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INDIAN TRIBAL GOOD GOVERNANCE PRACTICES AS THEY RELATE TO ECONOMIC DEVELOPMENT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

TO PROVIDE INFORMATION ON INDIAN TRIBAL GOOD GOVERNANCE PRACTICES AS THEY RELATE TO ECONOMIC DEVELOPMENT

JULY 18, 2001
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INDIAN TRIBAL GOOD GOVERNANCE PRACTICES AS THEY RELATE TO ECONOMIC DEVELOPMENT

WEDNESDAY, JULY 18, 2001

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell (vice chairman of the committee) presiding.

Present: Senators Inouye, Cantwell, and Campbell.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator CAMPBELL. The hearing will come to order. We are meeting today to discuss Indian tribal good governance practices as they relate to economic development.

The economic and social statistics on the Indian communities are well known. Unemployment is around 50 percent; social problems like alcohol and drug abuse, poor educational opportunities, ill health and many other things.

To reverse these trends, I believe there is no more pressing matter than assisting the tribes in building Indian economies that are strong and sustainable into the future. Achieving this involves many different factors like physical infrastructure, human capital and skill development, financial resources and a host of other things.

In addition to these building blocks, it is increasingly apparent that the kind of governing environment that a tribe has in place will determine whether or not businesses will prosper and jobs and income will flow.

The problems with undeveloped tribal economies do not all originate in Washington, DC. I believe that tribal leadership has a difficult, but critical role in making sure their tribe is doing all it can do to create business friendly environments. Some tribal leaders have done so and we will hear from several of them today on what good governance means. By "good governance" I mean stable institutions with administrative capacity, fair and effective dispute resolutions with an appeals process, a separation of politics from business management and transparency in government, to name a few.

Today we will hear from tribal leaders, researchers and others about what good governance means and how it affects the ability of tribes to attract and retain economic activity and the benefits that 9come from that activity.

We will go ahead and proceed since we have a little bit of limited time this morning. We will proceed with Neal McCaleb, Assistant Secretary for Indian Affairs. Neal, I believe this is the first time you testified before the committee since being confirmed by the Senate. We are very happy to have you with us.

By the way, to all the people who are testifying, your complete written testimony will be included in the record. If you would like to abbreviate or change your oral testimony, that is fine.

STATEMENT OF NEAL A. MCCALEB, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. MCCALEB. Thank you very much, Mr. Chairman. It is a delight to be here this morning, especially on this subject.

I want to thank you for the opportunity to appear today to speak about tribal government practices and how those influence economic development in Indian country. The development of a stable and responsive tribal government with a sound strategy for and a deep commitment to economic growth is a prerequisite for prosperity and economic opportunity in Indian country.

There are many contributing elements to economic success, including access to markets, access to capital, natural resources, human resources, governing institutions, and tribal culture.

But there has been tribal success where there was a lack of natural resources, minimally skilled human resources and even poor access to markets. These successes have been in spite of these economic liabilities and have been accomplished by determined tribal leadership committed to building stable and effective sovereign governmental institutions.

The policies contained in the Self-Determination and the Self-Governance Acts have been the seedbed of growth for de facto sovereignty and the development of strong and effective tribal governments are essential for sustainable economies.

Even now, tribes are asserting their self-governance influence through the Economic Development Subcommittee of the Joint BIA Tribal Budget Advisory Committee by developing strategies on how the BIA and other Federal agencies can be more effective in encouraging prosperity and economic parity for American Indian tribes within these United States.

Conversely, it requires a viable and vigorous economy to provide sovereign governments with a tax base from which to fund essential infrastructure and services required by their constituents and businesses.

With that in mind, I would like to briefly talk about some of the successful enterprises that exist in Indian country and their vision in making things happen. I am not going to go into great detail about each one of these, but I will just mention them.

One of the more notable is the Mississippi band of Choctaw Indians. The Mississippi Choctaws were federally recognized in 1945. By 1960, the tribal leaders were still unimpressed with the im-

provement, despite over 15 years of effort by the BIA and other Federal agencies to assist them.

The Mississippi Choctaws remained the poorest tribe in the poorest county in the poorest State. The tribal leaders took responsibility and initiated projects designed to create jobs for the Mississippi Choctaw members.

The first enterprise was a tribal undertaking called the Choctaw Development Company, a construction company to build houses under Low-Income Housing Programs for a small profit, while also training and employing tribal members.

From this modest beginning, the tribe began tackling other ventures and in some cases seeking and obtaining Federal assistance through the Indian Finance Act. The Mississippi Choctaws are now a major economic engine in northeastern rural Mississippi, providing a total direct and indirect impact of over 12,112 jobs and $173 million in wages, $16.7 million a year in taxes and $9.1 million a year in rent payments.

Currently, the tribe is engaged in the development of its own natural gas-fired electrical generating plant. Williams Energy is conducting a feasibility study. Based on the result, they anticipate construction to begin shortly after the first of the year.

Another success story is told by the Confederated Tribes of the Umatilla Indian Reservation located in rural northeast Oregon. Their original economy was based upon agricultural and natural resources, primarily fishing, grain, and timber.

Today the tribe has diversified into commercial developments such as a trailer court, a grain elevator, the Wildhorse Casino, a hotel, a RV park, a golf course, and a solid waste transfer station.

The tribe is now the second largest employer in Umatilla County, following only the State of Oregon. Their operating budget has increased from $7.6 million to $94.2 million in the last 9 years.

The Southern Ute Tribe, which you are very familiar with, Mr. Chairman, which is located, for those who don't know, in rural southwestern Colorado and northern New Mexico, provides another model of economic success. The tribe has taken control of its own oil and gas extraction activity.

In 1992, the tribe established a tribal production company called Red Willow Cooperative. In 1994, it acquired a majority interest in the gathering pipeline system called Red Cedar. In addition, the tribe has expanded by investing in other oil and gas properties in the West and investing its energy fuels revenues into other commercial enterprises.

Using the knowledge gained from managing and operating its own reservation companies, the tribe has acquired additional production properties in Texas that produce 20 million cubic feet of gas a day.

It has invested in an offshore well in the Gulf of Mexico and has entered into a partnership with northern Ute and the Dominion Oil Company to explore and develop their oil and gas reserves.

The tribe is evaluating the purchase of shopping malls and a drug store chain in Texas and Arizona. The tribe has not released its financial information, but it is reported that the income of the tribe is in excess of one-quarter of a billion dollars, that is with a "b," billion dollars a year.

The Wall Street rating houses that rate debt, Standard & Poor and Fitch, have given the Southern Ute Tribe a triple A rating for their proposed development bonds.

I submit that is an historic first for Indian enterprises. I also submit that the successes that I have just gone over as well as many others are not primarily the result of initiatives of the Federal Government, or the BIA.

They are the result of initiatives and leadership by the tribal governments themselves and the determination that they have had.

The role of the Federal Government should be to remove obstacles to economic development, especially those that we have created ourselves through our own rules and actions. We need to create incentives and provide technical and financial, and other assistance to tribes and tribal members and public and private investment businesses that are willing to promote economic activities in Indian country.

The initial priority for the Federal Government is to come together with the tribes to develop a straightforward approach on how we can all work together on the integration of program services and coordinate activities in the pursuit of economic parity for Indian country.

Congress has provided us the mandate and the authority under the Indian Employment, Training and Related Services Demonstration Act of 1992, the Native American Business Development, Trade Promotion, and Tourism Act of 2000, and the Indian Tribal Regulatory Reform and Business Development Act of 2000, from the 106th Congress.

The goal of the subcommittee that I mentioned earlier, which is working in conjunction with the BIA and the Tribal Budget Advisory Committee is to develop a strategy to coordinate and integrate all available resources from the tribal, Federal, private and public sectors into one comprehensive approach that will provide a business resource for enterprises and tribal government services and ultimately provide a living wage and employment in Indian country.

The subcommittee has identified 10 major tasks to be accomplished. Each of these tasks is to be examined by the subcommittee from past studies and recommendations. They are currently working models, available resources, legislative and regulatory authorities, budget and resource coordination and integration.

These subcommittees are named for the general subject matter and are as follows: Tribal Business Development Corporations and Tribal Venture Capital Funds; Taxation and Incentives; Tribal Economic Development Models; the Indian Finance Act; Tribal Courts; Federal Set-Aside Procurement; Technical Assistance Centers; Natural Resources and Energy Development; and Tribal Infrastructure and Employment Development.

The first of these working meetings of the subgroup was held this week. The first action was to contact representatives from all Federal programs, including HUD, SBA, ANA, Census, EPA, Energy, and others that provide economic development assistance to tribes and invite them to participate in this effort. The meeting was extremely well attended by all the Federal agencies.

The subcommittee is planning on providing its initial findings and recommendations to the full committee and the participating tribes in October.

The BIA's Office of Economic Development is committed to economic enterprise that enhances the lives of Indians and stabilizes the future of Indian tribes. In the more successful tribes in Indian business enterprises around the country, the BIA has observed some common elements.

The BIA has also noticed some themes where Indian economic development is lacking or has failed, and with study and consolidation with tribal leaders, we believe that a few initiatives would significantly improve the current disparity between the few American Indian tribes that have had success and the many that have not.

Ultimately, the relative economic success and vitality of any nation is the public-private effort that combines the resolve of government policymakers and the imagination and appetite for risk of independent entrepreneurs to create a healthy environment for enterprise and respect for each other's unique point of view.

The Government will always be focused on the "common good," while the entrepreneur has to be driven by an anticipation of profits as a reward for his risk.

Thank you again for the privilege and the opportunity to speak on this subject that is near and dear to my heart. I will be happy to answer any questions that you may have.

[Prepared statement of Mr. McCaleb appears in appendix.]

Senator CAMPBELL. Thank you, Neal.

I have a couple of questions. Before I go to them, I would like to yield to the chairman if he has some comments.

The CHAIRMAN. Mr. Chairman, I have a statement. If I may, I would like to submit it for the record.

Senator CAMPBELL. Without objection.

[Prepared statement of Chairman Inouye appears in appendix.]

Senator CAMPBELL. Neal, you mentioned the Southern Utes. Since I live there, I saw you on the plane the other day, in fact, coming from the Southern Utes to your new job in Washington, that Standard & Poor rating, the three-star rating, I understand the Southern Ute Tribe is the only tribe in the Nation that has that rating. Is that correct?

Mr. MCCALEB. That is my understanding, both Standard & Poor and Fitch.

Senator CAMPBELL. They have also become, through their success in energy and a number of other things, the largest employer in the Four Corners area of Colorado, larger than the school districts, the hospitals, literally any business.

But the interesting thing to me is that probably half, of the employees of their enterprises since they have grown and developed, are non-Indian. So, the success of that tribe, like many other tribes, is a shared success.

When they are successful, it is amazing how it helps the whole area. So there is more than one facet of why we need to help Indian tribes become successful, because they have this terrific history of sharing that success in terms of jobs.

Let me ask you just two or three things. In tribal self-determination contracting, Indian tribes who provide services to their mem-

bers by way of the 638 contracting and self-governance compacting have been found to be more effective. We know that. Yet, some tribes are somewhat reluctant to do it.

I have heard some of them in private saying they worry about whether it will erode the Federal trust responsibility.

Do you have any ideas how we can make incentives for the tribes to try that? I would like to know your views about that and realize that you are just getting settled in your job.

