 13175 issued on November 6, 2000 entitled: Consultation and Coordination with Indian Tribal Governments.

25 Id. “Today, there is nothing more important in federal-tribal relations than fostering true government-to-government relations to empower American Indians and Alaska Natives to improve their own lives, the lives of their children, and the generations to come. We must continue to engage in a partnership, so that the First Americans can reach their full potential. So, in our Nation’s relations with Indian tribes, our first principle must be to respect the rights of American Indians and Alaska Natives to self-determination. We must respect Native American rights to choose for themselves their own way of life on their own lands according to their time-honored cultures and traditions." [emphasis added]. President’s Statement on Signing the Executive Order on Consultation and Coordination with Indian Tribal Governments, 36 WEEKLY COMP. PRES. DOC. 2806 (Nov. 6, 2000). See Appendix C: for recent CFR responses to this Executive Order.
Consultation and Coordination with Indian Tribal governments. Will the new order indeed affirm "the tribes right to self-government and self-determination within the framework of federalism" or will it continue to disguise the concept of consultation as notification and leave the process an artificial one-way mechanism where tribes have little or no voice in crucial decisions that impact their sovereignty?

Concern over whether consultation is truly a two-way or one-way street, allowing sovereigns a voice in the crucial decision making process is not confined to tribes, but remains a concern in negotiations between countries in the international arena. As Robert A. Williams, Jr. eloquently asks, how "do different peoples, with radically divergent cultural backgrounds, languages, value systems and traditions, achieve peace and accommodation with each other?"

The question posed by Williams, remains a challenge in present day consultations between tribes and the federal government, as well as a challenge in the international arena. However, an answer to the challenge may be found in lessons from the era of encounter diplomacy and early Indian treaty making.

26 Recently, in hand with President Clinton's signing of the Executive Order on November 6, 2000, the Department of Energy unveiled a new American Indian Energy Policy. United States Secretary of the Department of Energy, Bill Richardson commented, "This plan underscores our recognition that tribal nations are sovereign nations that require different approaches. Our efforts help to show the way to new partnerships, new joint ventures and new improved relationships in Indian country." The new policy commits to pursuing "actions that uphold treaty and other federally recognized and reserved rights of the Indian nations and peoples." And recognize that some tribes have "treaty-protected and other federally recognized rights to resources and resource interests located within reservation boundaries, aboriginal territories, and outside reservation and jurisdictional boundaries." "An important point made in the policy is the fact that Energy recognizes tribes as separate and distinct authorities independent of state governments." "The policy establishes mechanism for outreach and consultation with tribes in any decision-making process and preservation and protection of historic and cultural sites." Cate Montana, Department of Energy Unveils New American Indian Energy Policy INDIAN COUNTRY TODAY, November 6, 2000.

27 Brian Stockes, Treasury Department Comes under Fire From Indian Interests in Class Action, INDIAN COUNTRY TODAY, December 5, 2000 at A4. [Comments of former B.I.A. Assist. Sec., Kevin Gover].

28 See Appendix D for a survey of tribal difficulties and concerns with the current consultation process.

ORGANIZATION OF THIS PAPER

This paper will compare the specific procedures and sources of authority of the Federal-Tribal "consultation process". Specifically, Part I and Part II of the paper compares the consultation process during the Encounter era, and as later developed in case law, executive orders, and federal policies. In Part III, the process of U.S. law will be compared with the consultation process as practiced in International law. Specifically, the paper will compare consultation procedures in the World Trade Organization, United Nations, and through international instruments. By comparing the United States consultation process with the consultation process as it exists in the international arena, it will be proven that the current United States government process is inadequate for protecting tribal sovereignty and is not a government to government communication that provides for the creation of an alliance or partnership. Finally, in Part IV, the author will propose strategies for strengthening the U.S. Federal-tribal consultation process by merging aspects of International law with the historical visions of Tribal law from encounter era diplomacy.

1. ENCOUNTER ERA DIPLOMACY

A. THE WORLD STAGE DURING THE ENCOUNTER ERA PERIOD

During the encounter era, the flow of trade, the seeking of the balance of power, and military alliances infused the structure of relationships on the world stage. Survival in this chaotic interplay of economics and politics depended on how the players on the stage utilized strategies of conflict resolution and the tools of negotiation and accommodation. Indians in the Americas became adept as "active sophisticated facilitators" and in injecting the system of

30 Id.
negotiations with new legal meanings. By actively transmitting their narratives into the system of European treatying, they transformed the period with new multivocality. Critical theorist, Robert Cover, best describes this manner of shaping new dialogue. He pointedly observes, "no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the contest of the narratives that give it meaning law becomes not merely a system of rules to be observed, but a world in which we live."

The world in which the Europeans and Indian tribes inhabited became infused with the new legal meanings contributed by American Indians and Europeans and their use of metaphors and symbols in the act of negotiating.

During the encounter era, treaties were considered to be sacred texts and prior to 1787 treaties were conferences in which “both parties prepared talks or speeches that they gave to the other party, and after an exchange of views often taking two weeks or more, each party made final speeches that summed up the points under discussion.” Robert A. Williams, Jr. argues in his book, on a survey of treaty making before 1800, that “Native Americans were in fact active participants in the crafting of a shared legal culture.” He emphasizes that they “drew on their own unique traditions of diplomacy to resist and even influence the conduct of European law.” During the Encounter era, it was expected that the treaty was to remain in force and that treaty partners were to meet regularly with each other in council.

32 VINE DELORIA JR., DAVID E. WILKINS, TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS 17 (1999).
33 WILLIAMS, Supra note 29 at 12.
34 Id. at 125.
35 Id. at 112.
Moreover, a "treaty required treaty partners to acknowledge their shared humanity and to act upon a set of constitutional values reflecting the unity of interests generated by their agreement.\textsuperscript{36} The basic foundational principle that a "treaty enabled different peoples to transcend their differences and unite together is, in fact, one of the most frequently voiced themes of Encounter era Indian diplomacy.\textsuperscript{37} From 1776 until the end of the 18\textsuperscript{th} century, tribes remained a powerful military and economic power in Northern America.\textsuperscript{38} One Northern tribal confederacy particularly reigned supreme in its negotiation tactics within the international community and the growing settler population on the northern continent. The League of Six Nations serves as an illustrative example of the merging of metaphor and narrative in the international and national treaty making process. The Six Nations drew from their creation story to use metaphors such as the covenant chain, the journey of two canoes and sharing from a common bowl, to give meaning to relationships and duties among parties in forming sacred treaties together.

\textbf{B. EXAMPLES OF METAPHORS AND DIPLOMATIC TOOLS AT WORK IN ENCOUNTER ERA DIPLOMACY AND MULTICULTURAL TREATY MAKING}

The League of the Six Nations in North America, as an empire\textsuperscript{39}, became one of the most active players in forming a multicultural treaty ing system with European nations. The confederacy was founded before Whites first came to their shores, and while there is no

\textsuperscript{36} Id. at 99.

\textsuperscript{37} Id.


\textsuperscript{39} In fact, some writers in the 18\textsuperscript{th} century referred to them as the "Romans of the New World". The Six Nations serves as an example, but is not to imply that other Indian nations were not equally involved in diplomatic negotiations among themselves and with Europeans. OREN LYONS ET AL., EXILED IN THE LAND OF THE FREE 272 (1992).
agreement as to the exact date of its founding, it is generally accepted that the League formed at some point in the period from A.D. 1400 to 1600.\textsuperscript{40} It was already a thriving system of diplomacy maintaining its balance of power on the continent prior to the European arrival. The Great Law of Peace\textsuperscript{41}, possibly the first democratic constitution in America, was founded on the ideals of unity and peace, and its origins sprung from the Iroquois Deganawidah epic. The epic describes a Peacemaker who "brought a powerful message to the survivors of ...tribal warfare: all peoples shall love one another and live together in peace. Peace [became] "the law" and the affirmative objective of government.\textsuperscript{42\textsuperscript{n}} The epic provides the source story which later breathes life into the principles of law embodied in the Great Law of Peace.\textsuperscript{43}

The League's constitutional principles of the Great Law of Peace were embodied in the mechanism of the covenant chain. This chain "was the name given to the complex system of treaties and agreements regulating trade and military obligations between the Five Nations, a varying number of lesser tributary tribes of the Atlantic Coast region, and several of the mid-Atlantic English seaboard colonies.\textsuperscript{44\textsuperscript{n}} Through the imaginings of different groups of people linking arms together, it became an obligation and duty to maintain the covenant in times of

\textsuperscript{40} The League was originally called Five Nations, composed of the Mohawks, Onondagas, Senecas, Cayugas, and Oneidas. At some point in the 18\textsuperscript{th} century, they became the League of the Six Nations when Tuscaroras from North Carolina joined the League. See WILLIAM N. FENTON, THE GREAT LAW AND THE LONGHOUSE 3 (1998).
\textsuperscript{41} The Constitution of the Confederacy, the Great Law of Peace has been cited by a resolution in Congress in 1988, acknowledging "the contribution of the Iroquois Confederacy of Nations to the development of the [United States] constitution." The League has been referred to as the first League of Nations embodying many of the principles later developed in the formation of the International League of Nations in the twentieth century. H. CON. RES. 331, 100\textsuperscript{th} CONG., 2\textsuperscript{nd} SESSION (1988). See LYONS, Supra note 39. But see, Erik M. Jensen, The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaf, 15 AM. INDIAN L. REV. 295 (1995); Elisabeth Tooker, The United States Constitution and the Iroquois League 35 ETHNOHISTORY 305 (1988).
\textsuperscript{43} The epic informs the Leagues constitution much as in the same manner the United States Declaration of Independence provides the source story of origins for the United States Constitution.
\textsuperscript{44} WILLIAMS, Supra note 29 at 117.
crisis or status quo. The covenant chain merged with principles of international law and in treaty making with the colonists.

