

CONSULTATION IN INDIAN AFFAIRS

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INTRODUCTION

Consultation between the federal government and the Indian tribes in the formulation of federal Indian policy and in the management of federal Indian programs is in the interest of tribal governments. But the control of the consultation system has historically been in the hands of the federal government, and rather than contest that control the tribes have reacted to federal initiatives. Like all governments, tribes must use their sovereignty in order to maintain it and to survive. If the consultation system is to improve, tribes will have to assume responsibility for its redesign. Tribal policy makers and not the federal government, Indian organization directors, lobbyists or tribal attorneys must define the tribe's participation in the consultation process and make it work.

Some basic propositions must be set out at the beginning of our discussion so that the problems of the present consultation system can be seen clearly:

- I. The fundamental relationship in federal Indian law and policy is between the federal government and the individual Indian tribe. Most of the business between the federal government and tribes is conducted at the local level between the individual tribe and the federal government.*
- II. Consultation between the federal government and the Indian tribes is a necessary part of national policy development and one of the cornerstones of the federal-tribal relationship.*
- III. From the federal point of view, the consultation process deals with the relationship between the federal government and nearly 600 tribal entities, not individually but as a whole.*
- IV. From the tribal point of view, any consultation other than a direct, one-on-one meeting between the federal government and the individual tribe compromises the fundamental federal-tribal relationship and, in some sense, the sovereignty of the individual tribe.*
- V. If the tribe's relationship with the federal government is to be compromised in favor of participation in a multitribal consultation process, it is the prerogative of the tribe, not the federal government, to determine whether and in what measure this compromise will take place.*

The national consultation system, no matter how well organized, manageable and efficient it might be, necessarily involves a compromise in the basic federal-tribal relationship and in some sense a compromise of tribal sovereignty because the sovereignty of the individual tribe is filtered through other tribes, intertribal organizations or other intermediaries established to speak for the tribes. For example, when the superintendent of a multi-tribal agency meets with his client tribes to talk about the Bureau budget and budget recommendations are settled by a vote of the tribes, each tribe's federal-tribal relationship is compromised by the votes of the other tribes - that is, it is filtered through the intertribal vote. A tribe on the losing end of such a vote has had the direction of its

federal-tribal relationship determined by its neighboring tribes, not by itself and the federal government.

The same holds for any regional or national meeting where a federal agency says it is "consulting the tribes". Each tribe should jealously guard its prerogatives to express its own views on important matters, while at the same time participating fully in multitribal consultation processes. Balancing these two interests is not easy; the exercise of sovereignty is not easy.

Once again let us stress: The question is not whether tribes should participate in consultation. Consultation is a necessary part of tribal existence in the modern world, and essential to tribal participation in the matters which affect tribal survival. The important question is the degree to which tribes control their participation, as they try to control any activity that compromises or tests sovereignty.

This paper is written in preparation for a conference of tribal governments and federal officials on the subject of consultation in the area of natural resources. It is hoped that it will provide a framework for tribal representatives to use to prepare for the conference, developing specific ideas about the consultation system. It is written in an informal style. The subject is too important to be hidden in the weeds and bushes of unnecessarily academic or technical language.

Tribes' duty is to their constituents. They must not shrink from assessing their situation accurately, even if they fear offending powerful interests. Tribes can recognize weaknesses in the present system and correct them without blaming anyone. This paper is not intended to criticize specific organizations or individuals, but no doubt some will take offense. Hypothetical examples should not be taken to reflect on the real organizations in the field. Most of the organizations now working to serve tribal governments provide valuable services, and are doing the best job they can. It is the structure of the system, not their individual fault, if their organizations sometimes hinder tribal participation in policy making.

This paper seeks to describe as clearly as possible the system which both the tribes and the federal government have allowed to develop over a long period of years. It is hoped that tribes will be able to gain greater control over that system.

I.

WHAT IS CONSULTATION?

I. WHAT IS CONSULTATION?

Consultation is inherent in the historic federal-tribal relationship because of the origin of the relationship in treaties and because of the federal government's recognition of the inherent sovereignty of Indian tribes. It is sometimes required by law; and on many matters it is derived inherently and even explicitly from the tribe's treaty with the federal government.

In addition, consultation is good management and good marketing for policy makers. It seems that the federal government constantly goes through phases of management improvement: Management By Objective; Total Quality Management; Reinventing Government. All of these fads have in common the notion that good management - government or private - is based on finding out what the "customer" or "client" or "constituent" wants - or will stand for. Consultation between the federal government and the Indian tribes promotes efficiency in government. An experienced policy maker in Indian affairs should have long since learned the cost of persisting with a policy strongly opposed by the tribes. But many, confident of their ability as manipulators, take a long time to learn their lesson, if indeed they ever learn.

But what is consultation? Let's start from the very beginning. According to the dictionary, "consultation" is the act of consulting or conferring; to "consult" is to ask the advice or opinion of someone.