Mr. MCCALEB. Well, I am familiar with the fact that there are a number of tribes that we call direct services tribes that still want to rely on the BIA to provide direct services to them rather than contracting or compacting for those who take over those services themselves.

Clearly the Self-determination Act and the Self-governance Acts provide for them to make that decision. That doesn't answer your question about what we can do to incentivize them to take a more assertive role in that area.

In fact, there are a number of incentives under the Self-governance Act. I think, in my mind, there are still a certain residual anxiety that these two acts and these two provisions are an attempt to step back from the trust responsibility, the Federal responsibility and a lot of the direct services tribes hold tenaciously to that.

That is their judgment and that is the decision that they make. Under the provisions of Self-determination, I guess we should allow them to do that, notwithstanding the fact that might not seem the best in our judgment.

Senator CAMPBELL. Well, my interest in it is how we actually encourage them to do it.

Mr. MCCALEB. I understand. I probably danced around that answer because I don't know the answer, Mr. Chairman.

Senator CAMPBELL. I don't either. If you find it, share it with us. Because we know it is a much better use of Federal money, obviously, if we can send that money through compacts or contracts directly to them rather than through the bureaucracy in Washington, they are going to get more bottom line dollars to use toward the problems they are trying to address.

Mr. MCCALEB. Absolutely. More importantly, it is a more effective use of the money when it gets there. They place it, as all local governments do, where they perceive the need to be the most urgent and they are the best judges of that.

Senator CAMPBELL. That is right.

Maybe one other question. I am sure you, like all Americans, are aware of the energy crunch, whether it is electricity in California or hydrocarbon fuels in the rest of the country. It kind of goes up and down. Right now gasoline is going down a little bit, but it is only a matter of time before it goes back up. It is kind of a roller coaster, but the roller coaster, little by little over a period of years, the valleys are higher and the peaks are higher, too. So, it is little by little going up.

I happen to think that puts Indian tribes that have resources, coal, oil, oil shale, natural gas, coalbed methane, and so on, really in an opportune situation in this country because they have the re-

sources that can help us get away from foreign dependency on energy.

We need to find a better way of helping them help develop their resources. In any of the discussions you have had so far, and I know it has been a very short period of time, have you found any ways to perhaps streamline or eliminate some of the Federal regulations that impede tribes in energy development?

Mr. MCCALEB. I can't cite any particulars in that area. I can cite a bright spot in this area of energy development. That has to do with the Three Affiliated Tribes that are looking very seriously right now, to moving toward the development of a refinery near Fort Berthold.

Senator CAMPBELL. The Three Affiliated?

Mr. MCCALEB. Yes; in North Dakota. Historically, tribes at best have been like Third World Countries exporting a commodity, that being the raw crude. The refinery is a value-added activity in which they would increase the employment, as well as the capital investment on the reservation and who has a big multiplier in terms of the economy, as well as the experience in managing this kind of facility.

They are developing a management contract to give them experience. I think that is the route, where tribes become value-added enterprises instead of just exporting a commodity.

Senator CAMPBELL. Well, last week in a committee hearing, just by chance, we heard that the Three Affiliated Tribes have also entered into an agreement with the manufacturers of wind-collecting systems, and with these great big fans, to build some on the reservation. The estimate is that they may make as much as $1 million a year from wind that is always in the Dakotas.

So, there are a lot of opportunities if we can figure out a way to make it a little easier for them to get through the permitting process.

Let me yield to the chairman.

The CHAIRMAN. Mr. Secretary, I am sorry I wasn't here to receive your testimony, however, I have a few questions from reading your prepared statement.

You speak of the BIA noting that among Indian nations are lacking in economic development there are common themes. I think that is the phrase you used. You said that the disparity between the "have" and the "have-not" nations can be addressed by "a few initiatives."

What are these common themes you speak of?

Mr. MCCALEB. Well, I think one of the common themes is that the tribes that are doing well economically have strong, well-developed, de facto sovereign governments. They have taken possession and built the government institutions and mechanisms that create an environment that is attractive to industry so that entrepreneurial people or investors are able to make an investment in that area with the expectation of a reasonable, if not handsome return on their investment.

It has to do with the court systems, judicial systems, the overall nation building. I think the tribes that have done well economically have been successful in nation building. That is one of the first ones.

The CHAIRMAN. You have touched upon a theme that many business people are quite concerned about, the constant turnover in tribal governments. Do you have any suggestions about how to bring about greater stability in tribal government administration?

Mr. MCCALEB. Well, I think my answer is probably kind of a circuitous answer in that when you have economic stability and economic growth, we also observe that people are ready to re-elect their tribal leaders in anticipation of the projection and extension of that tribal expansion and tribal growth.

There is the greatest turnover in tribal governments, I think, where the poverty and the economic deprivation is the greatest. You know, it is the chicken and the egg conundrum; how do you get started? Well, you get started, I think, by building strong, sovereign tribal governments.

That is clearly a local initiative. That is not something that is done from Washington.

The CHAIRMAN. What are the initiatives that you suggest to bring about less disparity?

Mr. MCCALEB. Well, I think we can assist in the area of making capital investment more attractive by expanding the Indian Finance Act, for one thing. We have a loan limitation of $60 million a year, which is fully subscribed now and has been every year for some time.

There is an appetite for Indian businesses to fully utilize that and more. So, I think probably that it is time to expand the cap on the Indian Finance Act, the Loan Guarantee Program.

Another is to secure the tax incentive for rapid write- down on capital investment that is due to expire here in two years because industry is just now becoming acquainted with that and beginning to make use of it. It is one of the things that attracted this refinery that I was talking about, that they are able to write-down their capital investment rather rapidly.

That is due to sunset here in the next couple of years. I think that we should look at other tax incentives to attract capital to Indian country. So, there is money, strong local governments and education, I think. Those are the three things. Education is largely in reservation country Indian education. We need to strengthen that. One way we can do that is by expediting the construction program for Indian schools.

The CHAIRMAN. Would you also consider, Mr. Secretary, the necessity for a land base for these nations?

Mr. MCCALEB. Yes; I think that you state the obvious that I did not state, that most of the tribes that have done very well economically have a well-established land base.

The CHAIRMAN. Well, I ask this because, as you know, there are many Indian nations that have been denied and deprived of land bases, especially in California, for example, because of the number of treaties that we in the U.S. Senate have either refused to ratify or have just bypassed the ratification of treaties.

Therefore, these nations are now coming forth seeking your assistance in having these lands taken in trust. How can we expedite this process?

Mr. MCCALEB. Well, first of all, I would like to point out that just having a large land base is not a formula for success. I think it is

important to point out that we have a number of tribes with large land bases. Some of them are direct service tribes that we were talking about earlier, that have some of the poorest economies.

So, although I think it is important, I don't think it is the essence or absolutely essential ingredient for the economic dollar. The question is: How do we expedite the land under trust.

I think the new regulations that have been imposed that are under review currently provide for expediting land under trust for lands that are immediately adjacent to or within the reservation boundaries. I think it clearly expedites that. Those regulations are a little more deliberate about taking land into trust that is removed from the reservations.

That is directly tied to the whole gaming issue. I think the regulations, proposed regulations, do in fact expedite taking land into trust that is within or immediately adjacent to the reservations.

The CHAIRMAN. Do you have sufficient staff to process these claims and applications?

Mr. MCCALEB. Mr. Chairman, I really can't answer that question, give you an enlightened answer on that. I have just been on the job 2 weeks now. It is kind of like taking a drink out of a fire hydrant. I hope I can give you a more enlightened answer on those kind of staffing questions later on.

The CHAIRMAN. Then, if I may, Mr. Secretary, I would like to submit for your consideration questions that you can answer for the committee.

Mr. MCCALEB. Thank you very much, sir. I will do that promptly.

The CHAIRMAN. I appreciate that. Thank you very much.

Senator CAMPBELL. Well, the Senator touched on some of the things that have stymied us for an awful long time. We know that in order to increase economic opportunities we have to have stable tribal governments. Yet, in order to have stable governments, we have to have better economic opportunities.

Our troubles are obviously how to get them both improved. But you are going to have a plateful. Do you still want the job?

Mr. MCCALEB. Yes, sir.

Senator CAMPBELL. Now I will yield to Senator Cantwell. Senator Cantwell is new to our committee from the State of Washington. She has a very large Indian constituency; I believe maybe 27 or 28 tribes.

Senator CANTWELL. We have 28 tribes.

Senator CAMPBELL. Twenty-eight tribes. We are delighted to have her with our committee.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator Cantwell. Thank you. Thank you, Mr. Chairman, I guess. I have an understanding that the committee works in a very cooperative manner here. I appreciate that.

Senator Inouye, thank you for the opportunity to ask questions of Mr. McCaleb. I guess I would say I am very fortunate to be on this committee. I appreciate the assignment. There are 28 tribes in the State of Washington. As the only member from the Pacific Northwest on the committee, I hope that I can bring some insights

to the challenges that we are facing throughout the entire Northwest in that population.

There are very important issues we need to work on, obviously, with health care, job training and economic development, some of the subjects that you were talking about this morning. I look forward to working with the committee on those issues.

Mr. McCaleb, I apologize, too, for not being here to hear your testimony, but I have reviewed it. Congratulations on your recent swearing in, as well.

I had a couple of questions about economic development as it relates to some of the subjects that you brought up. First of all the area of human resources and job training. You mentioned the Indian Employment Training and Related Service Demonstration Act that was passed in 1982.

Can you update us on how you think the workforce preparedness issues are being addressed by the agency and whether we need to significantly enhance that at a time when our economy is changing drastically and even the most prepared people are finding that they need to upgrade their job skills. So, how are we doing on the issue of job training and access to resources?

Mr. MCCALEB. Our whole economy is in a transition, as you stated, from an industrialized economy to a knowledge based economy. To be frank, I don't think our BIA-operated school systems, known to be consistent with most rural described systems, have been able to keep pace with the velocity of change and the acceleration and training needs for a knowledge-based economy.

We could start with computer skills. I think there needs to be a focused effort in math, science, and communication skills. In fact, that is the goal of the BIA, to bring our students and our educational system up to a minimum of a 70-percent proficiency in math and science and also communication skills.

We are not there. We are probably at 50 percent efficiency at this time.

The other programs that are for adult education need to be rifleshot focused on computer literacy and on the ability to operate in an economy that is going to be driven by computers, is driven by computers, whether you are buying an airline ticket or checking out at the grocery store; it is computers that handle the transaction.

Those are the kinds of skills and understandings that I think will be essential in the future.

Senator CANTWELL. So, you were say that we have adequate programs or in adequate programs?

Mr. MCCALEB. I would say our programs need to be improved. We are focusing on the need for math, science, and communication skills. But I am also saying that our results are well below our goal. So, they need to be improved. Our results need to be improved. We have set the goal well above the mark where we are right now.

Senator CANTWELL. Given the number of the locations of the reservations throughout the country, and sometimes they are adjacent to urban areas, sometimes they are more remote, does the BIA have any kind of policy on the delivery of high speed access to Indian reservations?

Mr. MCCALEB. Definitely we do. We are trying to optimize the high-speed access, first to our schools and then to the reservation in general. It is going to require some work with the Federal Communications Commission [FCC] and private investment, to attract private investment to wire the reservations, if you please, for high-speed access.

One of the problems that has held reservations back in economic development is the lack of access to markets. With few exceptions, they are largely rural and remote. That makes them remote to the large markets.