**C. THE AMERICAN REVOLUTION AND POST REVOLUTION TREATY MAKING PERIOD: Metaphors of the Covenant Chain and Two Canoes**

The covenant chain served as an indispensable part of making treaties of peace and friendship with European Nations and during the 18th century with colonists. Both groups, in turn, treated the League as a nation state. A two-row wampum belt or Gus-Wen-Tah symbolized the chain. Its description illustrates the structuring of treaty relationships between the League, Europeans and later with colonists.

There is a bed of white wampum which symbolized the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, traveling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.

The ideal of the covenant chain lasted throughout treaty relationships at least until the end of the 18th century. It became increasingly important for the colonists to maintain strong ties with tribes because of the fur trade, local and international economies, as partners to fight the British and for the protection of an expanding settler population.

---

45 Id.
47 Id.
48 In a speech to the Six Nations on July 13, 1775, Congress prepared a speech specifically to convince the League to stay out of the revolution and not to take sides with the British. "Therefore, we say, brothers, take care-hold fast to your covenant chain. You now know our disposition towards you, the Six Nations of Indians, and your allies. Let this our good talk remain at Onondaga, your central council house. We depend upon you to send and acquaint your allies to the northward, the seven tribes on the river St. Lawrence, that you have this talk of ours at the great council
In the first formal diplomatic Indian Treaty with the United States, the Treaty with the Delawares on September 17, 1778, the covenant chain was included as a “chain of friendship”, a phrase found in many treaties thereafter. The treaty also clearly recognized that tribes held a position of power in the newly organizing states and suggested the possibility of representation in Congress. Article VI in relevant part stated:

The United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treatise, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into. And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, nothing contained in this article to be considered as conclusive until it meets with the approbation of congress. And it is also the intent and meaning of this article, that no protection or countenance shall be afforded to any who are at present our enemies, by which they might escape the punishment they deserve.

The offer of congressional representation was made prior to the ratification of the U.S. Constitution, and as a result was eventually lost in the formation of the Union. But it is strong evidence that Indians were capable of making war, joining and initiating diplomatic relations and a power on par with other states under the Articles of the Confederacy.

One year later, Secretary of War Henry Knox in June 15, 1789 suggested the rejection of the principle of conquest in his report on the Northwestern Indians to Congress. Subsequently he urged:

fire of the Six Nations. And when they return, we invite your great men to come and converse farther with us at Albany, where we intend to re-kindled the council fire, which your and our ancestors sat round in great friendship. Brothers and Friends! We greet you all farewell. (The large belt of intelligence and declaration.)”


The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.\textsuperscript{51}

Knox's advice was neither heeded nor accepted by Congress. Subsequently, by the end of the 18\textsuperscript{th} century the settler population had grown tremendously in size and developed more military power. Gradually, treaties were made with indigenous peoples during the westward expansion of colonists to purchase lands often with unequal bargaining terms. Eventually relocation and forced assimilation became the mandates of the federal government with Congress in 1871 forbidding any more treaties with indigenous peoples.\textsuperscript{52} The diplomatic power structure was no longer on a level playing ground after the 18\textsuperscript{th} century, and the covenant chain was broken. However, as Vine Deloria notes, even one of the last treaties carefully retreated from using the word conquest as demonstrated in the Fort Laramie Treaty of 1868.\textsuperscript{53}

\textbf{D. \textit{Why Should Encounter Era Treaty-Making Be of Any Importance to Today's Consultation Process?}}

Why should encounter era treaty-making be of any importance to today's consultation process? As Williams posits,

Feminist philosophers and theorists like Annette Baier and Martha Minow, liberal philosophers like Richard Rorty, critical legal studies theorists like Roberto Unger and Joseph Singer, and other progressive thinkers and writers of our century have increasingly called our attention to the importance of trust in creating healthy social relationships. Thus, understanding some of the ways that Indians of the Encounter, through their 'confident example setting', sought to create relationships of trust with their

\textsuperscript{50} \textsc{The Avalon Project: Treaty with the Delawares: 1778.}\nhttp://www.yale.edu/lawweb/avalon/treaty/del1778.htm. (Visited 4/04/01).
\textsuperscript{51} \textsc{The Avalon Project: Congressional Papers of 18\textsuperscript{th} Century.}\nhttp://www.yale.edu/lawweb/avalon. (Visited 4/04/01).
\textsuperscript{52} "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe..." \textsc{Prucha, Supra note 4}, at 135.
\textsuperscript{53} \textsc{Deloria, Supra note 32 at 68.}
treaty partners can teach us important lessons about how we might achieve law and peace between different groups of peoples in a multicultural world.  

In fact, confident example setting is not a relic of the past, but in international "negotiations.... Diplomats often create scenarios that invoke 'confidence-building measures.'" Knowing that a complete solution to hostilities may not be possible as the product of the first round of talks," "ambassadors will agree to small steps that are easily achievable by both sides." The emphasis in such talks revolves around letting go of the tests of wills and focusing on that part of the process that will build trust over time. 

Therefore," one of the most important things to understand about the language of Encounter era forest diplomacy, ... is that it reflected the deeply held Indian belief that a successful treaty relationship, first and foremost, is built on a foundation of trust. Thus, for the Iroquois," the metaphor of the common bowl stood for the constitutional principle that different peoples in a treaty relationship mutualize and converge their interests, thereby eliminating the sources of distrust between them. 

How we resurrect this metaphor of the common bowl to mutualize and converge federal and Indian interests to eliminate sources of distrust is an important goal for today's struggling consultative process. It is a present day consultation process that has become one built on the

54 WILLIAMS, Supra note 29 at 125.
55 LAWRENCE SUSSKIND, PAUL F. LEVY, JENNIFER THOMAS-LAMAR, NEGOTIATING ENVIRONMENTAL AGREEMENTS 6 (2000)
56 WILLIAMS, Supra note 29 at 40.
57 Id.
58 Id. at 125.
59 Id. at 127. It has been suggested by some legal scholars, notably, Prof. Gloria Valencia-Weber at the University of New Mexico School of Law that "the Majority of the U.S. Supreme Court, as well as others, would suggest that the U.S. Constitution is the common bowl for states, as well as tribes, in today's world. All must fit appropriately in the common scheme of the common bowl, and in particular, the common bowl in that version focuses on the states' role." Comments during Native Rights Seminar (Spring Semester 2001).
tensions and inequities of the past; tensions which continue to be the awning over the conflicting interpretations of courts and federal agencies.

II. U.S. FEDERAL POLICIES, CASE LAW, AND EXECUTIVE ORDERS

THE COURT: **I do have a curious interest in finding out what individuals do if they don't like what (the Bureau is) doing, if they don't think it is in the best interests of their tribe **.

What recourse do they have to any hearing apparatus where they can voice their opinion?

Is this only a dream that they have?

Here these people have come into court because they can't apparently get anyone to listen to them. At least, there has been no hearing of any substance, at least, that I have heard of here. If there has been a hearing of ** real substance, then I am not aware of it.**

"Presidents, beginning with Nixon, have, by executive order, imposed procedural requirements on rulemaking by executive branch agencies that went beyond procedures required by the Administrative Procedure Act (APA)." The APA did not require-as earlier bills would have-that all administrative action follow a single, rigid procedural model. Instead the APA recognized and adopted various agency procedures that are commonly characterized as 'formal adjudication', 'formal rulemaking', 'informal adjudication' and 'informal rulemaking'. "Formal rulemaking is triggered only where a statute other than the APA requires a rule to "be made on

---

60 Oglala Sioux Tribe v. Andrus 603 F2d 707, 718 (8th Cir. 1979).
62 Id. at 5.
63 Id.
the record after opportunity for an agency hearing.\textsuperscript{64} In general, "executive orders carry force and effect of law if they are issued pursuant to constitutional or statutory authority.\textsuperscript{65}

As United States case law demonstrates, President Clinton's executive orders do not "grant or vest any right to any party "with whom the agency is thereby required to consult.\textsuperscript{66} However, "the promulgation of these policies, in conjunction with statutes such as the Indian Self-Determination and Education Assistance Act and a failure to carefully delineate internal policy from statutory duty, creates consultation expectations on the part of tribal members, which several courts have recognized amount to the creation of expectation rights.\textsuperscript{67} This observation begs the question then as to what is the creation of expectation rights? The phrase is certainly not uniformly applied or recognized by American caselaw in the realm of federal Indian law. However, it is a term that has been used at times in contract law and in analyzing the Contracts Clause of the United States Constitution.