"Consulting" the tribes, then, is getting their opinion, not their consent.

Many people have complained over the years that consultation is therefore meaningless:

If the federal government need only ask the tribes their opinion and can then go ahead and do what it wants anyway, what good is it?

Good question, but don't give up so easily.

A. Consent or Consultation: Which is "Better"?

The tribal-federal relationship was originally conducted through the medium of treaties and, later, agreements. Both treaties and agreements are based on the **consent** of both parties. From that beginning, tribes still prefer a relationship in which their sovereignty is recognized and in which they are an equal partner in decision making, and that implies tribal **consent**. But the harsh reality is that Congress now decides the role tribes will play in the policy making of Indian affairs.

Consent is an absolute form of power. One either gives or withholds consent, and the use of the word "consent" implicitly means that a particular course of action cannot proceed without it. If Congress provides that a statute will not take effect without tribal consent, the tribes have absolute power over whether the statute will be implemented at all.

On the other hand, **consultation** - as we have seen - means less. In a consultation process, one party has the power to make the final decision, and in this case it is usually the federal government - not, perhaps, as a matter of right, but as a matter of law and of power. If a statute only requires the federal government to **consult** with the tribes in the process of implementation, all the government has to do is seek tribal opinion but not be bound by it. Consultation involves negotiation, but not in the same sense that treaty making does, because treaty making requires consent. But a government must negotiate and compromise in order to achieve the support and general agreement that consultation implies.

But consent is better - more tribal power, right? In the system in which we operate, not necessarily, or not in all cases. When is **consent** not in the interest of the tribes? Why not seek to require tribal consent for everything, lock it into the law? The plain fact is that the system wouldn't work if each tribe had to consent to every federal decision that affected it -or worse, the system would just work around the tribes and we would have less power over our own lives rather than more.

The federal government and the tribes deal with each other daily on a wide variety of matters:

- the budget;
- reorganization;
- program planning and administration;
- contract management and accountability;
- development of new regulations;
- technical assistance, training and policy studies;
- litigation policy;
- the impact of national policy on Indian interests;
- and many others.

Regardless of the nature and quality of the nearly 600 individual tribal-federal relationships, the federal government must still make national policy on these and many other issues. If tribal consent were to be required before the federal government could make policy or make decisions about all these matters, what would be the result?

- Many important federal decisions concerning Indian tribes would never be made at all; the consent-obtaining process would bury them. Remember the "revised" 638 regulations.
- Many important milestones in the cycle of federal decision making would, as a practical matter, pass without meaningful tribal participation because time and resources did not allow obtaining full consent of all affected tribes. The federal government would have to choose between having no decision or making the decision without regard to tribal participation. For example, the President's Budget is submitted to Congress in January of each year. If each tribe had to consent to each change from the time the tribe first considered that year's budget, no Indian budget would ever be submitted.
- Tribes would simply be left out of major federal decision making on the national or regional level. As a practical matter, factoring an additional 600 governments **separately** into already complex decision making processes such as major environmental policy development would

complicate the process beyond control. The result would most likely be that Congress would exclude tribes from any participation.

- The "transactional costs" would be enormous. A great deal of tribal and federal resources would be wasted in a cumbersome process of negotiating every detail of federal Indian policy and administration with the tribes. These resources would otherwise go into tribal programs. The time burden on both tribal and federal officials would be incalculable. And attention would shift from substantive issues to the procedural issues concerning the consent-obtaining process.

Recent reform efforts have tried to reconfigure power in Indian affairs to allow more power to be delegated to the local level. The Joint Tribal/BIA/DOI Advisory Task Force on Reorganization of the Bureau of Indian Affairs raised a number of issues concerning delegation of power and authority from Washington and the Area Offices to the agency level. Had these recommendations been seriously considered by the federal government, a much greater degree of decision making could have been made on the individual tribal-federal level compared with the present system. This would have moved the process closer to tribal consent at the agency level and away from consultation. And the recent trend toward Self-Governance also increases tribal power in the decision process at the local level.

But neither of these reforms removes the need for national policy or for tribes to be involved in regional and national decision making. And if the only contact point between the federal government and the tribe is at the local level, tribes are without early warning or protection from threats at the national level. Some form of multi-tribal consultation is necessary to the operation of the Indian affairs system; it is also necessary to long-term tribal survival. We must recognize that in the system as we have it today, we need an intermediate step between those matters subject to tribal consent and those matters which are the exclusive domain of the federal government. All matters in between are in the area subject to consultation, and in a well-run federal government very few decisions would be made without consultation with the tribes.

PRINCIPLE #1: ALTHOUGH "CONSENT" APPEARS TO RECOGNIZE GREATER TRIBAL POWER, IT IS NOT ALWAYS BETTER FOR THE TRIBES THAN CONSULTATION. IN ORDER FOR THE 600 TRIBAL-FEDERAL RELATIONSHIPS TO OPERATE EFFECTIVELY, SOME FORM OF MULTI TRIBAL CONSULTATION SYSTEM IS NECESSARY.