In a knowledge-based economy, the distance doesn't really matter, as long as you are hard-wired to your customers. Computers, fiber optics, wireless communications, I think, present literally a world of opportunity for economic development, in rural America in general and on reservations in particular.

Senator CANTWELL. So, you would say that, again, the percentages of reservations having that kind of access——

Mr. MCCALEB. It is low. I think that is not uncharacteristic with rural America in general. In my own experience in my home State of Oklahoma, most of our rural towns do not have good access to the high-speed broadband communications system, fiber optics, if you please. I think that is characteristic of rural America. The tribes fall in that communication area.

Take basic communications, like the telephone, there are fewer Native Americans who have telephones in their homes percentagewise than the rest of the larger economy.

Senator CANTWELL. Mr. Chairman, if I could, one more question. Perhaps we can follow up with some additional questions about those programs, both for job training and for high-speed access.

I am curious, given our experience in the State of Washington where the Tallalah Tribe had a joint effort on economic development with their adjacent city, the city of Marysville. They both had a desire to develop land in an industrial way, requiring huge investments of sewer and water that were not currently there in the community.

So, they worked jointly on that from an economic development perspective and then later created the Tallalah-Marysville Chamber of Commerce. So, they joined together in an economic development effort.

Are there other instances of that around the country where the formal economic development mission has been, you know, joined with other organizations?

Mr. MCCALEB. Well, I am personally aware of a few in Oklahoma that are, the Chickasaw Nation in the city of Ada and the Industrial Development Authority of Ada cooperated in industrial development activities.

This business of making a joint effort where you actually finance major capital improvements for infrastructure, that is the first time I have heard of that. That is remarkable and it is very important.

When tribes and local governments can cooperate like that, a lot of the other barriers will melt away.

Senator CANTWELL. Thank you.

Senator CAMPBELL. Thank you, Neal. You know, I might mention before you leave that the people on this committee all serve be-

cause every one of us is trying to make things a little bit better for Indian people.

But, as a Government, we are doing a poor job of networking our different agencies. Too many times, in my view, the left hand doesn't know what the right hand is doing. Maybe you are following this huge question. In the last couple of days there is a hearing going on, in fact, right now here on the Hill dealing with the access for Mexican trucks and drivers to the United States under the NAFTA agreement.

We are going to face a big, billion dollar fine if we do not allow them access in the United States. Well, when we signed that NAFTA agreement, we knew, according to the American Trucking Association and a number of other groups that we are short of drivers, between 250,000 and 300,000 drivers.

We have unemployment on reservations between 60 and 70 percent and we can't seem to put it together that we have people that need the jobs in this country, and yet we are going to open access to foreign drivers. I am not against foreign drivers.

What I am saying is that we are doing a better job for them than we are doing for our own people. It just seems to me that we have a long way to go in trying to make sure that our agencies recognize and in our international trade agreements and things of that nature that we have people that need the jobs.

These are good jobs, $50,000 a year jobs. A lot of Indian people would love to have those jobs, and yet we are just bypassing them. That is an example of some of the dumb things we do here in Washington when we are trying to make things better.

I do appreciate your being here this morning. If any other committee members have questions, they may send them in writing.

Mr. Chairman.

The CHAIRMAN. Mr. Secretary, if I may ask one question before we proceed, the prepared statement of the president of the NCAI is a very interesting one. I hope you will read and study that statement. She speaks of devolution or the decentralizing of policy on the part of the United States.

Devolution is the philosophy that by providing assistance to States you might bring the activities closer to the people. Well, it happens that history has shown us that whenever we call upon the States to provide services to Indian country the services are not forthcoming. They are rather lacking at times.

For example, just a few days ago a court issued a judgment in which it is stated that the tobacco payments will be made to States and tribal governments will not receive any payments, on the premise that the States will be responsible for all the people living within the borders of that State.

Would the BIA make certain to monitor this so that Indian nations and the Native Americans will get their fair share? Otherwise, I think that just the non-Indians will get the tobacco benefits.

Mr. MCCALEB. Mr. Chairman, that is a large task that you just carved out there for the BIA. You know, I come from a State that has maybe the second or third largest Native American population in the United States. I was privileged to serve in the legislature there for a number of years. They had a large number of Native American members in the legislature.

Fundamentally, States historically have not been responsive to Indian interests. I agree with the principle of your statement. I am not sure how the BIA can regulate or incentivize the States to better perform their role with people who are already their constituents.

The fundamental problem here is that the larger portion of the population does not understand nor respect the sovereignty of the several American Indian nations of this country.

When I served in the legislature, I remember our Organic Act clearly provides that the treaty rights will be protected when we became a State. Of course, part of the treaty rights were basically unrestricted hunting and fishing.

I brought the modest bill to exempt Native Americans with a Certificate of Blood card, from having to buy hunting and fishing licenses, which I thought, was already provided for in the Organic Act. I worked for four years trying to get that bill passed and I never did. I don't think it was because of racism. I think it was because of insensitivity to the fundamental rights of Native American people that are provided in the Constitution of the United States.

That is a huge education job. I would certainly see the BIA assisting in whatever effective way we can in seeing that Indian people and Indian tribes get their appropriate share of Federal moneys that are dispersed directly to the States.

But that, in my judgment, is a huge job and one; again, that I think most effectively will be done in partnership with the local tribal sovereign leaders because they are the ones that understand those issues the best. They are the voters of the legislators. They are becoming more influential in every State.

I have been observing this now for over 30 years; 30 years ago Indian interests were totally disregarded in most State legislatures. If they were regarded at all, it was one of hostility.

That has changed. It has changed for the good. It has changed largely because of the policies of the Congress through the Indian Self-Determination Act and in many ways the subsequent amendment titles in the Self-Governance Act. We are developing strong tribal governments with articulate and thoughtful leaders who are able to present their cases most eloquently and most forcefully with their State legislators.

So, notwithstanding, you know, we kind of drown in the negative statistics that we have, and they are dismal and they are disheartening, but we have made great progress in the last 30 years. It has not been a straight line.

Starting 30 years ago, our progress plotted against time was flat and almost nothing was happening. It began to pick up and it is going up almost vertically. Our challenge is that it doesn't become an S-curve and level off at a plateau and doesn't go further.

One of the reasons that I am very pleased to have the position that you all have confirmed me in is the opportunities that I think are present in America today.

The CHAIRMAN. Just one final question, if I may, Mr. Secretary. Whenever I enter into discussions with tribal leaders, certain words come up most frequently. One is sovereignty. Another is trust reform. Another is consultation and also economic develop-

ment. These are the four words and phrases that the come up more often than anything else.

According to the testimony of the president of the NCAI, tribal leaders have been advised by BIA that whenever they ask for consultation on trust reform the response has been "These are internal matters, therefore we need not consult with you."

Do you have any response to that?

Mr. MCCALEB. Well, I reject that premise, Mr. Chairman. Trust is about communication. You can only have trust when people can openly address or discuss issues that are of mutual concern to them. The trust issue is not just whether some money has been misplaced or not distributed appropriately.

The trust issue, to me, is much deeper. It is about the whole issue of the competence of the Indian community in the larger sense with the BIA. I am not trying to say anything negative about the BIA, I am just saying that I trust the count at the bank is dangerously low and we have overdrawn it, if you please.

Trust, like respect, can only be given. It can't be demanded. We have to rebuild that trust. It is going to be a long and arduous climb. We will take it one step at a time. But the first step is open, unrestricted communication. I am trying to say in many words that I agree wholeheartedly.

The CHAIRMAN. I am certain that Indian leaders would be most pleased to hear that, sir.

Thank you very much.

Senator CAMPBELL. I am also delighted to hear that because in my view, agreements between the Federal Government and tribes are like Federal government and States or the Federal Government and other nations. You can't have a good agreement if only one party sits at the table.

You have to have trust built on the fact that both of them are there to provide input. I might mention just for your own information, on the tobacco settlement, we have a bill that collapsed of its own weight around here.

The question Senator Inouye posed might be better posed to the Department of Justice. But there were very, very good Indian sections in that bill when it was here in the Senate and primarily because of your boss, Secretary Norton, who was the Attorney General of Colorado in those days. She came in and testified several times to make sure that Indians had language in that bill that would enable them to receive some of the settlement money that would have gone to health care, to education to different kinds of ceremonial use and things of that nature. It obviously fell apart, but you might dig that old bill up and look it up.

Mr. MCCALEB. I will go to school at my boss's side on that.

Senator CAMPBELL. Thank you.

Our next panel will be three witnesses: Sue Masten of the National Congress of American Indians; Brian Cladoosby, chairman of the Swinomish Tribe of Washington; and Ardith "Dodie" Chambers, councilwoman of the Grand Traverse Band of Ottawa and Chippewa from Michigan.

We give a great deal of latitude to the administration witnesses. We ask other witnesses, though, to keep their comments a little more brief. So, if you would like to proceed.

STATEMENT OF SUE MASTEN, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC

Ms. MASTEN. Good morning, Chairman Inouye and Vice Chairman Campbell.

I want to thank you for the opportunity to address you this morning on this critical issue.

For the record, I am Susan Masten, president of the National Congress of American Indians, the oldest and largest organization representing tribal government. I also serve as the chairperson for the Yurok Tribe, located in Northern California.

I am here today to present testimony on the relationship between tribal governments and economic development on Indian reservations. As you know, economic development is perhaps the leading concern in Indian country today.

It is heartbreaking, as a tribal leader, not to be able to address the social problems that plague our communities. Our people are still dying of preventable diseases. We still have substandard housing, high dropout rates, substance abuse, suicide, teen pregnancies, and there is a high rate of crime against our people, all of which is relative to the overwhelming poverty on reservations.

Reducing unemployment rates as high as 80 percent, eliminating homelessness, decreasing dependence on welfare and increasing education opportunities are all linked to building economic activity within our communities.

Tribes face many obstacles to economic development, including lack of infrastructure, poor access to training and technical assistance, the shortage of equitable financing mechanisms, remote locations, and dual taxation, to name a few.

Although many tribes have found ways to remedy these problems through creative means to overcome the barriers to economic development, the incomparable structural and legal obstacles that tribes face are simply too large.

NCAI is poised to make the issue of economic development in Indian communities paramount in our work to promote and defend the concerns of our people. As such, my testimony today will focus on policy changes that we believe Congress should consider in order to reduce the barriers we face.

Successful economic development in Indian country is directly tied to strong, independent, culturally appropriate tribal government structures. Congress has the authority to support tribal authority or to impede it. All too often our authority is limited in ways that impede our ability to effectively contribute to economic development.

By passing sound Federal Indian policy, Congress will provide us with the key to create change in our communities. There have been many examples of positive and progressive Federal Indian policy, most notably Public Law 93–638. It is through self-determination and self-governance that tribes have been able to prioritize funding to meet our community's needs.

It is through these policies that tribal leaders and tribal staff have gained valuable management experience in decisionmaking while becoming accountable to our people through sound governmental procedures.

While self-determination has been a successful form of decentralization in matter involving the BIA and the Indian Health Service, there is still much to be done. For example, we are concerned about the recent actions taken by the Department of the Interior regarding reform efforts which may result in a departure from the policy of self-determination. By moving trust records away from tribal governments, this limits our ability to access information regarding our land and our resources.

Tribes own four-fifths of the trust property. We have the greatest interest in ensuring that there is proper accounting and management. If there is ever going to be trust reform, we must be actively involved by consulting with those who are making the decisions that impact us, as it is at the heart of our sovereignty.