The Contracts Clause of the United States Constitution has as its purpose the protection of the "expectations of persons who entered into a contract from the danger of subsequent legislation.\textsuperscript{68} Thus, in determining a claim that a state law violates the Contracts Clause, a court will analyze whether that change has caused "a substantial impairment of the contractual relationship\textsuperscript{69}. When a substantial impairment is found, the state must then demonstrate a

\textsuperscript{64} Id.
\textsuperscript{65} Legal Aid Soc. of Alameda County v. Brennan 381 F. Supp. 125 (N.D. Cal. 1974).
\textsuperscript{67} HASKEW, Supra note 21 at 32.
\textsuperscript{69} Id.
legitimate public purpose for the change, "such as remedying broad and general social or economic problem." In fact, 

Any vested right, entitled to be protected from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of a demand, or a legal exemption from a demand made by another; and if before such rights become vested in particular individuals, the convenience of the state induces amendment or repeal of certain laws, these individuals have no cause to complain. Nonetheless, a repeal or amendment of a statute which has the effect of extinguishing vested rights which have been acquired under the former law will be set aside.

Thus, in contract law vested expectation rights are generally protected from subsequent legislation or repeal of certain laws, which infringe on those vested expectations. Similarly, if tribes have vested expectation rights through the doctrine of the trust responsibility, it may be argued that such rights should be protected from subsequent legislation or administrative actions that in effect extinguish those expectation rights.

However, the doctrine of the trust relationship has not been scrupulously followed by Congress or the courts. As the scholar, Reid Chambers notes, "The courts have upheld congressional power to terminate the trust relationship or constrict its purposes, and while the Lone Wolf doctrine seems questionable, it is unlikely to be overruled." Chambers went on to acknowledge, "this power of Congress, recognized under the Lone Wolf rendition of the trust responsibility is manifestly awesome, perhaps unlimited. *** For while courts recognize that

---

70 Id.
71 Id.
72 Lone Wolf v. Hitchcock 187 U.S. 553 (1903). "The Supreme Court declared that Congress had plenary power over Indian relations and that it had power to pass laws abrogating treaty stipulations." PRUCHA, Supra note 4 at 201.
Congress has a trust responsibility, they uniformly regard it as essentially a moral obligation\textsuperscript{74}, without justiciable standards for its enforcement.\textsuperscript{75} However, there are different strategies for applying the trust responsibility which "can be reconciled to permit judicial enforcement as long as distinction is observed between executive and congressional action.\textsuperscript{76}

Thus, there are two different sources from which consultations may spring. The first are "procedures required of federal agencies by statute or published regulations and thereby create a cause of action."\textsuperscript{77} Secondly are those "promulgated by executive agencies----independent of statutory mandate or authority----primarily pursuant to the government-to-government federal tribal relationship policy of the Clinton administration,\textsuperscript{78} and may include "unpublished policies...which govern the internal management of bureaus and agencies."\textsuperscript{79}

Consultations are generally the province of federal executive agencies and bureaus. Thus, the process for consultation varies in each branch of the Department of the Interior and each federal agency depending on the source of the requirement. This variance and source of authority effects the enforceability of any obligation to consult. Stretching throughout the morass of rules, policies, statutes and regulations is the confusing usage of consultation as a generic term rather

\textsuperscript{74} This moral obligation has been referred to time and time again in Supreme Court cases. Notably, in \textit{Seminole Nation v. U.S.} 316 U.S. 286 (1941), the court acknowledges: "[T]his court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with Indians, should therefore be judged by the most exacting fiduciary standards."

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.} Chambers explains this as, "reading all the cases together, the principle that emerges is that Congress intends specific adherence to the trust responsibility by executive officials unless it has expressly provided otherwise. Such a formulation preserves the role of Congress as the ultimate umpire of the purposes of the trust relationship while requiring strict executive compliance with the terms of the trust."

\textsuperscript{77} HASKEW, \textit{Supra} note 21 at 25.

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.}
than a term of art. This can certainly be witnessed in the array of cases that have addressed the issue of the consultation process between tribes and federal government agencies.

There is a clear split among the circuits as to the interpretation of this phrase and the source from which to analyze the issue. Such a split has its genesis in the "conflicts between Indian trustee responsibilities and competing government projects that affect countless federal agencies." The following sections examine three circuit court decisions and their impact on the consultation process between tribes and federal agencies.

**A. OGLALA SIOUX TRIBE V. ANDRUS**

In *Oglala Sioux Tribe*[^81], an 8th circuit court case, the Oglala Tribe wished to prevent reassignment of Anthony Whirlwind Horse, the highest-ranking official of the BIA on the reservation and the first "full-blooded Lakota speaking person to hold that position."[^82] The court held that the Tribe was not necessarily entitled to a superintendent of its choice. However, the Bureau of Indian Affairs (BIA) established a policy requiring prior consultation with tribes in its "Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs."[^83] It thereby created justified expectations that such a policy should be carried

[^80]: "conflicts between Indian trustee responsibilities and competing government projects that affect countless federal agencies.

[^81]: 603 F.2d 707 (8th Cir. 1979).

[^82]: 603 F. 2d 707, 708 (8th Cir. 1979).

[^83]: "These guidelines * * * recognize the possible variations in scope and intensity of tribal consultation. It is incumbent on all Bureau managers to apply these guidelines to obtain maximum benefit from this relationship with tribal groups. We urge you to seek ways in which the guidelines can be used to accomplish the objectives of the consultation policy.

1. Consultation is intended to mean providing pertinent information to and obtaining the views of tribal governing bodies * * *.

2. The legal and regulatory framework within which the Bureau operates, including civil service rules, must be followed in applying these guidelines.

3. Within these guidelines, consultation with tribal groups will be encouraged. * * * Steps should be taken to apprise tribal groups of opportunities which exist as stated in these guidelines.

4. Because of the importance of clear understanding by all parties, agreements on the extent of consultation should be worked out. * * * When an agreement between a tribal group and a Bureau organization does provide for consultation on certain types of positions, care must be exercised to insure meaningful consultation consistent with
out. Here, those expectations of rights were not honored because the tribe was not given a meaningful opportunity to express their views before the Bureau issued its decision. The court noted that the

Failure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates general principles governing administrative decision-making but also violates the distinctive obligation of trust incumbent upon government in its dealing with dependent and sometimes exploited people. It is substantially important to note that the court recognized the distinctive obligation of trust that is incumbent upon the government in its dealings with tribes. This trust doctrine was further highlighted by the court in its citing of Morton v. Mancari. The premise in that case provided that the Indian Reorganization Act of 1934 (IRA) mandates "giving to Indians a greater participation in their own self-government; the furthering of the Government's trust obligation toward the Indian tribes; and the reduction of the negative effect of having non-Indians administer matters that affect Indian tribal life." Certainly, if the BIA failed to follow its own internal policy requiring consultation, it not only violated administrative decision-making principles, but it violated the trust doctrine.

6. Tribal groups should be consulted on recommendations for selection of employees for certain positions.
7. Tribal groups should be encouraged to provide comments and recommendations on personnel policies, programs and procedures. * * * In responding to contributions made, tribal groups should be advised as to who has authority to take action on their recommendations and should be informed of the action ultimately taken. * * *
8. Commensurate with the interests of tribal groups, they should be kept advised of significant circumstances affecting employees or overall staffing.
9. Tribal groups should be encouraged to become acquainted with the duties and performance standards of employees, with classification standards and qualification standards governing positions, and with Bureau organization at pertinent facilities. Recommendations for change should be encouraged and considered, and responses should be provided to the recommending group.
10. Tribal groups should be encouraged to evaluate or participate in the evaluation of personnel management programs and practices. When Bureau officials plan evaluations, tribal groups should be invited to participate when appropriate.

84 603 F. 2d 707, 721 (8th Cir. 1979).
Furthermore, the court described what is not sufficient for a process of meaningful consultation:

We do not believe that the two meetings of tribal delegates with Washington officials fulfilled the requirement of meaningful consultation with tribal governing bodies as contemplated by the guidelines. By the time that the May 10th audience was granted the decision to remove Anthony Whirlwind Horse had already been made.

The court went on to hold that allowing submission of views after an administrative decision had been made was "no substitute for the right of interested persons to make their views known to the agency in time to influence the (administrative) process in a meaningful way." While the BIA insisted that the reason for removal of Anthony Whirlwind Horse was due to a conflict of interest policy, the agency had never previously announced or articulated the policy. Therefore, the BIA violated its internal guidelines, administrative procedures, and the overriding trust doctrine.

B. HOOPA VALLEY TRIBE V. CHRISTIE

In Hoopa Valley Tribe v. Christie, a 9th circuit case, the Hoopa court looked at past cases addressing the issue of the right to consult. The Hoopa Valley Tribe sought an order to enjoin officers of the Bureau of Indian Affairs from transferring the Bureau's office staff from their reservation. The court examined the BIA's "Guidelines for consultation with Tribal Groups on Personnel Management within the Bureau of Indian Affairs". Subsequently, the court held they were not conceded by the Bureau to have the force of law, in contrast to the governmental concession made in Oglala Sioux Tribe v. Andrus. Nor were they the same as regulations that

---

87 603 F. 2d 707, 719 (8th Cir. 1979).
88 Id.
89 Hoopa Valley Tribe v. Christie 812 F.2d 1097 (9th Cir. 1986).
90 812 F.2d 1097 (9th Cir. 1986).
must be applied because "the rights of individuals are affected, as in the case of Morton v Ruiz.\textsuperscript{91}\n
The Guidelines were in letter-form and unpublished.\textsuperscript{92} They called for consultation where major moves affected the Indians.\textsuperscript{93} They gave direction to the Bureau, but they did not establish legal standards that could be enforced against the Bureau.\textsuperscript{94} Although, the court conceded the possibility that even if the guidelines were binding, they were not violated, because, "consultation is not the same as obeying those who are consulted." The Hooplas were heard, "even though their advice was not accepted."\textsuperscript{95} Therefore, the court held there was no violation of the Administrative Procedures Act or of the federal trust responsibility.