The decision making system has different levels: some decisions require tribal consent; others require consultation with the tribe or tribes affected; still others are exclusively tribal decisions, or exclusively federal. Someone, then, must determine which decisions require tribal consent, which ones require consultation, and which ones are either exclusively federal or tribal. Who should make that determination? Should it be the Congress, the federal Executive, or the tribes? Who has been making that decision in the past? Have the tribes historically played enough of a role in defining their participation in policy making, reorganization, budget, program implementation and the like? Why not? If there is a lack of a tribal role, can we truthfully blame this omission completely on the federal government?

We know that ultimately Congress has the power to make the decision, and that Congress controls the purse strings. Historically tribes have waited for Congress or the federal Executive to propose an approach, and then reacted to the federal proposal. One way to increase tribal power and bring greater rationality to the present system, then, might be that:

PRINCIPLE #2: THE FEDERAL GOVERNMENT SHOULD NOT EXCLUSIVELY DETERMINE THE KINDS OF FEDERAL DECISIONS THAT REQUIRE CONSENT AND THE KINDS THAT REQUIRE CONSULTATION;

NOR SHOULD IT DEFINE THE LINE BETWEEN DECISIONS THAT ARE EXCLUSIVELY FEDERAL AND THOSE THAT ARE EXCLUSIVELY TRIBAL.

TRIBES HAVE AN EQUAL STAKE IN THE PROCESS AND THE OUTCOME AND SHOULD PLAY AN EQUAL PART IN DECIDING THE SHAPE OF THE SYSTEM.

It is true that ultimately Congress has the power to make these determinations. But for too long tribes have not tried in a fully systematic way to play a major role in defining their part in the decision making system, especially on the regional and national levels. We know, because we joke about it among ourselves, that in the past we have found it easier to stay out of the process and complain about the result rather than to pitch in and help make the hard decisions and compromises.

We often find it easier to take unworkable "purist" positions regarding tribal participation in a process rather than to propose mechanisms for tribal participation that would effectively secure tribal interests in a federal decision making process.

B. Consultation: Tribal Powerlessness?

Consultation, although short of consent, is far from meaningless. The idea of consultation implies not just asking for an opinion, but also taking that opinion into account and giving it some weight in the decision making process.

In the plain meaning of the word "consultation", if someone "consulted" someone else with no intention of paying heed to that person's views, it would be considered a duplicitous act.

Some of us, it is true, frequently accuse the government of acting in a largely duplicitous fashion. But we must also recognize that we frequently give away our power in the consultation process, and it is not always so clear that the government has ignored tribal opinion. Sometimes we have simply not expressed it clearly and consistently.

A promise of consultation creates political expectations and obligations. Although sometimes they may not act like it, governments generally do not like to be embarrassed either on the world stage or in front of their own people. If a government promises consultation and then blatantly disregards the promise (either by not consulting at all or by totally disregarding the views of those it consulted), it would expose itself to considerable embarrassment.

PRINCIPLE #3: IN THE FUTURE, THE CONSULTATION SYSTEM MUST ADDRESS EXPLICITLY:

- 1). *WHETHER AND HOW TRIBAL VIEWS WERE SOLICITED AND TAKEN INTO ACCOUNT - WHAT WEIGHT WERE THEY GIVEN IN THE FINAL DECISION?*
- 2) *THE BASIS FOR A CLAIM BY THE FEDERAL GOVERNMENT THAT IT HAS OBTAINED TRIBAL SUPPORT FOR A DECISION.*
- 3) *IF TRIBAL VIEWS WERE OBTAINED AND DISREGARDED, THE FEDERAL GOVERNMENT SHOULD BE REQUIRED TO GIVE REASONS.*

It is relatively rare that the government defies a clear, consistent and sustained expression of tribal opinion on a major policy matter. In most cases, tribal opinion is or can be made to appear to be unclear, and we lack a measuring system to determine the quality of the consultation process.

PRINCIPLE #4: THE KEY ELEMENT IN THE CONSULTATION PROCESS IS DETERMINING WHAT THE TRIBES WANT.

AS A GENERAL RULE, THE MORE TRIBAL UNANIMITY, THE GREATER TRIBAL POWER - ON THE THEORY THAT IT IS MORE DIFFICULT FOR THE FEDERAL GOVERNMENT TO FORCE A POLICY AGAINST UNITED TRIBAL OPPOSITION.

CORRESPONDINGLY, THE LESS TRIBAL UNANIMITY, THE GREATER FEDERAL POWER.

It has been said that unity is difficult for tribal governments to achieve, and many Indian people believe that charge. In fact, tribes are remarkably united on major issues (even if they have a healthy diversity on minor ones) - especially compared with other political groups in the larger society.