NCAI would welcome the opportunity to assist and facilitate the government-to-government relationship between the Department of the Interior and the tribes on this critical issue. We also seek the committee's continued guidance to ensure that BIA and the Office of Special Trustee proceed with full respect for tribal self-determination in every area of trust reform.

NCAI is also greatly concerned about the Federal policies that are outside the scope of the BIA and Indian Health Service, including commerce, agriculture, taxation, human services, education, energy transportation, and environmental protection.

In general, there is a trend for the Federal Government to decentralize and to devolve many Federal authorities to State and local governments. Unfortunately, this trend has often negatively affected tribal governments. Most often, we are not recognized as units of government with authority to directly receive programs and funds.

Even when tribes are authorized to administer programs directly similar to States, often we are afforded proportionately fewer resources and are subject to greater oversight than the States are.

Devolutionary policies also raise questions about diminishment of Federal treaty and trust responsibility to tribes and a reduction of Federal responsiveness to tribal needs. State governments do not have the same legal obligations and it is of great concern that States will simply overlook the tribe's interest in their administration of Federal programs.

We also note that when State governments receive dollars they often do not regard tribal governments on a government-to-government basis, but view tribes merely as a part of the service population or as local interest groups.

If Congress is to fulfill its responsibility to Indian tribes by supporting tribal self-government, it must create Federal policies that support tribal government's authority and protects tribal self-determination.

There must also be clear definition of the roles of the Federal Government, the State government and the tribal government. Tribes are supportive of devolution that provides for increased authority and flexibility to tribes in the context of a respectful government-to-government relationship.

As devolution of programs to tribe is one of the surest ways to engage tribes in capacity building and economic development,

NCAI believes that the following principles may serve as a starting point for the development of sound Federal policies.

No. 1, as a basic exercise of tribal sovereignty, tribal governments should have the option to control any programs, functions, services or activities that are intended to benefit tribes and tribal service populations at the same level of authority and control as State governments.

No. 2, Federal policy should preempt the application of any State law that imposes a dual burden to comply with both tribal law and State law within the boundaries of Indian country.

No. 3, duplicative State regulation or taxation will drive economic development away from Indian lands.

Where tribal governments opt not to administer particular programs and functions, service and activities, State or county governments or private contractors who administer the programs must consult with tribes over the delivery of services to tribal members.

States must be encouraged through Federal policy to relate the tribal governments on a government-to-government basis, as do contractors. Federal policy should encourage the use of negotiated agreements between States and the Federal Government or State governments so that each tribe can address its unique needs.

Federal standards must give tribes enough leverage to reach a successful and enforceable agreement. Tribal governments should have a right to all documentation or studies held by the State governments or other institutions that are relevant to the sustainability, fairness and safety, et cetera.

Tribal governments should have their own independent experts present at the table as needed during negotiations and assessment processes. Tribal governments must be provided with adequate technical and financial support for administration of programs. Policies should protect Federal treaty and trust responsibilities.

Unfortunately, Indian country still lives in Third World conditions, lacking basic infrastructure in this time of prosperity. We have little hope of economic development unless funding for projects for future development becomes a priority.

The creation and maintenance of a viable infrastructure is the first step tribes must take to foster a positive business environment that will attract outside sources of investment as well as local business partners.

As such, Congress needs to work with us to develop policies that include infrastructure development. We need projects that construct or upgrade our roads, water and sewer systems, utility systems and electrical grids, commercial codes, licensing programs, phone systems and technology improvements.

All too often Indian nations are prohibited from receiving training and technical assistance to conform with new Federal statutes, while some appropriations have provisions for such measures, most are under funded.

If a tribe is not provided with the knowledge and expertise to administer a program, it is usually doomed to be unsuccessful. There is a funding shortfall in the administration's budget that impacts technical assistance, feasibility studies, business infrastructure and research for legal code issues that creates a gap that Indian country is often unable to fulfill.

Technical assistance can also address other important issues, for example empowerment zone technical assistance is a great example of a successful process. During the course of the program, implementation that technical assistance provided for grass roots structure to communities to talk about governance. Community members involved provided much needed input to ensure stability within their own government, furthering the idea that good governance is a result of good policy.

The premise of providing equity in opportunity to financial resource is also imperative for self-determination. Tribes often are left out of opportunities for obtaining bond financing and loan guarantee components.

State and local governments have long enjoyed the authority under Federal tax law to use tax-exempt bonds to fund a variety of governmental projects. We need to remove restrictions imposed on tribal governments to provide the same opportunities that other governments enjoy.

Loan guarantee components are vital for the success of tribal businesses, as many of our tribal members do not have the collateral for fully funded, fully secured loans during the start-up period of a business.

Economic development in Indian country requires not only successful tribal government businesses in economic development initiatives, but efforts to foster successful small businesses for tribal members also.

The problem that most banking institutions face when dealing with tribal members who reside on the reservation is the uncertainty of enforcement jurisdiction if the borrower defaults on the loan. To address this recurring issue, NCAI encourages hearings and briefings to be arranged between Indian nations and off-reservation commercial banks, as banks are reluctant to lend in this high-risk environment.

Good governance is not dependent upon quick fixes. Rather, good governance is dependent upon good policy that promotes long-term solutions. The application of these tenets, among others that will be uncovered in the policy consultation sessions that will occur before the drafting of legislation create a secure environment for tribal governments and investment.

By enacting these policies, the government is not only fulfilling their trust and treaty obligations, but is also giving the tribes some of the tools they need to build their own capacity to govern.

It has been the experience of NCAI that tribes who are best able to address the issues of economic development in their own communities are the ones who have comprehensive strategies that incorporate all the resources that the tribe has at its disposal.

Tribal plans that engage all the key players in their communities, capitalize upon the interests and strengths of community members is a key way to jumpstart economic development on Indian lands and ensure that economic development is spread throughout all public and private sectors of the tribal economy.

By creating policies that will enable tribes to use all of their resources together, the committee also creates an environment that is good for development in general. While it is good that the governmental agencies have programs that offer incentives for busi-

ness or companies who subcontract with tribes, these programs need to be evaluated for effectiveness.

Tribes have voiced concern that programs such as the Department of Defense 5 percent tribal incentive programs lack clear goals to ensure that the Department markets and promotes the program in the same manner as other incentive programs. We recommend that the committee commission evaluations of programs such as this to make sure they are proficient in serving the needs of Indian country.

Public Law 106–447, the Indian Tribal Regulatory Reform and Business Development and Public Law 106–64, the Native American Business Development Trade Promotion and Tourism Act of 2000, need to be implemented as soon as possible to help reduce the barriers that Indian country faces for economic development.

In closing, capacity building is the first step toward good governance. Only when Indian tribes have the ability to administer our programs and manage our affairs for our people will we be able to move to the path of self-determination by allowing tribes to engage in economic development initiatives, by enabling the expansion of tribes' capacities to govern is directly linked to tribal sovereignty and self-determination.

The establishment of clear policies that define the roles of Federal, State, and tribal governments that give tribes authority to self-regulate, that develop infrastructure and human resources, eliminate disincentives to investment such as dual taxation, create programs that are designed for the long- term direct resources to set a high standard of action and that preserve the Federal trust and treaty responsibilities is the most effective means by which the Federal Government can support good governance with tribal nations.

There is a need to work with Indian communities to develop comprehensive policies and analyze existing programs. NCAI is always available to cultivate the government-to-government relationship between tribes and Federal Governments. We are ready to help you facilitate any discussions that will need to take place in order to create effective Indian policies.

Thank you for this opportunity.

[Prepared statement of Ms. Masten appears in appendix.]

Senator CAMPBELL. Chairman Cladoosby.

STATEMENT OF BRIAN CLADOOSBY, CHAIRMAN, SWINOMISH TRIBE, WASHINGTON

Mr. CLADOOSBY. Chairman Inouye, Senator Campbell, members of the Committee on Indian Affairs, guests and staff: I am honored to have the opportunity to appear before you and share my thoughts on good governance and economic development in Indian country.

I would also like to take this opportunity to welcome Senator Maria Cantwell to the Senate Committee on Indian Affairs. We in Indian country, especially those of us from the great State of Washington, look forward to working with her in her new capacity and thank her for her support that she has shown us thus far.

For the record, my name is Brian Cladoosby. I am the chairman of the Swinomish Indian tribal community. I am also the president of the association of Washington tribes.

Our tribe is located about 70 miles north of Seattle. We have about 800 members in our tribe. My tribe is composed of descendants from the Swinomish, Samish, Lower Skagit, and Kikialus Tribes, which lived in the Skagit Valley region and the islands that are now Woodby Island and Camano Island.

We are a treaty tribe. I am proud to say that my grandfather's grandfather signed the treaty for our tribe in 1855. His Indian name Washington Kalkultsic and his *x* appears in the Point Elliot Treaty.

Our reservation was set aside by Executive order in 1873 and it has been the homeland of the Swinomish people for many generations. However, today, as a result of the General Allotment Act of 1887, also known as the Dawes Act, our homeland has been reduced to just over one-half the area of the reservation. Our exclusive homeland is now also home to more non-Indians than tribal members.

You are all familiar with the devastating impacts of this ill-conceived legislation. Other tribal leaders have told you of the multiple problems created by the checkerboard lands within the reservations across the United States, the fractionated ownership of Indian allotments and the jurisdictional conflicts generated by this failed strategy of assimilation.

We have heard these accounts of lost lands, unmanageable resources and eroded sovereignty on many occasions. The Swinomish people have lived it on a daily basis.

Over the years the Swinomish people have been involved in a variety of conflicts and confrontations over fishing and hunting rights, criminal jurisdiction, taxation and gaming issues and the regulation of reservation land use.

Our inherent right to exert jurisdiction over the lands we reserved in our treaty is constantly being questioned and threatened.

Recognizing that the your hearing today is about good governance and economic development, I would like to turn my remarks to my tribe's efforts to make the best of the challenging context in which we now live.

In recent years the Swinomish Tribe has viewed inter-governmental cooperation as an important vehicle for increasing tribal self-determination and expanding our capacity for good governance. We truly believe that cooperation and communication go a lot further than confrontation and litigation.

We have entered into a number of agreements with neighboring jurisdictions for the provision of major public services. There are two major water purveyors in Skagit County, the city of Anacortes and the Skagit County public utility district. They used to be the main purveyors of water within the Swinomish Reservation. We signed an agreement with them and they agreed that the Swinomish Tribe would be the only purveyor of water within the reservation's boundaries.

We signed a wastewater treatment agreement with the town of LA Conner. We have a police cross-deputization agreement with the Skagit County Sheriff's Department. We have a first- of-its-

kind in stream flow water agreement with the Skagit County PUD and the city of Anacortes.

As many of you are aware, there are many disputes involving water issues with Indians and non-Indians across the United States. Of course, we have the Swinomish Cooperative Land Use Program, which I am here to talk about today.

We have a long history of working well with our neighbors and believe firmly that respectful cooperation and coordination with other governments are central to our expansion of self-determination.

Like many of you, our tribe spends countless hours in deliberations, negotiations and policy development to devise dynamic forms of conflict resolution. Perhaps slightly different than many of you, most of our work is focused on the complex and often contentious historic divisions existing between jurisdictional interests operating within or around the boundaries of the Swinomish Indian Reservation.