\textbf{C. LOWER BRULE SIOUX TRIBE V. DEER}

\textit{Lower Brule Sioux Tribe v. Deer,}\textsuperscript{97} built on the Hoopla decision. The court recognized that reduction in force (RIF) notices to BIA employees on their reservation were invalid. The court issued a mandamus instructing the BIA to engage in meaningful prior consultation with the Tribe before issuing notice. The BIA had ignored its own rules and representations and violated its obligations of trust and fiduciary obligations when it failed to afford the tribe a meaningful prior consultation before issuing the RIF notices.\textsuperscript{98} In fact, the BIA's own memorandum of May 5, 1972 set forth a policy of "consultation on general personnel programs" which was a policy "of

\begin{footnotesize}
\textsuperscript{92} 812 F.2d 1097,1103 (9th Cir. 1986).
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\end{footnotesize}
tribal involvement in Indian programs and in the operation of activities providing services to Indian people.\textsuperscript{99}

The court gave credence to the express policy of the Department of the Interior Manual, which stated that,

It is the policy of the Department of the Interior ... to consult with tribes on a government-to-government basis wherever plans or actions affect tribal trust resources, trust assets, or tribal health and safety. In the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal governments... all consultations will be conducted in an open and candid manner respectful of tribal sovereignty, so that all interested parties may evaluate for themselves the potential impact of the proposal on trust resources.\textsuperscript{100}

The tribe argued that Clinton's memorandum of April 29, 1994 created an enforceable duty to consult. However, the court emphasized that the presidential memo does not, create any enforceable duty. Rather, executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits.\textsuperscript{101} But, the court offered the memo as "further evidence of BIA policy, the interpretation of BIA policy by the BIA, and by the federal government and the tribe's reliance thereon."\textsuperscript{102} The memo when conjoined with administrative procedures was enough to defeat the BIA's neglect of the consultation process.

The court also defined the meaning of the phrase \textit{meaningful consultation}:

Consultation, as described by the tribal chairman, Michael B. Jandreau, would amount to a meeting between the superintendent of the Lower Brule agency and the Tribal council. Consultation has occurred in the past, which consultation comprised a one to two hour meeting, not more than one half day, during which meeting the superintendent notifies the council of the BIA's proposed action, justifying his reasoning. The Tribal Council may either issue a motion or resolution of support for the decision, or reject the decision. Recognizes that the BIA need not obey the council's decision. Meaningful consultation means tribal consultation in advance with the decision-maker or with intermediary's with

\textsuperscript{101} Id.
clear authority to present tribal views to the BIA decision-maker. The decision-maker is to comply with BIA and administration policies.103

The court also made a special point of noting that, "[t]he BIA is unlike any other agency, however, and...reducing the number of employees may not be accomplished without meaningful prior consultation with tribes." Again, the BIA violated the Administrative Procedures Act and the court intimated the BIA violated the federal trust doctrine.

**D. SUMMARY OF CASES AND EXPECTATION OF RIGHTS**

All three cases illustrate the uneven application of interpreting the consultation process. Both courts in *Oglala Sioux* and *Lower Brule* recognized the internal and external parameters of the administrative process at work in the BIA. And because of the special nature of the BIA, both cases acknowledged the need to remain true to the objective of the federal trust responsibility in upholding the input of tribal decision-making in the administrative process. However, in *Hoopla*, the court failed to take into consideration any overriding principles of the trust doctrine. Instead the court accepted the word of the BIA when they informed the court that the unpublished guidelines were not legally binding. The guidelines were virtually the same as those in *Oglala Sioux*. However, the court refused to recognize any duty to enforce the guidelines. For the *Hoopla* court, it was enough that the tribe was heard and there was no need for the court to characterize what is meant by "being heard." *Hoopla* appears to be a purely ad hoc application of the consultation process.

On the other hand, the Supreme Court has remarked in the case of *Morton v. Ruiz*,105 that "it is essential that the legitimate expectations of these needy Indians not be extinguished by what
amounts to an unpublished *ad hoc* determination of the agency. But in a subsequent case, *Lincoln v. Vigil*, the court reflected on *Morton* commenting that the case was "driven by an internal BIA procedure in the Indian Affairs Manual subjecting the agency to rulemaking procedures even when the APA did not require it." Given the ever changing nature of what remains enforceable in requiring agencies to consult with tribes and the inherent conflict of interests for agencies in the process, there should be an effort to enforce an absolute duty within the government to consult with tribes.

In the case of *Northern Cheyenne Tribe v. Hodel*, the court acknowledged that, "[T]he Secretary's conflicting responsibilities...do not relieve him of his trust obligations. To the contrary, identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights." However, it does appear that a lesser standard of adherence to the Indian trust responsibility exists when the BIA or the Secretary of the Interior have to serve competing public interests. A strategy for building a more meaningful consultation process must take this into account to infuse an *ad hoc* process with principles of trust, fairness, and accountability.

Therefore, expectation of rights remains a heated issue in U.S. consultation policy and is an issue in international law. Just as in U.S. caselaw, in the World Trade Organization [WTO], even where there may be an absolute duty to consult, there may not be a duty to reach agreement. But, in the WTO, creation of expectation rights [to consult] is presumed as a principle of state self-determination.

---

106 *Id.*
III. THE LAW OF DISPUTE SETTLEMENT AND THE CONSULTATION PROCESS IN INTERNATIONAL NEGOTIATIONS

It is an inescapable fact that issues that divide States are best settled by negotiation and agreement. That is true whether the dispute is one that fails to be resolved within the framework of existing law or is one of such novelty or proportions that a specifically legislative effort is called for. The greater the direct involvement of the opposing parties in the process of finding a solution to their differences, the greater the likelihood of a satisfactory and lasting outcome.\(^9\)

The encounter era was a unique example of the forced forging of interdependence and trade between sovereigns, not unlike what the world is presently witnessing today in international economics and trade. However, any honest comparison of today's international consultation process with the federal tribal consultation process must take into account the historical disparities of indigenous peoples as colonized peoples. On today's world stage, between countries, the dynamics of power do not reflect the damaging history of encounter era colonization. Countries generally have the leverage of political and economic power to convince each other to negotiate.\(^10\) Indigenous peoples have a long history of being disadvantaged because of historical and legal disparities, and for the most part, do not have the leverage of political and economic power with which to negotiate in the international community or in the United States.\(^11\)


\(^10\) Although, even in the international community the faces of individual countries are rapidly changing. Less developed countries are increasingly finding their way to the negotiating table. Accommodating these diverse voices in the international community is challenging the fundamental international scheme for negotiation and accommodation.

\(^11\) Notable exceptions include Wisconsin, Minnesota, Connecticut and some Californian gaming tribes who have generated such revenues that they wield a great deal of economic power. Politically, they have given substantial donations to the Democratic, as well as, Republican parties and have created leverage for themselves because of their economic wealth. W. DALE MASON, *INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS*, 241 (2000).
The World Trade Organization (WTO) and the United Nations (UN) are presently involved in economic negotiations on the world stage. Presently, the WTO is witnessing a change in the nature of its membership. It is no longer "the small club of like-minded trade policy officials\textsuperscript{112}\textsuperscript{a}, but is now composed of diverse member governments. Such an evolution in composition from homogeneity to diversity is forcing the WTO and the UN to create new consensus building mechanisms.

Daily the world watches the dance of nations forced to deal with each other because of trade centered economic pressures. And the world is caught between the incentives that flow and reverberate through such relationships. The decisions impact local economies and individuals and parallel the universe of tribal-federal relationships to the extent that lesser developed countries are economically and politically disadvantaged and not always on a level playing field. However, it is possible that some elements of the consultation process in this arena may be beneficial to creating an appropriate model between tribes and the U.S. federal government.

A. THE WTO AGREEMENT: "UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES."

The World Trade Organization (WTO), formed in 1995, describes itself as "the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.\textsuperscript{113}\textsuperscript{a} The WTO is the successor to the General Agreement on Tariffs and Trade (GATT) established fifty


years ago. The WTO was created during the 1986-1994 Uruguay Round negotiations. However, GATT remains the WTO's "principal rule book for trade in goods".

Currently, there are "more than 130 members, accounting for over 90% of the world trade." All WTO agreements are ratified in all members' parliaments. The leading decision making body is the Ministerial Conference, below which is the General Council which meets as the Dispute Settlement Body (DSU). Consultation is the encouraged mechanism for settling disputes between members. During the entire fifty-year span of GATT, there were only 300 disputes brought to the system. Conversely, "by March 1999, over 167 cases were brought to the WTO for dispute settlement. "By July 2000, 32 out of 203 cases had been settled 'out of court', without going through the full panel process. Unlike the current WTO, GATT did not have a final timetable for settling disputes.

The new dispute settlement procedures have specific timetables for each step in the process. This change in policy has been characterized by Renato Ruggiero as the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy. The new WTO system is at once stronger, more automatic and more credible than its GATT predecessor...The system is working as intended - as a means above all for conciliation and for encouraging resolution of disputes, rather than just for making judgements. By reducing the scope for unilateral actions, it is also an important guarantee of fair trade for [less powerful countries].