The consultation process has eluded tribal control because:

- the federal government has been allowed to define issues so as to minimize the possibility of tribal unity; the person who asks the question can often determine the answer, and tribes have not developed the skill of redefining questions to their advantage in the consultation process;*
- the federal government is expert at "getting a second opinion" on tribal matters; by calling and controlling meetings, it can often achieve any result it wants from a consultation process*
- at worst, it can be made to appear that the tribes don't agree;*
- the federal government has shown a capacity to outwait the tribes; tribes are not organized to maintain a sustained effort unless the issue is of great significance. On lesser matters, the federal government simply has more staying power and has the advantage of taking the initiative.*

C. Summary and Conclusion

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ACTION:

1. In preparation for the conference, tribes should list:
 - the decisions as to which they feel tribal consent should be required;

- decisions as to which tribal consultation should be required;
- decisions which may properly be exclusively federal;
- decisions which must be exclusively tribal.

This list should be maintained and regularly updated by each tribe as a framework for its future consultation policy and its ground rules for participation in future consultation processes.

2. Tribes should insist that federal agencies report specifically the nature and results of anything the agencies regard as a consultation process. Where the agency claims that a decision is based on tribal views, it should explain the basis for that claim. Where clear tribal opinion has been ignored, the agency should be required to give reasons. Tribes should not give up when agencies stall or ignore these requirements.

3. The federal officials attending the conference cannot amend the law on the spot or even issue Federal Register announcements, but they can and should be asked to commit to consultation ground rules as suggested in "2." (above), within the power of each to comply. Each should also be asked to make the best effort to secure a similar commitment from his or her superiors in the government. They should be asked the specific steps they intend to take to implement their commitment, and asked to report to the tribes in attendance the steps as they are taken. They should be made aware that tribes expect to participate in the development of new and improved federal consultation methodologies.

4. Tribes should prepare for the conference by thinking about the issue of tribal unanimity. How can tribes prepare on their own for consultation with the federal government, so that divisive issues have already been discussed and common ground has been articulated?

Tribes will always disagree on some matters, just as other groups do. The issue is not tribal disagreement; the issue is whether tribal disagreements are addressed in a tribally-controlled forum where compromises can be worked out or in a federally-controlled forum where the federal government can claim that since "the tribes cannot agree", the federal government might as well go ahead and make its own decision.

II.

FRAGMENTATION

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We have seen now that framing the issues to maximize tribal unanimity is the most difficult problem in the consultation process. Only the tribes can improve their management of that problem.

The fundamental **structural** problem with the present system of consultation between the federal government and the Indian tribes is the problem of fragmentation - ironically, an outgrowth of tribal success and progress. There are two kinds of fragmentation that complicate today's consultation process: the fragmentation of federal Indian policy and programs; and the fragmentation of power within the Indian community nationally and regionally. We will not deal here with fragmentation of the individual tribal community, since that is a feature of all communities, and since it is easily managed by forcing the federal government to adhere to the basic principle of dealing with the elected or otherwise legitimate government of the tribe, internal politics notwithstanding. But the fragmentation that is discussed in this section results in the tribes ceding vast powers to the federal government to determine what the tribes want and what they will stand for. As people renowned throughout history for tactical genius on the battlefield, we have somehow left that tactical sense behind us in the bureaucratic and political wars which affect and perhaps determine our survival.

Historically, the federal government could meet with a tribe or a group of tribes and conduct business, each returning to its own world and its own affairs at the conclusion of the meeting. Not so long ago, tribes could conduct virtually all of their business with the federal government merely by meeting with BIA and IHS officials. In the modern era, things are not so simple. Tribal relations with the federal government are vastly more complex than in the early days. Indian tribes now have extensive dealings with perhaps a dozen federal agencies, and overall probably deal with 40 or 50 different federal agencies in some measure.

Each of these agencies seeks to consult with the tribes at one time or another, and often they aspire to meet with tribal chairmen or chairwomen and to have their issues placed high on the tribal agenda.

As a result, tribal leaders' attendance at meetings and conferences is constantly sought and highly prized. If they attended every meeting called by federal agencies, they would have little time to govern their reservations. Yet if they don't, they justifiably fear that decisions will be made in their absence at these "consultation" meetings and that the results of these meetings will be characterized as adequate consultation, as the views of the tribes whether they attended the meeting or not.

One solution to this problem would be for the federal government to rationalize its Indian programs and coordinate its consultation system to avoid duplication. But that is not going to happen. The federal government historically has shown little capacity for coordination or self-discipline, and it is apparent that the interagency coordinating group recently established by the Secretary of the Interior and the White House will produce little of importance.