An important outgrowth of these efforts has been the Swinomish Cooperative Land Use Program. The program provides a framework based on a memorandum of agreement between the tribes and Skagit County for conducting activities within the boundaries of our checkerboard reservation and a forum for resolving conflicts that might arise during the process.

Land use issues confront virtually every tribe that has been impacted by the Allotment Act. This program provides a potential model for resolving those issue through a collaborative and cooperative process. Our Cooperative Land Use Program received a high honors award from the Honoring Nations Program administered by the Harvard Project on American Indian Economic Development.

We are grateful for the recognition of the Harvard Project. In addition to providing encouragement to other governments with whom we might negotiate future agreements, participating in the Honoring Nations Program has given us the opportunity to learn about the great work being done by Indian communities all across the country.

We believe this MOA is a first of its kind between tribal and county governments in the United States. Whether it is the first of its kind or one of a proud few, we hope that it indicates a growing belief in the benefits of working together rather than against each other.

Establishing a viable, self-sustaining reservation economy is a primary goal of our tribe. Unresolved jurisdictional issues arising from checkerboard land tenure patterns can be a serious obstacle to economic development by deterring investment and limiting the tribe's ability to achieve our development goals.

These conflicts impede our tribe's ability to use our land and natural resources effectively and in a manner that fully benefits our tribal members and indeed benefits all members of our reservation, Indian and non-Indian alike.

Only when our sovereignty is supported by sustainable economic development can the goals of self-government be fully realized.

The Cooperative Land Use Program is still a work in progress with a long history, and hopefully, with more effort and continued cooperation from Skagit County, a bright future.

The work actually began in the mid-1980's when the tribe and the county found themselves in the midst of a jurisdictional conflict. Both governments were administering zoning, permitting and regulation enforcement programs that affected non-Indian fee simple owned lands within the reservation's boundaries.

The resulting confusion over jurisdiction and allowable land use engendered skepticism, anti-Indian and anti non-Indian sentiments, a litigious atmosphere and serious difficult in attracting investment. Rather than litigating these jurisdictional issues, the tribe and the county agreed in 1986 to attempt to resolve the conflict by embarking on a joint planning program.

The philosophy guiding the effort was to overcome inconsistencies through mutually agreed land use policy for the reservation. Assisted with funding from a northwest area foundation and a facilitator from the Northwest Renewable Resources Center, representatives from the tribe and county began discussions on the issues of mutual concerns related to land use.

We agreed that it would be mutually advantageous to avoid costly litigation by resolving differences under a formal government-to-government relationship. While the talks proceeded slowly, they proved useful. Ultimately, our governments were able to craft a series of agreements, including a 1987 Memorandum of Understanding recording our commitment to work together on a comprehensive land use plan.

In 1990, we created a draft Comprehensive Use Plan, which was the first comprehensive planning effort, attempted by a tribe and a county. In a 1996 Memorandum of Agreement between the Swinomish Tribe and Skagit County, which delineates a set of procedures for administering the Comprehensive Land Use Plan, in particular the MOA requires joint reviews of proposals, provides dispute resolution mechanisms and affirms that cooperative problem solving is the preferred means of decision making. A copy of the MOA is attached to the text of my comments.

Because of time, I will spare you the reading of the MOA, but I hope you and your staff have an opportunity to review it.

Where the Cooperative Land Use Program has succeeded, one of the fundamental reasons for the success of the program is that it has institutionalized a process of collaboration. We truly believe that we need to institutionalize these agreements because we know that elected officials come and go.

So, in closing, I would just like to thank you for allowing me to share with you a little bit of the work that the Swinomish Tribe has done in trying to work out cooperative agreements with other governments in trying to create an economic development base.

In closing I would also like to thank you for bringing up the issue of how the recent court decisions are affecting Indians in Indian country. I hope we can work with our representatives to figure out a way that we can look at those decisions.

Thank you.

Senator CAMPBELL. Thank you.

Ms. Chambers.

STATEMENT OF ARDITH "DODIE" CHAMBERS, COUNCILWOMAN, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS OF MICHIGAN, SUTTONS BAY, MI

Ms. CHAMBERS. Good morning. I want to thank the chairman and the vice chairman for inviting the Grand Traverse Band to speak today.

The issues we are going to talk about are tribal courts and issues of separation of power.

My name is Ardith "Dodie" Chambers, the treasurer of the Grand Traverse Band of Ottawa and Chippewa Indians, Peshabestown, MI. I have served our tribe all of my adult life. I was one of the original group of people to bring our petition for Federal recognition to Washington in 1978.

On May 27, 1980, the Grand Traverse Band of Ottawa and Chippewa Indians became the first tribe in the United States to successfully petition for Federal recognition under the new process. Shortly thereafter, I became our tribe's first tribal chairperson.

I am a descendent of Chief Peshabe, who founded the village of Peshabetown in 1852, along with other groups of Ottawas. The Grand Traverse Band consists of 3,682 members. One-half of our members live in our six-county area. The others are scattered nationwide and worldwide, because we have some members in Germany, as well.

Today, I will speak on the issue of separation of power in our tribe's governing structure. But keep in mind as I testify, that I am neither a judge nor an attorney. By a vote of 376 to 47, tribal members ratified our constitution on February 24, 1988.

The U.S. Secretary of the Interior, Donald P. Hodel, approved our constitution on March 29, 1988. In chapter 6 of our tribe's history book, chapter 6 is entitled "Tribal Courts and Law Enforcement." Our history book is called the Mem-ka-weh, Dawning of the Grand Traverse Band of Ottawa and Chippewa Indians by George Weeks. That chapter 6 defines our judicial system.

Significantly, the Grand Traverse Band is one of the few in the country that has mandated a separate branch for it's tribal court system. It is the only one in Michigan that mandates that the appellate structure be part of the independent judicial system. Our appellate court consists of three judges.

Article V, section 6 of our tribal constitution states:

> The tribal judiciary shall be independent from the legislative and executive function of the tribal government and no person exercising powers of the legislative or executive function of government shall exercise powers properly belonging to the judicial branch of government.

Two opinions from our tribal court will demonstrate the separation of power and the independence of the judiciary.

Opinion no. 1. Tribal councilor removed from office, conflict of interest. In Re: Referral of John McSauby, Tribal Councilor to Tribal Judiciary for Removal from Office. A tribal councilor was ordered removed from the tribal council for misconduct in office.

In the GTB constitution, article VII, section 2(a)(3), which is your exhibit C, Mr. McSauby sold a piece of his property to the tribe while he was a member of the tribal council. The judiciary meeting en banc found that he violated the constitution, article XII, and

section 1 in that his personal financial interest in the property sale amounted to a prohibited conflict of interest.

While the judiciary ordered him removed from office, it did allow reasonable attorney fees and costs to be awarded to Councilor McSauby's attorney.

Opinion no. 2. Due Process Required Before Disenrollment Tribal Membership Upheld. In this appellate decision, Angus A. DeVerney, Sr., et al, exhibit E, the court affirmed the lower court's decision that a member, once enrolled, is entitled to due process before he can be disenrolled. There is no automatic disenrollment.

Mr. DeVerney enrolled himself and his children as minors in 1982. An adult child attempted to enroll at a later date. The membership office discovered that Mr. DeVerney and his children had been enrolled with another tribe since 1976. In 1996, the membership office attempted to automatically remove the family from the membership rolls.

On appeal, the court found that the lower court's decision was not a violation of sovereign immunity as a direct grant of right under the constitution was involved. As persuasive law, the court looked into the 6th Circuit Court of Appeals, *Bartell* v. *Lohiser*.

The court also found that the lower court's ruling to pay the per capita funds to the DeVerneys did not violate sovereign immunity because the money was not damages, but rather it was an entitlement under the Claims Commission docket funds to members.

In reaching its decision, the court cited tribal constitution article II, section 2, Dual Membership Prohibition, in tribal ordinance 7 GTBC, section 202(b), Incorrectly Enrolled Members.

The Peace Makers Court. In 1999, Harvard University, John F. Kennedy School of Government, sponsored Honoring Nations: An awards program that identifies, celebrates and shares outstanding examples of tribal governance. The program conferred an award on our tribal court, Exhibit H. The group specifically mentioned our Peace Makers Program.

In the materials I have submitted with this testimony, I have included a description of our Peace Makers Program. That is in your exhibit I. The Peace Makers work with children and juveniles who are at risk or who commit criminal offenses. The unit is a division of our court system.

The Peace Makers utilize alternative conflict resolution strategies to assist young juveniles to accept responsibility for their actions and to restore to society what is due it. Community service and restitution are important. A recent report from our Chief Peace Maker, Paul Raphael dated June 1, 2001 indicates that he works with 42 youths a week. There were seven referrals from the court of tribal prosecutor.

The Peace Makers have been called to the local public school to help resolve conflicts between native and non-native students. Young couples with marital problems utilize the Peace Makers. Landlord and tenant issues are also resolved.

For the period of January 2000 through January 2001, Peace Maker handled 14 court referrals involving four retail fraud, five assaults and two minor in possession. A sample Peace Maker agreement is attached as exhibit L.

I hope this brief summary has informed you of the workings of our court. We seek, as a people, to serve justice and to promote dispute resolution in a cultural context. Thank you.

[Prepared statement of Ms. Chambers appears in appendix.]

Senator CAMPBELL. Thank you. I have a couple of questions. Let me start by telling you that we do hearings for two purposes. We do them to try to define the problem and the second is to try to find some solutions. Boy, since Senator Inouye and I have served together, we have heard the problems. We know there are a lot more problems than we have solutions. You deal with them in the sense of sovereign and good governance and self-determination and jurisdiction and all those things. They are great big pictures.

We can pass, I mean with the help of other people in Congress, literally any bill that helps Indian people. Getting it through the whole process, through the Senate and the House, as Sue knows, is a little tougher.

If we have a friendly administration, we can get it signed. But that doesn't mean our job is finished, because the agencies sometimes don't implement it in the way we meant. We face that all the time. Or they will say there is no money to implement it and we come back and we have to go through the whole thing again to provide the money so they can implement the darn thing.

Sometimes they don't have the will. Sometimes they don't have tribal input. Sometimes they don't notify the tribes of the opportunities there under the bill. But we are trying.

Susan, you spoke of a lot of the problems that we have heard many, many times. But in your capacity at NCAI, I would really challenge you to try to find specific language to help us resolve the problems.

We have a great staff. Senator Inouye does and I do, too. They work together. We are desperate, literally, to try to find specific language to resolve some of the things that Indian country faces.

We have had a great few years, the last few years, when I, Senator Inouye, and the other members have passed a lot of legislation in this committee. You mentioned some of it in your testimony.

There is still a lot more to be done. But come up with specific language, if you can, about how we can fix things.

I certainly was interested in hearing Chairman Cladoosby's comments because I think we have to go a long way in looking at the effective models that some tribes are already doing. Sometimes they are doing it totally without the help or input of the Federal Government. They are doing it almost in spite of the Federal government and sometimes they are doing it because we opened an avenue with some legislation where they have taken advantage of it.

We need to have a better way that we can share those things. We hear about it when you come in here. But we don't have a real good way of sharing those opportunities or those success stories, so to speak, with other tribes.

Two days ago, I had a meeting with the Northern Cheyenne, where I am enrolled. I told them about the successes of the Southern Utes that our assistant secretary mentioned. They are going to make a trip this October and spend time with the Southern Utes to study some of their successes. Some of the experiences might not be transferable, but I think some of them are.