114 Id.
116 Id. The entire set of rules dealing with trade and dispute settlement runs to over 30,000 pages.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 Id.
123 WTO WEBSITE, Supra note 109.
Despite Ruggiero's enthusiasm, the procedural process of the WTO has in fact diminished confidence between rich and poor countries.\footnote{124} This came to a head at the WTO Seattle Ministerial in December 1999.\footnote{125} From that debacle, the WTO agreed to new confidence boosting measures directed between rich and poor countries.\footnote{126} As a result, the 136-member WTO “will hold regular consultations on problems facing poorer nations in implementing trade accords.”\footnote{127} This signals at least recognition of the potential problems facing an authentic creation of consensus based consultations between countries with unequal bargaining power. However, this issue and its tensions remain very much alive throughout consultation processes on the international stage, and have not been resolved by any convention including the WTO.\footnote{128}

Nevertheless, the structural process for consultation in the WTO will provide a meaningful example of consultations between countries. Notably, the absolute duty to consult in the WTO is a possible lesson that could be borrowed for United States-Tribal negotiations.

\textbf{B. PROCESS FOR CONSULTATION IN THE WTO}

Typically in the WTO, the current process for any nation, rich or poor, occurs when “a dispute arises [where] one country adopts a trade policy measure or takes some action that one or

\footnote{124} This seems to be a symptom of any consultation negotiation process. Who has the power? The tensions are rift with the dilemmas of rich versus poor. This appears to exist at any level of consultation or negotiation. It can be seen at a local government level, between rich and poorer tribes, between more developed and less developed countries, and even between federal agencies: those with larger versus smaller budgets.

\footnote{125} The protests, which greeted the WTO Seattle Summit, demonstrates "the explosion of new energy flying in the face of such a consensus throughout the international system. It brings together an extraordinary and bewildering variety of groups and alliances, from Third World peasants to US trade unionists, French small farmers, indigenous peoples, human rights and environmental campaigners, together with many non-governmental organizations and a new phenomenon-global public policy networks capable of mobilizing activists rapidly and effectively with the new communications technologies." Paul Gillespis, \textit{Anti-capitalists Take to the Streets}, IR. TIMES, 2000 WL 30759265 (December 28, 2000).

\footnote{126} EU/WTO: WTO Agrees New Confidence Boosting Measures, EUR. INFO. SERV. (May 6, 2000).

\footnote{127} Id.

\footnote{128} Id.
more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations.\textsuperscript{129} The central importance of the process is that there is an \textit{absolute right to consult} under the Dispute Settlement Understanding (DSU) and "members may request consultations on virtually any basis for which it is not embarrassed."\textsuperscript{130} In one characteristic case that went to panel, the \textit{Japanese Film Case}, the DSU emphasized that, "\textit{In our view, these provisions (Article 4.2 and 4.6 of the DSU) make clear that Members' duty to consult is absolute.}"\textsuperscript{131} "The only prerequisite for requesting a panel is that the consultations have "fail [ed] to settle a dispute within 60 days of receipt of the request for consultations.}\textsuperscript{132}"

Consultations under Article 4 of the DSU are normally required as the first step in the WTO dispute settlement process. WTO decisions\textsuperscript{133} regarding the consultation process additionally emphasize that Article 4.2 of the DSU requires a Member "to accord \textit{sympathetic consideration to} and afford adequate opportunity for consultation regarding any representations made by another Member."\textsuperscript{134} Article 4.5 of the DSU also specifies that "[i]n the course of the consultations ... before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.\textsuperscript{135}" DSU Article 4.3 provides that if a request for consultations is made under a covered agreement, the Member to whom the request is

\textsuperscript{129} World Trade Organization (WTO) website: \url{http://www.wto.org/engish/news_e/spmm_e/geimpl_e.htm}. (Visited 3/09/01).


made shall enter consultations in good faith, with a view to reaching a mutually satisfactory solution.

Moreover, good faith may be characterized in the requirement that claims are to be stated with specificity.

All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be clearly stated. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.\[136\]

The WTO jurisprudence does not recognize the concept of adequacy in consultations. Cases stress that this does not imply that consultations are not a critical and integral part of the DSU. On the contrary it is because of their importance that at present there is no mandate to investigate the adequacy of the process. Not all countries view this mechanism as successful and have proposed changes.

Countries such as Egypt, Guatemala, India, Venezuela and Japan have complained that the process fails "to provide adequate access to developing countries."\[137\] These countries "cited resource constraints and expense as the primary problems."\[138\] Additionally, both Japan and Hungary have argued that "consultations should not be treated merely as a procedural

\[134\] JAPAN Supra note 128. Emphasis added.
\[135\] Id.
\[138\] Id. at 570.
Complaints often involve the adequacy of the consultation process. "Members have questioned to what extent the request for consultations and the consultations themselves must include discussion of all issues that are subsequently raised in the panel process." Members "have also raised the issues of whether failure to consult in good faith during the consultation process is an enforceable obligation constituting grounds for requiring the process to be restarted." This argument was rejected in the case of Bananas II.

In Bananas II, the dispute centered on the European [EU] Banana import regime in which the WTO found the EU system discriminatory. Subsequently, the United States felt compelled to enforce sanctions against the European community. European countries gave preferential treatment to their ex-colonies for banana exports, but imposed a tariff import system on those countries not ex-colonies. The U.S., Guatemala, Ecuador and Honduras banana market declined in profit as a result of the EU's actions. The long drawn out case illustrated the issue of sovereignty concerns when superpowers negotiate in the world trade market system. In fact, the United States "conducted hearings to determine the effect of the WTO on United States sovereignty." Interestingly, "critics argued against the ability of unknown bureaucrats to determine that United States laws violate international policy, and the United States' ability to impose unilateral sanctions." Certainly since the Bananas case, the EU feels that its' sovereignty has been infringed upon by the WTO and the United States. Several commentators

139 Id.
141 Id.
142 BRIMEYER, Supra note 112 at 137.
143 Id.
144 Id. at 140.
145 Id.
146 Id. at 167.
have cautioned that "if countries continue to see the WTO as infringing upon their sovereignty and do not see a viable means of settling the dispute, non-compliance may become an acceptable option...Indeed, if superpower nations continue to choose sanctions over compliance, the WTO serves little purpose in the arena of dispute resolution." Thus, it could be argued that the WTO consultation process acts as a deterrent effect on litigation primarily for developing countries who do not have the resources or political clout to litigate at the international level.

Good faith, sympathetic consideration, specificity to complaints, and flexibility concerning the adequacy of consultations are important themes in any meaningful consultation process. As witnessed in the previous section, none of these mechanisms have been one hundred percent successful in the WTO. However, the principles at least provide a mechanism for ensuring some process is followed with regularity within a rule-based system. The mechanism at least strives for collaboration and partnership within the world community.

These themes of collaboration and partnership have been heightened in the role of indigenous peoples in the international community through instruments of the United Nations, particularly in the International Labor Organization (ILO) and the agreements reached regarding indigenous peoples' right to environmental security at the Earth Summit in Rio de Janeiro (Rio Summit), in 1993.

C. UNITED NATIONS INSTRUMENTS AND INTERNATIONAL CONVENTIONS

147 Id.
148 Id.
The past decade has heralded a new vision of indigenous voices in international consultations and international instruments. Speaking on behalf of indigenous peoples, Mary Simon declared, "We are no longer merely objects of international law; we are subjects of international law." Indigenous peoples are now recognized as active participants in the international community, resurrecting their position of the early days of the encounter era in the Americas. Partnership, cooperation and collaboration with indigenous peoples have become important themes on the world stage.

This new positioning can be witnessed in the establishment of the United Nations Working Group on Indigenous Peoples (Working group), the development of the International Labour Organization's Indigenous and Tribal Peoples Convention Number 169, and agreements signed at the Rio Summit. All of these instruments contribute to the recognition of "indigenous peoples' collective rights to international decision making, representation in nation decision making, land and control of development." Because of these initiatives, indigenous peoples have become active participants in the shaping of United Nations policies, which in turn have influenced activities of the World Bank, the Organization of American States, and the European Community.

D. ILO AND RIO SUMMIT

---

153 Barsh, *Supra* note 152 at 43.
154 Id.
Under the ILO Convention 169, state actions involving indigenous peoples must not be "contrary to the freely expressed wishes of the peoples concerned" and any measures affecting indigenous communities must first have a good faith consultation "with the objective of achieving their agreement or consent." Any national plans involving the Convention must allow for the participation of and cooperation with indigenous peoples. Thus, the Convention provides that indigenous peoples be acknowledged as "distinct polities within states, entitled to negotiate with state authorities and sometimes to veto state plans. Indigenous peoples remain distinct as territorial and political entities over which states have only limited power."

In the Rio Summit declaration, Agenda 21 calls on states, "in full partnership with indigenous people and their communities, to establish a process to empower indigenous people through the recognition of traditional resource-management practices, the settlement of land claims, and protection from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate." The same agenda also calls for the active participation of indigenous peoples in "development planning which may affect them."