At the same time as the multiplicity of federal agencies is competing for the attention of tribal chairmen, two other processes are going on. The last 30 years have seen the explosive growth of tribal executive branches, with tribal government programs and departments mirroring the pattern of their federal funding. Each federal funding agency has a ready-made constituency in tribal

government of the program administrators it funds. One obvious consequence of this trend is that federal agencies tend to deal on a day to day basis with the programs they fund and not necessarily with the elected tribal officials who make policy for those programs. Many federal agencies have developed their own constituencies on the reservation, who respond to their funding and management priorities and who in some sense are more responsive to the federal funding agency than to the governing tribal councils. For many years, tribes have accepted this fragmentation as the price of obtaining money for housing, health, education, economic development and other important matters. But as the years go on and federal agencies learn the value of franchising their own bureaucracies regardless of their fragmenting impact on the local Indian community, tribes have begun to work toward regaining control of their own governments. The federal funding agencies have also developed the skill of playing against each other the elected officials and the staff of the programs they fund, often using one to pull an end run on the other depending on the needs of the federal agency.

At both the tribal level and the federal level, then, "consultation" is not clearly defined and communication sometimes takes place between bureaucrats from both governments, and at other times between federal bureaucrats and tribal elected officials. In addition, these federal funding agencies sometimes fund national organizations, regional intertribal organizations and other organizations to provide technical assistance and training or to provide services to constituent tribal governments. Many of these organizations have a tribal membership base, and because of this the interaction between them and their funding agencies is often treated as "consultation".

These trends can develop for good reasons and not so good reasons. One Bureau official (who was, in fact a tribal official on loan to the Bureau on an Intergovernmental Personnel Act assignment) tried to abolish a program that funded tribes directly so that he could fund several national professional organizations in his area of responsibility. He explained that he was "buying a constituency" and remarked that the organizations were better able to help and protect him than the tribal programs and that the tribes would never "get their act together enough to do anything about it".

On another occasion, representatives of the Interior Inspector General's office were conducting a program review to answer congressional inquiries. Their preliminary conclusion was, they stated, that the best way to fund juvenile treatment centers was on a regional basis, because for the most part a single tribe did not have enough need for its own treatment center. It was explained to them that if tribes could define programs more broadly and receive funding from multiple sources, each tribe could in fact support multi-service reservation-based programs. It is only when programs are narrowly defined from the Washington point of view that it appears that an intertribal approach is the only viable means of funding.

What does this have to do with consultation? Each federal agency, approaching the tribes on its own, finds that the task of dealing with nearly 600 tribal entities - either for funding or for consultation - is simply too complicated, time-consuming and expensive. But they come to these conclusions because tribes have been unable to demonstrate to them how funding and consultation can be done in a reasonably efficient and effective way. BIA and IHS are virtually unique among federal agencies in that their missions are largely defined in terms of their constituency - Indian tribes and individuals - rather than by subject matter. In many instances, BIA and IHS deal with tribes on

the most basic and general levels, as broad-based as their overall relationship. Other federal agencies, on the other hand, typically administer a number of separate, narrowly-defined programs.

While each constituent agency may try to have an Indian program, the agency does not have the budget to fund or provide direct services to every tribe. So the agency may try to compromise by funding a national or regional organization to provide services to the tribes, and still claim to have an Indian program. From the tribal point of view, however, the agency has simply passed its responsibility to a multi-tribal organization which cannot possibly deliver actual services to tribes in any measurable amount. As a result, the funded organization tends to host meetings at which it talks about the subject matter and tries to serve the funding agency by "delivering" tribes for meetings.

The inability of federal agencies to meet with every tribe, and of most federal agencies to fund or provide services to every tribe, gives rise to the role of brokers - those who purport to fill the gap between the tribe and the federal government. Most of us have observed in Washington at one time or another that the ideal - from the government point of view - would be to have one Indian or one Indian organization who could tell them what "Indian country" thinks. To have such a spokesman would fulfill a federal dream - and most important would relieve the federal government of having to make a decision about what the tribes think in the midst of what must seem to be a multiplicity of voices. Over the years, various individuals have been willing to offer themselves as either the voice of Indian country or as someone having the inside track - the "scout" who can lead the Senator or agency head to the real Indians. These brokers have a strong vested interest in maintaining their control of information and access so that they are continually needed by the government to help cut short the communication with Indian tribes, and so that they can continue to present themselves to the tribes as the inside track to federal officials.

To a large degree, the tribes themselves are responsible for the perpetuation of this phenomenon. By not bringing it definitively to a halt or controlling it by clear communication to the federal agencies, they create the impression that within limits it is a tolerable substitute for a genuine consultation system. But when an individual or an intertribal organization is allowed to stand between tribal governments and the federal government with little accountability to either, it becomes an entity unto itself. The staff and the board become power centers in themselves and, as the gatekeepers between the tribes and the federal government they often jealously guard their access to both. They often find themselves competing for funds with their own constituent tribes and are, perhaps without realizing it, in a conflict of interest.