We can't really do that here in Washington. That has to be done tribe by tribe and it has to be done with some kind of an intermediary agency like NCAI that will help network where the tribes who have the needs can benefit from the experiences that have been successful with the tribes that have already done it. That has to be played more on your ball field.

Ms. MASTEN. Senator, if I might, we did have some success with developing a tribal-State relations brochure that showcased best practices. Maybe that is something that Harvard and us could partner up with for showcasing the best practices in Indian country for economic development. I would be interested to talk more about that and possible funding sources to support that initiative.

We would be happy to step forward. I personal am committed and our new executive director, Jackie Johnson, has a similar commitment to prioritize economic development and identification and reduction of barriers in working with the agencies to ensure that, you know, those that we can remove without legislation, we do, and identification of the barriers so that we can pursue legislation to remove those that still exist.

Senator CAMPBELL. I would encourage NCAI to do that and share with us specific information that we can try to put in bill form.

Senator Inouye, may I yield to you?

The CHAIRMAN. I thank you very much, sir.

About 15 years ago, I believe tribal leaders throughout this land looked upon the U.S. Supreme Court as the court of last resort and believed that they could depend upon the justices sitting there to uphold their rights.

Their rights were denied or abridged, tribes believed that they could always go to the Supreme Court and get some relief.

In recent days, we have noted the development of a trend in court decisions that would suggest that this has changed. For example, several weeks ago in *Nevada* v. *Hicks,* the Supreme Court held that tribal courts are not courts of general jurisdiction and are not vested with authority to determine whether State law enforcement officers who come on their reservations to search tribal members homes located on trust land are acting within the scope of their authority.

This is a dramatic departure from what we have considered to be the sovereign powers of Indian nations. They also declared that exhaustion of tribal court remedies is not required before proceeding to Federal court. Now this has been the rule for many years, that before you can go to Federal court you have to exhaust all remedies before the tribal court. But now, the Supreme Court says that, that is no longer the case.

Several weeks ago, in the *Atkinson Trading Post* case, the Supreme Court held that the Navajo Nation has no authority to impose hotel occupancy taxes even though the Navajo Nation provides fire and police protection and emergency medical services to the hotel and its patrons.

You know, that is a real departure from accepted principles of sovereign rights. I could go on and on because there are other cases, and these are not cases from 50 years ago. These are just cases within the last several years.

I think the time has come for the Congress to address these rulings of the Supreme Court because we are at a very critical juncture, and therefore I welcome the nine principles that the NCAI has enunciated in their statement. I think that this could be a basis of a discussion between tribal leaders and this committee to come forth with a comprehensive law setting forth basic standards or principles because, if not, this trend will continue.

If this trend continues, then Indian country will no longer be Indian country.

So, I commend the NCAI for coming forth with the nine principles. I would like to arrange a meeting soon with Indian leaders to begin discussing this because I think time is of the essence.

Mr. Vice Chairman, I have many questions.

I would like to commend Chairman Cladoosby on receiving the high honors from Harvard.

I will be submitting a question to you, asking your opinion on how we can apply your principles on bringing about better relations.

Mr. Vice Chairman, before I relinquish the Chair I would like to note the presence of the assistant secretary. I do not know if the witnesses realize that he has been sitting here listening to all of you.

In all the years that I have been a member of this committee, I think this is the first time that the Assistant Secretary of the Interior in charge of Indian Affairs has stayed to hear testimony of Indian leaders without being urged to do so.

I wish to commend you, Mr. Secretary.

[Applause.]

The CHAIRMAN. I believe that you can tell by the applause that they appreciate your presence here, sir.

So, Mr. Vice Chairman, I would like to submit questions to the three witnesses and ask them to respond with their thoughts on my statement here. I think it is very urgent that we get together.

Ms. MASTEN. Senator, I just wanted to add that we are planning for a forum with tribal leadership the week of September 11 to do just that. So, we welcome you. We will have further discussions. We have had initial discussions with your staff with regard to that. We will continue to keep them informed on our progress toward that.

Senator CAMPBELL. Did you have something final to say, Chairman Cladoosby?

Mr. CLADOOSBY. Yes; two things. Our program that we have initiated with Skagit County is a model. I cannot thank Harvard enough. I think these models need to be proven to the Indians and non-Indians around the United States that it can work. Like you said, Senator Campbell, it might not work for your tribe exactly how it works for ours, but it is a start. It is a basis and a foundation.

In response to Senator Inouye's remarks about the recent Supreme Court decisions, they do seem out of step with the support that we have received recently from Congress and in recent Executive orders for tribal sovereignty and self-government.

When courts do question tribal regulatory authority on our reservations, they do undermine the economic vitality and social de-

velopment that has emerged from tribal self-government. So, those are very, very serious cases.

We look forward to working with you to ensure that the good governance that we celebrate today will be strengthened and that economic development, so long coming in Indian country, will continue. We need to work together somehow to try to look at these cases.

I agree with Senator Inouye that a meeting with leaders is needed.

So, I thank you for the time that you have given the Swinomish Tribe today. I appreciate all your comments.

Senator CAMPBELL. We thank you. We will submit some questions in writing, too.

We will now go to the last two people testifying. That will be Andrew Lee of the Harvard Project and Jerry Reynolds, associate director of Informational Services, First Nations Development Institute, Fredericksburg, VA.

Go ahead, Mr. Lee.

STATEMENT OF ANDREW LEE, EXECUTIVE DIRECTOR, THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, CAMBRIDGE, MA

Mr. LEE. Good morning, Mr. Chairman and Mr. Vice Chairman. Thank you for the opportunity to be here with you today. My name is Andrew Lee. My Seneca name is Ono-dah-geyh. I have the pleasure of serving as the executive director of the Harvard Project on American Indian Economic Development, which is housed at the John F. Kennedy School of Government at Harvard University.

For the past 15 years, the Harvard project has been working to understand the conditions under which sustained, self-determined social and economic development is achieved on American Indian reservations.

Collaborating with the Udall Center for Studies in Public Policy and the Native Nations Institute, both at the University of Arizona, our activities include research, advisory services, and executive education for tribal leadership.

Additionally, the Harvard Project administers Honoring Nations, a national awards program that identifies, celebrates, and shares outstanding examples of good governance.

Mr. Chairman, I believe the most ambitious challenge facing the Indian country today can be posed in a single question: How can tribes build and sustain healthy, prosperous Indian nations?

Certainly there are no easy answers, but the Harvard Project's research points out very clearly that successful Indian nations assert the right to govern themselves and exercise that right effectively by building capable and culturally appropriate institutions of self-governance.

Governance goes a long way toward explaining why some tribes are able to break poverty, dependency and their related social ills while other languish. Fortunately, a growing number of tribal success stories are emerging from Indian country.

As director of Honoring Nations, I have witnessed the astonishing success that tribes achieve when they put themselves in the

driver's seat for decisionmaking. I have been inspired by those tribes that stop insisting others are responsible for solving their problems and instead craft sovereign solutions.

I have seen how program success hinges on such attributes as accountability, performance-based tracking and institutionalization. In sum, Honoring Nations' 32 award-winning programs give us many reasons to be optimistic about the future of Indian country.

Now, in discussing economic development specifically, the importance of tribal governance cannot be overstated. Let me explain. In our work at the Harvard Project, we often encounter two different approaches to economic development. The first is a "planning and projects" approach, grounded in the idea that economic development is about getting the next big Federal grant or picking the one winning project that will magically solve the reservation's economic problems.

This is approach is destructive and shortsighted. It encourages tribes to become expert grant-seekers. It engenders institutional dependency whereby tribal governments become mere appendages of the Federal apparatus.

And history demonstrates that this approach produces economic development failures.

The second approach is a "nation building" approach. Nation building tribes recognize that economic development is first and foremost a political challenge and that the task is to create an environment where businesses and people can flourish. These tribes displace the role of Federal agencies, focus on the exercise of sovereignty and create capable institutions of self-governance.

Critically, these nation-building tribes are the ones that are breaking away from the pack economically, socially, politically and culturally.

So what institutional attributes characterize nation building and serve as the underpinnings for economic development? Our research points to at least five. First, tribes must have stable institutions and policies. The experience of the developing world demonstrates that unstable institutional environments fail to attract investment both within and outside the nation. The same holds true for Indian country.

Second, tribes need to establish fair and effective dispute resolution mechanisms. We find that the unemployment rate among tribes with independent judicial systems is on average five percentage points lower than those tribes that don't have independent judiciaries. Why? Investors tend to look for court systems that will give them a fair shake. They tend to shy away from places where court decisions are arbitrary or the courts are controlled directly by politicians.

Third, economically successful tribes tend to have a clear separation of business and politics. Tribal enterprises that are formally insulated from political interference are four times as likely to be profitable from those that are not.

Fourth, tribes must have capable bureaucracies. Contracting and compacting place a premium on efficient bureaucracies that, at the most basic level, can get things done.

Finally, successful economies in Indian country stand on the shoulders of culturally appropriate governing institutions. It is no

coincidence that tribes functioning under essentially foreign governing systems have a long history of economic failure. The task for tribes is to equip themselves with the institutional tools that fit their unique societies.

To conclude, our research, coupled with the lessons taught by our Honoring Nations winners, suggests that the Federal Government has a role in fostering economic development on Indian reservation. Of primary importance, self-determination should remain the cornerstone of Federal Indian policy. It is the only policy in over a century that has brought improvement to the material health of Indian country.

To withdraw from self-determination would not only reverse the successes of the past 30 years, but it would ultimately burden the Federal Government and America at large.

Moving forward, we urge the Government to expand opportunities for tribes to control programs through compacting and contracting, and fully break away from the "planning and projects" mentality by supporting institutional capacity building for tribal governments.

If there is one thing I would stress, Mr. Chairman, and Mr. Vice Chairman, it is that governance matters and self-governance works.

Thank you for the opportunity to be here today.

[Prepared statement of Mr. Lee appears in appendix.]

Senator CAMPBELL. Mr. Reynolds, why don't you go ahead? I have some questions of Mr. Lee. I will hold them until you are finished.

STATEMENT OF JERRY REYNOLDS, ASSOCIATE DIRECTOR OF INFORMATIONAL SERVICES, FIRST NATIONS DEVELOPMENT INSTITUTE, FREDERICKSBURG, VA

Mr. REYNOLDS. Very well. Thank you, Senator. Greetings, Mr. Chairman and Mr. Vice Chairman. Members of the committee and staff: My name is Jerry Reynolds. I am with First Nations Development Institute. For the second time before the committee, I think, I am pinch hitting for our president, Rebecca Adamson and vice president, Sherry Salway Black, who are engaged in other First Nations obligations.

We are pleased and privileged to take part. We know how hard you work and how hard you try. We take note of your successes and all that you do. Please include us if we can help you in the important work that you do.

We felt that the contribution that we could make today was to emphasize the role of philanthropic, nonprofit activity on good governance and economic development in Indian country. I don't think I have to tell anyone here that the demands on tribal government often exceed the demands on other forms of government.

I was a reporter at Indian Country Today from 1988 to 1993. I would often go over to talk with the late, lamented Alex Lunderman, Sr., chairman of the Rosebud Sioux Tribe. In the course of 1 hour, he might have people coming in to help him with commodities or women, infant, and children benefits. He might give someone some money. He might be on the phone with a congress-

man. He might be making a decision about the tribe's economic future.