Principles from the ILO Convention have influenced the activities of the World Bank, which has been targeted as making decisions often at the expense of the indigenous community. "In 1990, the World Bank adopted a stronger policy directive, reflecting the principles of cultural integrity and indigenous self-development in ILO Convention 169. Planners of World Bank projects now must ensure that indigenous peoples suffer no adverse

155 Id.
156 Id. at 52.
157 Id.
158 Id. at 60.
effects and enjoy 'culturally compatible social and economic benefit' with 'full respect for their dignity, human rights, and cultural uniqueness'.

E. SUMMARY OF WTO AND INTERNATIONAL PROPOSALS

As subjects of international law indigenous peoples are entitled to have good faith consultations with the objective of achieving their agreement or consent. States have a responsibility to ensure a process of indigenous empowerment in any governmental decision making process. Good faith, sympathetic consideration of proposals, and a willingness to input specificity in the process are paramount to a successful negotiation. The key tool in the WTO is the absolute necessity and duty to consult when requested by a member. This is not necessarily a part of the tribal-government consultation process, but should be a mechanism enacted by congress to ensure that tribes at all times have an active voice in any governmental activities that impact them. It is apparent that the U.S. consultation process would additionally benefit in recognizing a rule-based system of consultation. Such a rule-based system should not be implemented to deprive the process of flexibility, but rather to ensure adequacy, implementation and follow through. As in the WTO, adequacy should be an element of the process, but it should be in terms of good faith and specificity to complaints rather than having an non party adjudicator measuring the adequacy of the process.

IV. PROPOSALS FOR CHANGE AND MODELS OF MEANINGFUL CONSULTATION BETWEEN TRIBES AND THE FEDERAL GOVERNMENT

As in the case of family, corporate, partnership, carrier, and all other important relations, the slender tie of the initial contract is overgrown by a network of tissue, nerves and tendons, as it were, which gives the relation its significance...
Both groups are joint adventurers, as it were, in industrial enterprise. Both have and necessarily must have a voice in the matters of common concern. Both must have protection adequate to their interests as against the world at large as well as against the undue demands of each other.\footnote{161}

On the world stage, countries are forced to deal with each other because of their interest in maintaining their economic power base. Tribes seldom have such a potent negotiating device. In the tribal-federal consultation process the issue then becomes how to create value in the process? How can the process overcome different fundamental approaches to consulting while reaching meaningful accord? Neill H. Alford, Jr. makes a distinction in approaches in his description of "apple societies and orange societies.\footnote{162} "In apple societies: law, religion, art, economics, and all other aspects of society are a part of a single whole, an integrated oneness. In orange societies: law, religion, art, and economics are each a segment; life is fragmented into separate sections or compartments. It is often difficult for these two societies to understand each other because their fundamental approaches to life are opposite ends of the scale of perception.\footnote{163}"

While Native Americans and their legal systems may be pure apple societies, Alford suggests, "there are points at which differing societal paths may lead to the same ultimate destination.\footnote{164} Thus, the League of Six Nations' metaphor of the two canoes is not a metaphor of the past. While it may be desirable for tribes and the federal government to travel in separate canoes; they may still be able to mutually reach the same destination. The key to the present consultation process is how to guarantee a mutually satisfactory destination?"
Charles Wilkinson, as a participant, describes what he terms a fine example of "how the
government to government relationship between the United States and Indian tribes can be
successfully implemented." The successful consultation he witnessed occurred during
dialogues producing the "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities,
and the Endangered Species Act." [Hereinafter ESA] Wilkinson describes the process of
consultation that occurred as a serious "bilateral relationship" between the federal and tribal
governments. According to Wilkinson, this particular consultation became effective because
both sides were willing to do their homework, put in long hours, negotiate at the highest level,
remain open and flexible to each other's values, meet at a convenient location for both sides,
jointly develop and draft the agenda. Both the tribes and the agencies involved developed
extensive protocols for conducting the negotiating sessions and adhering to the ground rules as
laid out. Of particular note was the fact that tribal representatives were able to describe the
environmental impact of the negotiated topic in their own meaningful words, using their own
metaphors. Reading Wilkinson's description at times reads like the encounter era process where
Tribes and Europeans returned again and again to the treaty making system to build trust and
respect that eventually mutualized and converged interests.

The negotiation as detailed by Wilkinson, broke the cardinal rule of negotiations as laid
out by Russel Barsh in his *Handbook on Effective Negotiation by Indigenous Peoples.* Barsh
recommends that negotiations should be performed with the lowest level of bureaucratic officials

166 Id.
167 Id.
168 Id. at 274.
since they are closer to the consultation issue than higher level bureaucrats. However, in the Wilkinson description, negotiations were conducted with lower level officials, but the success of the process hinged on the participation of higher level officials. Therefore, it is extremely important that the content of the issues involved in the consultation process be carefully assessed prior to the beginning of the negotiation. If a tribe is comfortable and familiar with local or regional agency officials and knows where their sympathies lie, then the tribe may wish to involve only these members. However, if it is a contentious issue and the tribe feels they will not be able to garner respect for their sovereign status at the local agency bureaucratic level, then they should initiate involving higher level officials in the process.

The process described by Wilkinson, and many of the elements used by Barsh in his Handbook, is similar to a model illustrated in Susskind, Levy and Thoma-Larmer's book, *Negotiating Environmental Agreements*. In the latter book, the authors describe four stages that "all multiparty, multi-issue negotiations move through which include: preparation, value creation, value distribution, and follow through." The author of this paper proposes a model, which merges aspects of these four steps, as well as, observations from the negotiations noted by Wilkinson, and recommendations from Barsh's *Handbook for Indigenous Peoples*. Additionally, the process should bare in mind the consensus building mechanisms used in the international community and the principles for building trust from the encounter era.

---

170 Id.
171 SUSSKIND, *Supra* note 55 at 40.
172 Id.
The next section highlights through a chart format, the tensions and concerns exhibited in the Tribal Federal consultation process. Both tribes and Federal agencies often have the same concerns. However, tribes have additional hurdles in the consultation process due to a long history of broken treaties and governmental attempts at assimilation and termination. Therefore, any consultation process may contain anger with regard to past inequities and suspicions of racism. Additionally, rights of indigenous peoples are not clearly defined in the United States. While, "the autonomous authority of 'Indian tribes' is recognized by congress and the courts, there are no clear boundaries between the competencies of Federal, State, and Indian institutions. To achieve clarity, Indian tribes must negotiate and agree with other levels of government. Thus, when inequities in power and legal ambiguity exist, negotiations become even more important. With the Supreme Court chipping away at the autonomy of indigenous peoples, it becomes even more crucial for tribes to negotiate rather than to seek litigation on certain issues. Greater benefits may accrue for tribes if they are able to negotiate an agenda rather than wait for that issue to be resolved in court or in Congress, which may ultimately disfavor their position.

For a process to employ meaningful consultation "and equitable participation in the sharing of development benefits [it] is contingent upon the existence of an enabling regulatory framework. Such a framework, Barsh notes depends on the "capacity of indigenous and tribal peoples to negotiate, with the State and/or the private sector, fair and adequate terms and conditions. This, in turn, depends on the existence of representative, strong and technically-equipped indigenous and tribal organizations and/or communities. The next section will look

---

172 Barsh, Supra note 169.
174 Id.
175 Id.

at conditions under which tribes and the federal government negotiate with each other. Following that section will be a series of recommendations for change.

A. TENSIONS IN THE PROCESS OF CONSULTATION BETWEEN TRIBES AND FEDERAL AGENCIES

The following chart illustrates the questions and concerns in the consultation process for tribes and federal agencies. Often, each side will be asking the same questions. Unfortunately, federal agencies will have political, economic, and environmental leverage on their side which may in turn pressure tribes "to give in" to an offered agreement by the government. It is crucial that tribal nations prepare well for the consultation process. The costly mistake in many negotiations is when "negotiators spend far too little time clarifying the details of implementation—what might go wrong and who to handle it before signing an agreement.

<table>
<thead>
<tr>
<th>TRIBES</th>
<th>FEDERAL AGENCIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who is not at the negotiating table? Are there other federal agencies involved in the final decision-making not at the table?</td>
<td>Who is at the negotiating table? Are there other tribes or tribal members who should be involved?</td>
</tr>
<tr>
<td>Do the parties we are negotiating with have the authority or flexibility to make decisions?</td>
<td>How will this consultation affect other federal agencies?</td>
</tr>
<tr>
<td>What are the ground rules?</td>
<td>Should there be a national tribal consensus on this issue?</td>
</tr>
<tr>
<td>How to ensure no conflict in the process with the federal trust responsibility?</td>
<td>How do we know Indian Country is on board?</td>
</tr>
<tr>
<td>How to debunk myths that already exists, &quot;white bureaucratic narratives&quot;?177</td>
<td>The subject matter is too complex, we are not historians, how do we do our jobs and have time for background materials when the government’s interests are at stake?</td>
</tr>
<tr>
<td>What other choices are there for tribes besides the consultation process?</td>
<td>What are the ground rules?</td>
</tr>
<tr>
<td>How to establish bilateral negotiating process?</td>
<td>Who is legitimately entitled to make decisions for the tribe?</td>
</tr>
</tbody>
</table>