Does this describe all intertribal regional and national organizations? Of course not. In fact, some of the more effective tribal-advocate intertribal organizations are accused by federal agencies of not having a tribal constituency or of not representing their tribal constituency, as a means of discrediting them and weakening their advocacy. How does one tell the difference between the broker-organizations and individuals and the genuine advocates and servants of the tribes? The best source - obviously - should be the tribes themselves. Yet too often tribes allow brokers to remain in business because they believe the brokers' sales pitch - that they have influence with the federal funding agencies. But the brokers' influence with federal agencies depends solely on their presumed access to the tribes, and their influence with the tribes depends correspondingly on their presumed influence with federal agencies. Surely the tribes can see the importance of controlling this "market" of influence.

What is needed is for the tribes to demand greater accountability from intertribal organizations and for tribes to make clear to federal agencies the proper role and the limitations of not only intertribal organizations but also attorneys, lobbyists and other advocacy organizations.

The present situation is so complex and the demands on tribal elected officials are so great that it is probably not possible nor is it necessary for only elected officials to represent tribes at all consultation meetings. In addition, over the years unelected Indian people have developed great expertise in many important matters and should be able to contribute to the process as long as it clear that they are contributing expertise and experience, not speaking for the tribes. The key is not who speaks. The key is whether those who speak keep themselves within the boundaries of their expertise and refuse to make the political judgements that only elected officials can make, and whether those who speak are ultimately accountable to the tribes.

It would be foolish and unrealistic to think that the solution to this problem of fragmentation is "tribal unity" - for the tribes to "Speak with One Voice". That is movie Indian stuff. We are a very diverse group with interests that sometimes compete with one another. It is more realistic to aim at better management of the problem. To achieve better management, tribes can make their definition of consultation more explicit; they can define who speaks for them and in what context; they can demand accountability from federal agencies and from various Indian advocates (and brokers), including intertribal organizations, lobbyists and lawyers. And finally and perhaps most important, tribes can draw on their institutional experience and anticipate - stay two or three steps ahead of - the federal government. Of all things, this is not hard to do; experienced people in this business can see Bruce Babbitt coming about two miles away.

III.

METHODOLOGY

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Now we get to the hard part. The part called methodology. The methodological questions are:

- *who defines "consultation" and decides when it is necessary;*
- *who controls the consultation process;*
- *what constitutes "tribal opinion";*
- *who speaks for the tribes?*

A. What and When?

It would be interesting to study the use of the term "consultation" in Indian affairs in the last 30 years. It may be that it is applied by the tribes largely to those situations where the tribes feel that a federal initiative or decision is not in their best interest, and a claim of a lack of consultation may be a tactical method of reopening the question. When a federal agency appears to be on a string of making the "right" decisions (from the tribes' point of view), the notion of consultation is not often mentioned. From the federal point of view, a formal consultation process may most often be used in response to tribal opposition to a proposed policy, program or decision, or in anticipation of tribal opposition.

In any event, it does seem to be the case that, the more reliable the sources of information about tribal opinion available to the federal government, the less a formal consultation process is deemed necessary. It also may be that the federal government, over the years, has developed a variety of means of ascertaining tribal opinion or securing tribal input, and that these means constitute tribal consultation in a broader sense than a formal series of meetings between the federal agency and tribal representatives.

B. The Process

The present system concentrates power in the federal government because the tribes are apparently willing to -

Let the government control the process: decide when to consult; what to consult about; and control the results - that is, to say what was decided.

What is the consultation process that we are familiar with now? Typically, a federal agency calls a meeting or series of meetings, conferences or hearings with tribal representatives in Washington or in the field at which tribal opinion is solicited and expressed regarding a specific matter of mutual concern. The subject matter may be broad or narrow, but it is generally on a specific topic. Rarely does the government meet with the tribes just to chat about things in general.

When the consultation meeting or meetings take place, typically the federal agency already knows what it wants to achieve, convenes the meeting, sets the agenda, establishes the groundrules, and often even selects the speakers or "influences" their selection. Most important, the federal officials take the proceedings of the meeting back to their offices and decide what tribal opinion is, based on the transcript or on their notes. We all know from experience that unfortunately many of the presentations at such meetings are not effective, are irrelevant or too localized to be representative of tribal opinion regionally or nationally on the subject of the meeting. Nevertheless, under the present system the government has a wealth of "tribal opinion" on which to base its final decision on matters under consideration.

Suppose the meeting includes a vote of the tribes present? Does that improve the situation? It does, but only marginally. Very often the questions on which the tribes vote are stated so broadly as to give the government the maximum room to maneuver. Resolutions are usually made up on the spot with little serious thought to their long-term implications. And the history of BIA-tribal relations is rich with the folklore of legendary area directors and superintendents with the ability to guide an intertribal meeting to an intended result. Although tribal power and sophistication has greatly increased since the salad days of these great manipulators, on-the-spot decisionmaking still does not favor tribal interests, especially when the federal government has had ample time to decide what it wants to achieve - or avoid - at a consultation meeting. Often the federal representatives allow themselves to "forget" that even tribal chairmen may not be able to commit their tribes to a position on the spot.