So, that was a first-hand lesson on the enormous demands on tribal governments and tribal leaders. I think everyone here is well aware, too, that those demands are increasing between Federal devolution and the rising in youth population on reservations.

I had the opportunity to be in Seattle at the beginning of April at the Wisdom of the Give Away Conference that First Nations held. It was on Native American philanthropy. The Umatillas have been mentioned.

At that meeting, Les Minthorn, a tribal councilman with the Confederated Tribes of Umatilla Indians said something I think is very worth noting. He said that as the demands increase on tribal governments, whether you can fulfill those demands or not, you need to deal with them one way or another.

Well, First Nations has teamed up with the National Indian Gaming Association for the first, we believe, national survey of Indian gaming nation charitable giving. It is in a late draft stage and I will submit it to the record when it is in final form or if the record is not open, I will get it to your staff.

Senator CAMPBELL. That will be fine.

Mr. REYNOLDS. Among the findings that I know will not change are that a majority of Indian gaming nations make charitable contributions without a formalized process or structure and that the majority of recipients of tribal contributions are non-Indian nonprofit organizations. We believe this reflects the limited number of native nonprofit organizations operating within some Native American communities

In conclusion, I think that I would simply like to emphasize the role of nonprofit intermediaries, native nonprofit intermediaries and their potential role in stabilizing governments and providing for economic development by taking away some of the demands that are made on tribal governments. They can meet some of those demands.

In fact, among the many outstanding case studies that the Harvard Native American Project has put together, and you can read about them in the book that is back on the mantle, in many, many cases you will find that it is nonprofits that are working with tribal governments and other organizations, State and Federal agencies and helping to facilitate this economic development.

I would mention in particular the Yukana Development Corporation in Alaska where actually the tribe's willingness to create a corporation enabled the tribal government to concentrate on politics while others concentrated on business. This is the kind of process that nonprofits and tribal government created, governmental entities—I won't get into all the details of tax law at this point in the day.

We know that these considerations are often not noted. They seem to have a little bit of a low profile when we discuss economic development. So, we felt that our role should be to emphasize what nonprofits can do and their value to good governance, stability of governance and economic development.

I will be very happy to answer any questions. As I say, I will fill out the record when this survey becomes final.

Senator CAMPBELL. Thank you.

Let me start by telling you, Mr. Lee, that I have briefly read your testimony. I have to tell you, it is terrific testimony. I have always been very impressed with the Harvard Project. I guess it is because you share my philosophy about how to make things better in Indian country.

I have never believed that the way you help make Indian country better is to make them more dependent on the Federal Government.

You mentioned in your testimony that some people have become expert grant seekers. There is no question about it. There is a keen competition about getting grant money. To me it flies in the face of sovereignty. How can a nation dependent on another nation and still declare itself sovereign?

We have the problem, of course, of fitting that into the trust responsibility that we are obliged to provide the tribes. So, we have to find a balance, you know that. But there is no doubt that just depending on grants for jobs, we have something backward.

You know, in the free enterprise system, it seems to me what you do is provide a service. You provide a product and then you compete out there and you get the thing sold or you do whatever you have to do. That provides jobs.

But in some conditions with some tribes, the way to create the jobs is to get a grant and that grant provides the jobs for the duration of that grant. I mean you have explained that very carefully. It is not very far-sighted, as I think your testimony indicates.

It seems to me as a Federal Government, what we need to do is help provide the conditions for growth. The tribes can flourish in a democratic market-based system. I know they can do it. The places where they have had some successes, they have proven over and over they can do it if they are given the opportunity to do it.

So, it is really a tough question, but one of the things that makes this tough is that we have an institutionalized bureaucracy that is afraid of letting tribes be too independent. You know that. I don't mean to say it to our new Assistant Secretary, but you know, we have known that for years that in some cases the agencies that are authorized and empowered to help Indians become more independent in fact put some roadblocks in there because they worry about the loss or authority or turf or jobs or whatever the reason is. We have to get away from that mentality, too, if we are truly going to let tribes be free.

I just wanted to tell you that I don't really have any questions. I want to submit some in writing to both of you. But that testimony really hits the nail on the head. Unfortunately, in some circles it probably offends some people because somebody probably could misconstrue that to mean, "Do you mean you are going to pull the rug out from under the tribes?"

It is not that at all. We have to have a new way of thinking and get away from this mindset that somehow government has all the answers. Most tribes don't want the government to have the answers to their problems. They want to have the answers to their problems.

We have to help create conditions so that tribes cannot only define the problems, but find solutions and give them the opportunities to be able to do it.

Senator Inouye, do you have any questions or comments before we close down?

The CHAIRMAN. Thank you. I would like to join you in commending Mr. Lee for his testimony. I have always maintained, especially in the last 15 years or so, after serving on this community for some time, that the best laws are laws made my Indians in Indian country for Indians, because all to often, well-meaning non-Indians living in Washington, living in air-conditioned homes, not really knowing the conditions in Indian country, draft laws that do not serve Indian country well.

So, your statement is right on target. However, as you indicated, if there are to be successful governments, there must be an environment that would be conducive to success. When one looks at some of the conditions in Indian country, you see conditions that are just horrendous, conditions which would be unacceptable, even in Third World countries.

Having said that, many of those who want to do business with Indian country have repeatedly suggested that it would help if Indian nations had stable governments. They frequently cite one example. The turnover is too high. Every year there is a change of government.

Do you have any suggestions at to what can be done? I realize that Indian governments have to be relevant to their conditions. For example, there is a tribe in New Mexico where families take turns in governing.

Other than that, do you have any suggestions?

Mr. LEE. I am very glad you asked that question, Mr. Chairman. Let me suggest that the problem has less to do with turnover in tribal government as it does with inconsistent policies or institutions that change rapidly.

The problem is not necessarily the politicians themselves and their turnover, but the institutions. We work with a number of the Pueblos in New Mexico. They have rapid turnover. Some of those Pueblos, like the Cochiti Pueblo, Pueblo of Pojoaque, and many other Pueblos have elections every year.

What they have there, in the ones that are economically successful, is stability in institutions. The policies don't change from administration to administration. So, I think the appropriate way to frame this issue is stable institutions, rather than turnover in government.

That said, I think there are a number of things that tribes should be thinking about. I think Mr. Reynolds has it exactly right. The civil society sector should be holding tribal governments accountable.

What the Federal Government can do, I think, is change the incentive structure. If it is true that many tribal governments are experts in the grantsmanship game, then their incentive is to perform according to how the Federal Government wants them to perform rather than how their citizens demand that they perform.

I think shifting around that incentive structure will have a tremendous difference. The implications for policy are that block

grants might be the appropriate way to go. I very much see devolution as providing good opportunities if it is done properly.

Another way the Federal Government can help in this regard, is to have performance-based grants rather than having a checklist of boxes that a tribe must go through before a grant is made. The Federal Government might consider doing midstream and post-investment appraisals.

Those kinds of things shift the accountability to the people and the tribal governments, and I think, with more accountability, we will eventually see less turnover and greater stability in the vary institutions that we are talking about today.

The CHAIRMAN. Mr. Reynolds, you submitted a couple of articles that speak of section 7871 of the Internal Revenue Code.

Mr. REYNOLDS. Correct.

The CHAIRMAN. What are some of the benefits that Indian country can derive from the application of that section?

Mr. REYNOLDS. Yes, thank you, Senator. The section 7871 determination is for tribal government entities. Often people say it is nonprofits, but that is a little tricky terminology. It is for tribal governmental entities. It assures grant makers that the grant they made counts toward their payout. In other words, a simple way to say it is that it is tax deductible.

Tribes have the benefit of not having to file with the State Secretary of State in their State if they get a section 7871 determination. This is helpful because if the tribe ever wants to change the charter of that organization, it will not risk running into some problem within the State where they maybe don't want to see that charter changed for various reasons. They will just be able to do it. They won't have to answer to that Secretary of State.

In other words, they are not under the oversight of State government. They answer to Federal law. So, we consider it as an extension of sovereignty to do that.

They also have much less of a compliance burden because they do not have to file Form 1023 initially or Form 990 every year thereafter, reporting on their activities to the State. Now, we always advise that because compliance and reporting is the comfort zone for grant makers and philanthropic community as a whole, shall we say, we always advise that tribes should acknowledge donations and report on them publicly, maybe in an annual report.

However, it is quite an advantage in terms of the compliance burden not to have to constantly report to the State. So, those are two of the major advantages that tribes can realize from section 7871 for their government entities.

The CHAIRMAN. If the Navajo Nation decided to use section 7871 and set aside a large parcel of land within their reservation borders and this section 7871 organization leased this property to a hotel operation to conduct hotel business, would the terms of the contract be subject to State scrutiny or approval or disapproval?

Mr. REYNOLDS. That is a fascinating question. I think we are getting into Atkinson here, maybe. It is fascinating. I am not normally known for holding back when I can plunge over the verge. I am tempted to do so here. I don't know the exact answer to that, but I think the possible answer is that there are real possibilities there.

I think the tribes should explore those possibilities. I guess part of what we hope to accomplish today is to urge the committee and the Congress at large to help them explore those. I think it might make a good topic for your conversations with NCAI.

We would be very happy at First Nations to provide you references to the tax attorneys that we have used who could give you truly reliable information. I am a little bit worried about myself there. I know some, but not enough.

The CHAIRMAN. We will be calling upon you, sir.

Mr. REYNOLDS. I hope so. I just can't predict this Supreme Court, Senator.

The CHAIRMAN. If I may, I would like to submit a few questions to Mr. Lee and Mr. Reynolds.

Senator CAMPBELL. Please do.

The CHAIRMAN. Thank you very much.

Mr. Secretary, you have established a new record and a new standard, sir.

Mr. MCCALEB. After you gave me that "atta boy," I had to come back.

The CHAIRMAN. Thank you very much.

Senator CAMPBELL. With that we will keep the hearing record open for 2 weeks. If anyone has additional things they would like to comment on to be included in the record, do so in the next 2 weeks.

We thank all the witnesses.

The hearing is adjourned.

[Whereupon, at 11:38 a.m. the committee adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The committee meets this morning to receive testimony on the governmental practices that foster the potential for economic development in Indian country.

I am pleased to know that the academic research conducted by the Harvard University Project on Economic Development has documented that the fundamental cornerstone of good governance is sovereignty.

Without sovereignty, in all likelihood, Indian people would have long ago been assimilated into the dominant society and would no longer have any lands or communities that you have made your own. Your children would not know their culture, their traditions, their language or the great contributions their ancestors have made to America.

All of this would have been wiped out over time, because American law draws a sharp distinction between those who have a government-to-government relationship with the United States and those people who are defined by reference to their race or ethnicity.

Although there are still many Americans who don't seem to understand this distinction. That which makes the indigenous, native people of this country unique.

The members of this committee do understand this most fundamental of all principles, and we know that it is on this basis that the treaties with Indian nations were entered into, and that it is on this basis that the Congress has, for over 200 years, enacted legislation to address conditions in Indian country.

But when we speak of good governance, we must be much more careful that we are not calling upon Indian governments to be a mirror reflection of other governments.

As the Navajo Nation Supreme Court expresses so effectively, your traditional laws have governed the relations among people in your communities for hundreds of years before this country was ever founded. You have customs and mores and ways of resolving disputes that have proven effective over time, and have stood the test of time. So the dominant society must not rush to judgment if your governmental mechanisms may differ a little or even a lot from those they are accustomed.