176 SUSSKIND, Supra note 55 at 37.
177 HASKEW, Supra note 21 at 32.
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>How to fight bureaucratic inertia and stonewalling?</td>
<td>What should the protocols be?</td>
</tr>
<tr>
<td>How to educate negotiators?</td>
<td>We gathered comments and gave notice according to internal consultation guidelines, what more can we do?</td>
</tr>
<tr>
<td>How to create mutuality between the U.S. and sovereign tribal governments?</td>
<td>How to allow time for the process when there are so many other special interest groups involved in the matter?</td>
</tr>
<tr>
<td>Do the parties we are negotiating with have an understanding of tribal law or federal Indian law?</td>
<td>We are not historians, why should history matter?</td>
</tr>
<tr>
<td>Who's legitimately entitled to make decisions?</td>
<td>Who's legitimately entitled to make decisions?</td>
</tr>
<tr>
<td>What will be the process for communication and maintaining on going communication?</td>
<td>What will be the process for communication and maintaining on going communication?</td>
</tr>
<tr>
<td>Are all parties willing to maintain on going communications?</td>
<td>We can't meet individually with every tribe and tribal organization, so we made our best and concerted effort of consulting with and involving tribes in the development of these regulations, isn't that enough?</td>
</tr>
<tr>
<td>Is language adequate to ensure trust responsibility is adhered to?</td>
<td>How to educate tribal negotiators on federal agency policies and guidelines?</td>
</tr>
<tr>
<td>Who will make decisions for tribe or tribes involved?</td>
<td>Who will make decisions for agency or agencies involved?</td>
</tr>
<tr>
<td>What methods will be used for monitoring on-going programs?</td>
<td>What methods will be used for monitoring on-going programs?</td>
</tr>
<tr>
<td>What type of value creation do tribal members wish to seek?</td>
<td>What are the goals of the agency?</td>
</tr>
<tr>
<td>What type of preparation and research needs to be accomplished prior to negotiation?</td>
<td>What type of preparation needs to be accomplished prior to negotiation</td>
</tr>
<tr>
<td>Are there any other parties, non-Indian that the tribe can collaborate with?</td>
<td>Are there other agencies we can collaborate with?</td>
</tr>
<tr>
<td>What are the desired expectations for the outcome of the consultation? What are the bottom line limits of those expectations that tribes are willing to compromise to?</td>
<td>What established policies are involved? (Ex. Federal agency policy? Federal Indian law policies? Tribal law policies? Tribal cultural mandates or traditions?)</td>
</tr>
<tr>
<td>Are there any briefings that should be prepared prior to consultation to inform the process and federal participants regarding legal, historical or cultural matters?</td>
<td>What research and briefings need to be performed?</td>
</tr>
<tr>
<td>What are the most urgent, important needs of the other parties?</td>
<td>What are the urgent needs of this agency?</td>
</tr>
<tr>
<td>How have the other parties behaved in the</td>
<td>What have been our previous practices in this</td>
</tr>
</tbody>
</table>
B. INFUSING THE CONSULTATION SYSTEM WITH PREPARATION, VALUE CREATION, VALUE DISTRIBUTION AND FOLLOW THROUGH

It is apparent throughout this paper that the present tribal consultation process between tribes and the federal government is clearly not working. It is a system infused with imbalance, inequities, lack of enforcement and ad hoc application. Trust and mutual cooperation must be injected into the mechanism of consultation. Achieving that countervision will be an on-going process. As tribes are more vocal in the international community and achieve a recognized personality, no doubt they will achieve a greater political foothold and louder voice in the national arena. Roberto Unger, a critical legal theorist suggests a way of mapping that countervisions:

[O]bligations do arise primarily from relationships of mutual dependence that have been only incompletely shaped by government-imposed duties or explicit and perfected bargains. The situations in which either of these shaping factors operates alone to generate obligations are, on this alternative view, merely the extremes of a spectrum. Toward the center of this spectrum, deliberate agreement and state-made or state-recognized duties become less important, though they never disappear entirely. The closer a situation is to the center, the more clearly do rights acquire a two-staged definition: the initial, tentative definition of any entitlement must now be completed. Here the boundaries are drawn and redrawn in context according to judgments of both the expectations generated by interdependence and the impact that a particular exercise of a right might have upon other parties or upon the relation itself.\(^{178}\)

There must be an effort to infuse the process of consultation toward a movement to the center of the Unger spectrum. There needs to be a congressional recognition of the right of tribes to

\(^{178}\) WILLIAMS, Supra note 29 at 179.
consult in any matter for which they request a consultation. The trust doctrine which has generated an interdependent relationship between tribes and the federal government needs to be recognized as the creation of expectation rights to consulted vested in tribes. To achieve mutuality and a more centered dialogue, both parties to a consultation must adequately provide preparation, value creation, value distribution and follow through. The following discussion focuses on what tribes can do to have a strong voice in the process of consultation.

Preparation will be key for any tribe. In preparing for the consultation, Barsh recommends that tribes ask questions and organize discussions inside their communities. It will be damaging from the onset if a tribe goes to the negotiation table, but there is a split within the tribal community on the key components of that negotiation. Important questions to prepare include: What are the needs of the community? What aspects of their way of life would people like to see change? What changes do they want to avoid? Which of these needs are concerns for the community as a whole? Barsh recommends focusing "on needs that enjoy wide community support." If the community can meet and agree as a whole, there will be a greater ease in creating value in the process of consultation.

Creating value in the consultation process is an area where tribes may have to take the bull by the horns to ensure that agency bureaucrats are respecting those values. This may be an area where value creation will consist of extensive education of agency officials on federal Indian law, tribal culture, and tribal laws. This harkens back to the encounter era of treaty-making between tribes and Europeans. To create value in the process for tribes, tribes may have to find a way to include their metaphors of diplomacy in the process. As in the Wilkinson description earlier,

179 BARSH, Supra note 169.
sometimes this can be a powerful tool to catch the attention of negotiators. Additionally, prior to consultation, the tribe could request that native values and particular tribal tools of negotiating are to be included in the protocols for consultation.

In creating value distribution, Barsh suggests that tribes explore: "Which of these needs can be addressed by negotiation? [and to] Focus on those needs which the other parties could help you meet, either directly, or by helping you gain the power and resources to put pressure elsewhere." If it is an issue that both the federal government and the tribe have attached value to, then, even distribution will occur when there are mutual benefits accruing to both.

"Answering this question will depend on how well [tribes] have studied the other parties' preparation.

In creating follow through, tribes need to be aware of what is most important in the process that they desire to achieve. What is the bottom line for the tribe as to defining a meaningful consultation process? Barsh suggests that tribes at this stage, "focus on needs which are not only within the power of the other parties to address, but which are of greatest importance to the community. Since you are unlikely to be able to achieve all of your goals in a single negotiated agreement, you must have some way of setting priorities." Additionally, for follow-through to be achieved and enforced, federal agencies must agree to consult in good faith. Such an agreement should be an enactment of Congress, which gives tribes, as in the WTO, a right to take their grievance to an independent panel process if they are dissatisfied with the adequacy of the consultation.

\[180\] Id. 
\[181\] Id. 
\[182\] Id. 
\[183\] Id.
Throughout these four stages, additional questions that a tribe should explore include: "What are the risks and costs of a stalemate? What do you stand to lose if the negotiations fail to produce an agreement?" As Barsh notes, "this is essential information for your negotiators. If negotiations stall, they must have a framework for deciding whether to offer concessions as a way of breaking the stalemate. They must also have a basis for deciding how hard to press your own positions, in the face of other parties' threats to walk away." Throughout each stage, credibility on the part of tribes and federal agencies is key to the success of the process.

While tribes may lack economic and political power, the incentives that drive international negotiations, they can still succeed in achieving their goals in consultation. As with small lesser-developed countries that have successfully profited in international negotiations, the key is creativity. As Barsh suggests, "studies of international negotiations have found that the total size and power of nation-states is not what determines the results. Small countries are often able to achieve their objectives by focussing their efforts on a single issue." This is vital for tribes caught in the melting pot of consultations.

Other methods of achieving parity in the process may involve tribes forging relationships with interested parties and finding sympathy in the media. Regardless, all four tools that tribes may find valuable to use must be backed up by a governmental congressional recognition of the absolute duty to consult with tribes. In addition, that duty must go hand in hand with principles of good faith international negotiation. The process will also benefit from infusing principles of trust and mutual cooperation from the encounter treatymaking era. Both tribes and the federal
government must be willing to return to the process repeatedly to reach parity, to dissolve
distrust, and to mutualize and converge interests.

**CONCLUSION**

Any adequate consultation process between tribes and the federal government must consist
of a rule-based mechanism, which includes the absolute duty to consult with tribes for any issue
upon which they request consultation. During consultation, principles of good faith and a
specificity of facts must be adhered to by both tribes and federal agencies. Parity and a level
playing ground can only be reached if credibility, sincerity and meaning are inherent in the
process.
Memorandum on Government-to-Government Relations With Native American Tribal Governments

April 29, 1994

Memorandum for the Heads of Executive Departments and Agencies

Subject: Government-to-Government Relations with Native American Tribal Governments

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

(a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.
(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

(c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

(d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.

(e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

William J. Clinton

[Filed with the Office of the Federal Register, 3:49 p.m., May 2, 1994]

Note: This memorandum will be published in the Federal Register on May 4.
EXECUTIVE ORDER

CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian
tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable
process to ensure meaningful and timely input by tribal officials in the
development of regulatory policies that have tribal implications.
Within 30 days after the effective date of this order, the head of each
agency shall designate an official with principal responsibility for the
agency's implementation of this order. Within 60 days of the effective
date of this order, the designated official shall submit to the Office
of Management and Budget (OMB) a description of the agency's
consultation process.