One of the most important aspects of government control of the present system is that, controlling the data, the government is always in a position to assert that tribal opinion is divided or unclear, or that "the tribes" supported a particular position based on the comments of a few speakers. For example, the recent Listening Conference - entered into with the utmost sincerity by the Attorney General - gathered an enormous amount of "raw data" from individual speakers. No report was ever made, no transcripts published, and the Interior and Justice Departments have been free ever since to develop a host of new policies and programs, relying on the vast source of "tribal input" from the Listening Conference. It may be that the initiatives stemming from the Listening Conference are all good projects supported by the tribes. It is quite another thing for the conference transcript to be interpreted within the federal government as the Voice of the Tribes.

Similarly, the Interior Department has never taken the Report of the Reorganization Task Force seriously despite the long process and huge sums of money that went into it. Indeed, there is some question whether it has ever been read by the top officials of the Department. Yet whenever another reorganization plan is announced - with no tribal consultation - reference is characteristically made to the Task Force Report despite the fact that the reorganization proposal often is directly contrary to the Task Force recommendations.

The key, perhaps, is whether control of information is left in the hands of the government or the tribes. If the government controls the process, it can then decide whether tribal opinion is divided or united, and decide when one speaker will be seen as speaking for all the tribes. When the tribes control the process, they can withdraw from a consultation process to resolve tribal differences, or redefine a problem so as to remove tribal differences from the possibility of government exploitation.

And finally, attention must be drawn to the aftermath of a consultation meeting. Whether the meeting could be fairly interpreted as indicating tribal support or opposition to a government initiative, the government agency will then characteristically return to the office either to develop Plan B (if the tribes opposed) or to continue implementation (if the tribes seemed to support). But the greater tribal interest may be in the details of implementation, or the details of Plan B. In other words, episodic consultation is often a very inefficient process. It may be improved if a technique could be developed to include tribal participation in the development or redrafting process, to avoid more unnecessary problems at the next consultation point. If it is to be improved, the federal government must be required to report to the tribes on the subsequent decision process.

Tribes must remember that consultation meetings are only **events** in the consultation **process**. If they participate in the meetings but not in the entire process of interpreting the significance of the meetings in the context of the total process, they cede their power to the federal government. Tribes must have their own process at the local, regional and national level that anticipates the federal process and stays one step ahead throughout. After all, tribes have the institutional memory that the federal government seems to lack; we simply fail to use it effectively.

IV.

SOVEREIGNTY AND PREROGATIVES

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A. Sovereignty

"Sovereignty" means the power to govern. Over the years, the term "tribal sovereignty" has become such a central concept in Indian affairs that it has sometimes become static and hampered tribal decisionmaking. Sometimes scholars and advocates have done the tribes a disservice by arguing that anything less than absolute power is a defeat. But no government has absolute power. Governments have more or less power in different circumstances and relationships. In order to survive, tribes must learn to use the power at their disposal with increasing effectiveness, rather than merely to complain about how far it falls short of the absolute.

The important issues are not that tribal power is not absolute; the surrounding issues are important:

- *who limits tribal power?*
- *how it is limited?*
- *why is it limited?*

One aspect of sovereignty is the power of a government to manage its relationship with other governments. When a tribe participates in a regional or national organization or attends a regional or national consultation meeting where decisions are to be made, it necessarily subjects its own tribal position to a vote in which other tribes participate. The individual tribe's position is filtered through the voting process, and its relationship with the federal government is compromised to that extent.

But participation in such processes is not necessarily a bad thing for tribes. In the first place, the notion of sovereignty must include the power to decide how to use one's sovereignty - one's powers of self-government. The United States and many other nations participate in the United Nations, for example, in which the vote of any one nation must be counted against the votes of all the other nations. Some people in the United States feel strongly that U.S. participation in the United Nations is an unacceptable compromise of U.S. sovereignty. And others - apparently the majority - feel that larger U.S. national interests are served by participation in the U. N. But the decision whether to join and participate is the undoubted decision of a sovereign.

By the same token, a tribe may decide that participation in a multi-tribal decision process is in its interest, and it may therefore be willing to "compromise" its sovereignty to that extent. Indeed, when one looks at the price an individual tribe would pay if it insisted (unrealistically) that it be consulted individually by the federal government on all decisions, one can see that compromise must be in the tribe's interest. Sovereignty must be exercised in the real world, and in the real world the tribe, just like the United States, exists in a complex network of governments competing in a system that allocates power and resources. The closest thing to "absolute power" any government could have would be completely internal, but the greatest threat to tribal sovereignty in the modern era is the attempt to limit tribal powers to just that - internal power over tribal members and tribal lands. Many of the most important decisions for all governments in the world are made in reference to the system external to each government, and participation in those decision processes necessarily involves both

sovereignty and compromise.

B. Prerogatives

By not carefully defining the prerogatives involved in consultation, tribes have mistakenly assigned responsibility to the federal government to design, implement and enforce the consultation system, with the result that the system, if it works at all, favors federal government interests. But it would be difficult to see any contrary result with the tribes not fighting for their interests and trying to balance the natural and predictable federal self-interest. The only way for the system to accord the proper weight to tribal interests is for the tribes to take the initiative in redesigning it.

At the same time, the system will work the best when it shows respect not only for tribal prerogatives but for federal prerogatives as well. The federal government is the trustee for Indian land and other property, and it has assumed a larger political relationship to protect the tribes and assist them in adapting to the pressures of the modern world. In that respect, the federal government certainly must consult with tribes individually and collectively on trust matters. And good government management dictates that tribes should be consulted on a wide variety of other matters, if only as a courtesy. But there are certain other decisions which must be made by the federal government alone in the exercise of its discretion as a government, just as certain decisions are exclusively the prerogative of the tribes.

For example, a persistent misconception holds that a tribal relationship with a particular federal office or official to which the tribe objects somehow dilutes the "government to government" relationship. This is erroneous. The federal government is the federal government, whether it is in the person of a low level field employee or a cabinet officer. The federal government is no less the federal government in a regional office than in Washington. As tribes guard their prerogative to determine for themselves how they will arrange their side of the political relationship with the federal government, they must no less recognize the prerogative of the federal government to decide who speaks for the federal government in any particular situation.

This is not to say that tribes may not have a just complaint regarding a particular situation, but that complaint is more likely based on protocol, courtesy or efficiency - all legitimate tribal interests. Tribal opposition to a government decision in this area is much more effective if it is properly addressed and not characterized as directed at the "government to government" aspect of the issue.

And finally, the federal government must be instructed that tribes have the prerogative to send anyone to a meeting. Federal officials sometimes refuse to meet with appointed tribal officials on the ground that they do not "represent" the tribe. It is, of course, the prerogative of the tribe to instruct its employees as to the limits of their authority and to send them to a meeting within the area of their expertise and responsibility, and the federal government should be instructed to accede to tribal wishes in this regard.

V.

SUMMARY AND RECOMMENDATIONS

V. SUMMARY AND RECOMMENDATIONS

This paper has argued that only the tribes can fix the consultation system. For too long, tribes have seen consultation as the responsibility of the federal government, and have complained about its shortcomings. But if the tribes take the initiative and remain united, it is difficult to see how the federal government can resist any reasonable plan.

Herewith are presented some ideas for tribal consideration for methods of bringing some organization to the present consultation system.

1. Tribes should define areas where consultation is expected and insist on consultation.
2. Tribes should not be afraid to say no to the federal government, including the Congress. Saying no does not need to be insulting, but it can be firm and unequivocal.
3. Tribes must increase their attention span on consultation issues, rather than allowing themselves to be out waited by the federal government. By attending meetings at the government's invitation and ignoring the aftermath, tribes cede their sovereignty to the federal government - then complain about the result.
4. Tribes should anticipate federal actions and be ready for them, rather than waiting for the federal government to take the initiative on consultation. In most cases it is clear when consultation is called for, and tribes could control the process by taking the initiative.
5. Tribes should insist - both as to individual tribal matters and regional and national matters - on being informed as to what the federal government considers tribal views to be and what weight is being given to tribal views. When tribal views are ignored, tribes should insist on being given the reasons. If tribes do not accept the reasons as valid, they should not be afraid to insist on reopening the question.
6. Tribes are often organized regionally or on a statewide basis. Where they are already organized regionally, they should focus their activity on coordinating consultation, so that they are not constantly attending meetings called by federal agencies and their grantees. They should establish their own schedules for meeting with federal agencies, having them in the form of hearings if necessary. They could take the initiative on consultation by offering to hear federal agencies at their regular regional meetings - and by refusing to attend any other meetings called by federal agencies.
7. Tribes should guard against regional or national intertribal organizations usurping their power, competing with them for funds or acting as the gatekeepers with the federal government. To do this, tribes must insist on strict accountability of these organizations to their tribal constituents and define the roles of these organizations precisely.
8. Tribes should see the consultation system as coming from the local level up rather than from the

top down.

9. Tribes must present a united front, which is more likely if they have been able to discuss issues in a tribally-controlled forum rather than in the presence of federal officials who can be expected to exploit evident tribal divisions. Tribes must also devise a system of enforcing solidarity by repudiating tribes, organizations and individuals who break ranks and cooperate with divisive federal consultation procedures or initiatives.

10. Tribes should insist on advance notification of matters to be discussed at meetings called by the federal government, prepare themselves on those topics, and then refuse to depart from that agenda.

11. Tribes should notify all federal agencies of a tribal definition of consultation, and advise them that any substitute will not be acceptable as "consultation".

12. Tribes should define limits of authority of organizations and individuals and work out a system of accountability.

13. Tribes should, if necessary, seek an Indian amendment to the Federal Advisory Committee Act to accommodate a wide variety of tribal consultation for all federal agencies.

14. Tribes should work together to help federal agencies fulfill the President's commitment made at the White House meeting in April, 1994.