(b) To the extent practicable and permitted by law, no agency shall
promulgate any regulation that has tribal implications, that imposes
substantial direct compliance costs on Indian tribal governments, and
*3 that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian
tribal government or the tribe in complying with the
regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of
developing the proposed regulation;

(B) in a separately identified portion of the preamble to the
regulation as it is to be issued in the Federal Register,
provides to the Director of OMB a tribal summary impact
statement, which consists of a description of the extent
of the agency's prior consultation with tribal officials,
a summary of the nature of their concerns and the
agency's position supporting the need to issue the
regulation, and a statement of the extent to which the
concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written
communications submitted to the agency by tribal
officials.

(c) To the extent practicable and permitted by law, no agency shall
promulgate any regulation that has tribal implications and that
preempts tribal law unless the agency, prior to the formal promulgation
of the regulation,

(1) consulted with tribal officials early in the process of
developing the proposed regulation;

(2) in a separately identified portion of the preamble to the
regulation as it is to be issued in the Federal Register,
provides to the Director of OMB a tribal summary impact
statement, which consists of a description of the extent of
the agency's prior consultation with tribal officials, a
summary of the nature of their concerns and the agency's
position supporting the need to issue the regulation, and a
statement of the extent to which the concerns of tribal
officials have been met; and
(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but
not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Search Term Begin Coordination Search Term End with Search Term Begin Indian Tribal Governments) Search Term End is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

WILLIAM J. CLINTON

THE WHITE HOUSE
November 7, 2000

THE WHITE HOUSE,
November 6, 2000.
2000 WL 165066 (White House)
END OF DOCUMENT

Copr. (C) West 2001 No Claim to Orig. U.S. Govt. Works
APPENDIX C: SAMPLING OF CRFs WHICH INCLUDE REFERENCES TO EXECUTIVE ORDER 13175 ISSUED ON NOVEMBER 6, 2000.

OVER 76 LISTINGS SINCE JANUARY 2001.

Navigation Area and Moving Safety Zones, Cuyahoga River and Cleveland Harbor, Cleveland, OH Thursday, March 22, 2001 66 FR 16020-01, 2001 WL 276446 (F.R.);
FEDERAL EMERGENCY MANAGEMENT AGENCY 44 CFR Part 295 Disaster Assistance; Cerro Grande Fire Assistance Wednesday, March 21, 2001 66 FR 15948-01, 2001 WL 272567 (F.R.);
RULES and REGULATIONS DEPARTMENT OF TRANSPORTATION Coast Guard 33 CFR Part 165 Safety Zone; Crescent Harbor, Sitka, AK Tuesday, March 20, 2001 66 FR 15624-01, 2001 WL 264547 (F.R.);
RULES and REGULATIONS DEPARTMENT OF TRANSPORTATION Coast Guard 33 CFR Part 165 Safety Zone; Crescent Harbor, Sitka, AK Tuesday, March 20, 2001 66 FR 15624-01, 2001 WL 264547 (F.R.);
RULES and REGULATIONS DEPARTMENT OF TRANSPORTATION Coast Guard 33 CFR Part 165 Safety Zone; Gulf of Alaska, Southeast of Narrow Cape, Kodiak Island, AK Monday, March 19, 2001 66 FR 15350-01, 2001 WL 260938 (F.R.);
PROPOSED RULES ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 81 Proposed Effective Date Modification for the Determination of Nonattainment as of November 15, 1996, and Reclassification of the St. Louis Ozone Nonattainment Area; States of Missouri and Illinois Monday, March 19, 2001 66 FR 15591-01, 2001 WL 260959 (F.R.);
RULES and REGULATIONS ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 81 Determination of Nonattainment as of November 15, 1996, and Reclassification of the St. Louis Ozone Nonattainment Area; States of Missouri and Illinois Monday, March 19, 2001 66 FR 15578-01, 2001 WL 260948 (F.R.);
NOTICES ENVIRONMENTAL PROTECTION AGENCY Proposed Decision Regarding the Request by Astaris Idaho LLC for Renewal of the Current Extension of the Land Disposal Restrictions (LDR) Effective Date for Hazardous Wastes Generated at the Pocatello, Idaho Facility Friday, March 16, 2001 66 FR 15243-01, 2001 WL 255520 (F.R.);
RULES and REGULATIONS ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 52 Approval and Promulgation of Implementation Plans; Texas; Electric Generating Facilities; and Major Stationary Sources of Nitrogen Oxides for the Dallas/Fort Worth Ozone Nonattainment Area Friday, March 16, 2001 66 FR 15195-01, 2001 WL 255485 (F.R.)
APPENDIX D:

Tribes have continuously lamented the lack of consultation and failure of notice in the process. Examples directly culled from editorials, testimony and newspaper accounts include the following:

Gaming: The Narragansett Tribe prevented from operating a gaming facility by the passing of a bill attached as an amendment to the Department of the Interior Omnibus spending bill. "Tribal officials said the bill bypassed the authorizing committee, the Senate Committee on Indian Affairs, had no public hearing and there was no consultation with the tribe." David Melmer, Narragansett Tribe Rallies for Justice at Inauguration, INDIAN COUNTRY TODAY, (Feb. 17, 1987).

Removal of agency officials: Jim Parris was ousted from his position as director of the Office of Trust Funds Management. He claimed he was never informed why he was being moved. Rep. Synar, D-Okla., blasted "Given Ms. Manuel's failure to comply with these simple consultation and notice requirements, it seems to me there is a very legitimate question raised as to whether (the removal) is even valid...it is uniformly seen as an effort to punish him for having pushed for reform, for having the temerity to establish good and candid working relationships with tribes and for being forthright with Congress about the conditions of the trust funds program." Bunty Anquoe, BIA Reaffirms Parris Decision, INDIAN COUNTRY TODAY, (Nov. 10, 1994).

Education and Tribal Schools: "The first paragraph of a memorandum prepared for the BIA, by the Dakota Area Consortium of Tribal Schools reads: "we have continually supported the tribal consultation process of the BIA. However, the last consultation for the streamlining of the Bureau has brought us to the realization that the process is outdated and dictatorial in as much as it does not allow for local empowerment. It goes totally against the intent of self-determination when we find that employees of the BIA refuse to listen nor consider our views in matters which greatly effect us and our prosperity." Tribal Schools Slighted by the BIA, INDIAN COUNTRY TODAY, (1995). 1995 WL 15622075.

Health care: Tribal leaders in Montana became concerned when they felt they had no input in the consultation process regarding a four-state program to deal with fetal alcohol syndrome, even though their reservations were targeted in the studies. "Fort Peck tribal executive board member Pat Iron Cloud told a gathering of the Montana-Wyoming tribal Leaders Council. Whenever the U.S. government creates something like this, we need to be involved in step one, not step ten." Ron Selden, Indian Leaders Claim Exclusion from Four State Fetal Alcohol Syndrome Program, INDIAN COUNTRY TODAY, (Oct. 24, 2000).

Grazing rights: Dissatisfaction has been exemplified over concern with the BIA's handling of proposed regulations on trust funds, leasing and grazing." Charles Tillman, Chief of the Osage Nation and co-chairman of a joint BIA/Tribal workgroup characterized his concern by stating, "we have participated and observed the tribal
consultation process as it has occurred so far and have found it to be ineffective and
deficient for the scope and complexity of the regulations." "At every stage of the
discussion between the tribes and the Department, the Department has been too focused
on its self-imposed timetables to consider the merits of our substantive proposals." He
went on to criticize, "the organizations contend the pressures of the high-profile
litigation [Cobell v. Babitt] have caused BIA staff to attempt to avoid responsibility and
diminish the government's trust responsibilities whenever possible." Brian Stockes,
 Senators, Tribal Officials Disagree with Fast Track Approach to BIA Changes, INDIAN

Inequities in balance of power relationship: In another testimony, US Representative
Dan Burton R-In Chairman commented, "I am tempted to discuss at length the multitude
of ways the Interior department violated their own procedures. There was no finding of
any detriment to the local community, which is required by the law. There was never any
meaningful consultation with the applicants to give them a chance to resolve any
problems, which is required by the law. They reopened the administrative record at the
request of the opposing tribes---the very rich tribes---and they kept it a secret from the
applicants the very poor tribes." Michael Steel, Poor Indians' Fate Ruled by Rich Tribe's
Clout, 32 THE NAT'L JOURNAL 42 (Oct 14, 2000). (Sec. Interior).

Agenda item for year 2001: " NCAI President Susan Masten outlined a set of priorities
which echoed many major issues commonly faced by tribes - preservation of tribal
sovereignty, proper federal funding of American Indian programs, recovery of tribal land
through land-to-trust, economic development, health care, Indian education, welfare
reform, state taxation, trust funds, law enforcement, transportation, government-to-
government consultation, and the Census." "For the purposes of today's hearing, we have
narrowed our focus to 14 issues, a relatively large number, but even then we will omit
many important ones," the chairwomen for the Yurok Tribe in California said. "We chose
these issues because they are the most fundamental for the purposes of protecting tribal
self-determination and serving the health and welfare of Indian people, and because they
are the issues that our member tribes most frequently bring to our attention." Brian
Stockes, Senate Committee Begins Hearings on Tribal Priorities, INDIAN COUNTRY