Having said that, I believe the Harvard Project has tried to examine those governance practices that are the most effective from the vantage point of what works in Indian communities because those practices have the greatest degree of acceptance from the citizens of the tribal government—and thereby, the consent of the governed.

Indian nations that are strong and healthy will be those in the best position to shape the future of Indian country. Those of us on this committee who are dedicated to your cause want to do everything we can to assist you in building and maintaining governance structures that will serve your children and your grandchildren well.

PREPARED STATEMENT OF NEAL MCCALEB, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Good morning, Mr. Chairman and members of the committee. I want to thank you for the opportunity to appear before you today to speak about tribal government practices and how that influences economic development in Indian country.

The development of stable and responsive tribal governments, with a sound strategy for and commitment to economic growth, is a prerequisite for prosperity and economic opportunity in Indian country.

There are many contributing elements to economic success including access to market opportunities, access to capital, natural resources, human resources, governing institutions and tribal culture. There have been tribal successes where there was a lack of natural resources, minimally skilled human resources and even poor access to markets. These successes have been in spite of these economic liabilities and have been accomplished by determined tribal leadership building stable and effective sovereign governmental institutions.

The policies contained in the Self-Determination and Self-Governance Acts have been the seed bed of growth for sovereignty and the development of strong and effective tribal governments that are essential for sustainable economies.

Even now, tribes are asserting their self-governance influence through the Economic Development Subcommittee of the Bureau of Indian Affairs' [BIA] Tribal Budget Advisory Committee by developing strategies on how the BIA and other Federal agencies can be more effective in encouraging prosperity and economic parity for American Indian tribes within these United States.

Conversely, it requires a viable and vigorous economy to provide sovereign governments with the tax base to pay for the essential infrastructure and services required by their constituents and businesses.

With that in mind, I would like to talk briefly about some of the successful enterprises that exist in Indian country and their vision in making things happen. One of the more notable examples is the Mississippi Band of Choctaw Indians [MBCI]. MBCI was federally recognized in 1945. By the late 1960's, tribal leaders were unimpressed with their improvement, despite over 15 years of effort by Federal employees sent to help them. MBCI remained the poorest tribe in the poorest county in the poorest State. Tribal leaders took responsibility and initiated projects designed to create jobs for MBCI members. The first enterprise for the tribe was Chahta Development, a construction company that built houses under a low-income housing program for a small profit while also training and employing tribal members in a building trades skill. From this modest beginning, the tribe began tackling other ventures, in some cases seeking and obtaining Federal assistance through the Indian Finance Act. MBCI is now a major economic engine in northeast rural Mississippi, providing a total direct and indirect impact from MBCI and its affiliate companies of 12,112 jobs, $173M in wages, $16.7M in taxes and $9.1M in rent payments. Currently, the tribe is engaged in the development of its own natural gas fired electric generating plant. Williams Energy is conducting a feasibility study, and based on the results, construction could begin in 6–8 months.

Another success story is told by the Confederated Tribes of the Umatilla Indian Reservation, located in rural northeast Oregon. Their economy was based on natural resources, primarily fishing, grain and timber. Today, the tribe has diversified into commercial developments such as a trailer court, a grain elevator, the Wildhorse Casino, a hotel, an RV park, a golf course, a solid waste transfer station and the Tamastslikt Cultural Institute. The tribe is now the second largest employer [1,100] in Umatilla County, following only the State of Oregon. Their operating budget has increased from $7,559,950 in January 1992 to $94,157,875 in January 2001.

The Southern Ute Tribe, located in rural southwestern Colorado, provides another model of economic success. That tribe has taken control of its own oil and gas production. In 1992, the tribe established a tribal production corporation [Red Willow Cooperation], and in 1994 it acquired a majority interest in a gathering pipeline company [Red Cedar]. In addition, the tribe has expanded by investing in other oil and gas projects in the west, and is investing its energy fuels revenues into other commercial enterprises.

Using knowledge gained from managing and operating it's own reservation companies, the tribe has acquired production properties in Texas that produce 20M cubic feet of gas per day. It has invested in an offshore well in the Gulf of Mexico, and has entered into a partnership with the Ute Indian Tribe of the Unitah and Ouray Indian Reservation and the Dominion Oil Company to explore and develop conventional oil and gas from the former Naval Oil Shale Reserve No. 2. The tribe is also evaluating the purchase of shopping malls and a drug store chain in Texas and Arizona.

The tribe does not release financial information on their enterprises, but it's reported that the income to the tribe is in excess of $250M per year. The Wall Street rating houses of Fitch and Standards & Poor recently gave the tribe a triple A rating on the tribe's development bonds.

The role of the Federal Government should be to remove obstacles to economic development [especially those created by Federal rules and actions], create incentives, and provide technical, financial and other assistance to tribes, tribal members and public and private sector businesses willing to promote economic activities in Indian country.

The initial priority is for the Federal Government to come together with tribes to develop a straightforward approach on how we all can work toward the integration of program services and coordinate activities in the pursuit of economic parity for Indian country. Congress has provided us the mandate and authority under the Indian Employment, Training and Related Services Demonstration Act of 1992 [Public Law l02–477], as amended; the Native American Business Development Trade Promotion and Tourism Act of 2000 [Public Law 106–464]; and the Indian Tribal Regulatory Reform and Business Development Act [Public Law 106–477].

The goal of the subcommittee, I mentioned earlier, is to develop a strategy to coordinate and integrate all available resources from the tribal, Federal, private and public sectors into one comprehensive approach that will develop businesses, enterprises, and tribal government services and provide meaningful living wage employment in Indian country. The subcommittee has identified 10 major tasks to be accomplished. Each of the tasks is to be examined by a sub-subcommittee for past studies and recommendations, current working models, available resources, legislative and regulatory authorities, budget and resource coordination, and integration. These sub-subcommittees are named for the general subject matter of their inquiries, as follows: [1] Tribal Business Development Corporations and Tribal Venture Capital Funds; [2] Taxation & Incentives; [3] Tribal Economic Development Models; [4] Indian Finance Act; [5] Tribal Courts; [6] Federal Set Aside Procurement; [7] Technical Assistance Centers; [8] Natural Resources & Energy Development; [9] Tribal Infrastructure; and [10] Employment Development.

The first working meeting of the subgroup is being held this week. The? first action was to contact representatives from all Federal programs [HUD, SBA, ANA, Census, EPA, Energy, et cetera] that provide economic development assistance or statistical information to tribes and invite them to participate in the effort. The subcommittee is planning on providing its initial findings and recommendations to the full committee and the participating tribes in October.

BIA's Office of Economic Development is committed to economic development that enhances the lives of Indians and stabilizes the future of Indian tribes. In the more successful tribes and Indian business enterprises around the country, the BIA has observed some common elements. BIA has noted some common themes where Indian economic development is lacking, and through study and consultation with tribal leaders, believes that a few initiatives would significantly improve the current disparity between the few American Indian tribes and businesses that are doing well, and those that are not.

Ultimately, the relative economic success and vitality of any nation is a public—private effort that combines the resolve of the government policymakers and the imagination and appetite for risk of entrepreneurs to create a healthy environment for enterprise and respect for each others unique point of view. Government will always be focused on the "common good" while the entrepreneur has to be driven by an anticipation of profits as a reward for it's risk.

Thank you, again, for the opportunity to speak on a subject that is near and dear to my heart. I will be happy to answer any questions you may have.

NATIONAL CONGRESS OF AMERICAN INDIANS

Testimony to the Senate Committee on Indian Affairs
Economic Development, Good Governance, and Capacity Building
from
Susan Masten
Chairwoman, Yurok Tribe
President, National Congress of American Indians

July 18, 2001

Good morning Chairman Inouye, Vice Chairman Campbell, and distinguished Committee Members. In particular, I'd like to welcome Senator Cantwell as a new member of the Senate Committee on Indian Affairs and say that I'm thankful for the dedication to Indian Country that she has shown with her interest in serving as a member of this committee.

My name is Susan Masten, and I am the President of the National Congress of American Indians (NCAI), the oldest and largest Tribal organization in the U.S., and the Chair of the Yurok Tribe. I am here today to present testimony on the relationship between Tribal governance and economic development on Indian reservations. Thank you for affording me the opportunity to represent our member-nations and their concerns on this issue.

As you know, economic development is perhaps the leading concern in Indian Country. Almost all of the well-documented social problems in Indian Country, including issues involving health care, education, housing, substance abuse, suicide, teen pregnancies, and law enforcement, are related to the overwhelming poverty that is felt throughout most Indian reservations. Decreasing unemployment, eliminating homelessness, decreasing dependence on welfare, and increasing education are all linked to building economic activity within Indian communities.

We all know that Tribes face many obstacles to economic development, including lack of infrastructure, poor access to training and technical assistance, shortage of equitable financing mechanisms, remote locations, and dual taxation, among other things. Many Tribes have found ways to remedy these problems, and Indian Country has developed a range of creative means to deal with barriers to economic development. However, some of the problems are too large to be addressed by ingenuity alone–the incomparable structural and legal obstacles that Tribes face are simply too large. NCAI is poised to make the issue of economic development in Indian communities paramount in our work to promote and defend the concerns of Indian people. Following that commit-ment to offer Tribes some support in their ongoing efforts, I will focus my testimony today on the policy changes that we believe Congress should consider in order to reduce the barriers that face Tribal governments in their pursuit of economic development.

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Federal Policies Supporting Tribal Governance Lead to Economic Development

The distinguished leaders and researchers testifying before the Committee today have repeatedly and convincingly demonstrated that economic development in Indian Country is directly tied to strong, independent and culturally appropriate Tribal governmental structures. However, the authority of Tribal governments is tied into a complex relationship between inherent Tribal sovereignty, the federal power in Indian affairs, the federal trust responsibility, and state government authority. It is in this area that the role of the U.S. Congress is most critical. Congress has the authority to either support Tribal authority or to impede it, and all too often Tribal government authority is limited in ways that impede the Tribal government's ability to effectively contribute to economic development. It is the creation and passage of sound federal Indian policy, in a broad range of issue areas, that allows Tribes to work within their own communities to enact change.

There have been many examples of positive and progressive federal Indian policies. Perhaps the most notable is the policy of Tribal Self-Determination and the Indian Self-Determination and Education Assistance Act (ISDEA) of 1975 (Public Law 93-638) which authorizes Indian Tribes to manage and administer programs that had previously been the province of the federal government. With the passage of the ISDEA, Tribes began to contract programs from the government, run them on the Tribal level, and more effectively apply available monies.

The newfound aspects of self-determination that have accompanied the enactment of policy to increase Tribes' ability to govern their own people have been very successful throughout Indian Country. Not only does the shift of responsibilities from the agencies to the Tribes lessen the burden on the federal government, but it invests the Tribes and engages the Tribal government in good governance practices that result in better services for Tribal members. Through self-determination and self-governance, Tribes have been much better able to respond to the needs of their people and prioritize their funding in a way that makes sense for their own needs, rather than being subject to a "one size fits all" formula. But perhaps even more importantly, the self-determination and self-governance policies have put elected Tribal leaders and Tribal staff in a position to gain experience in management, make their own decisions, and be accountable to their own people through their own governmental procedures. The benefits that have accrued to Tribes in building their capacity for governance have been of enormous importance and have contributed heavily to the general rise in Tribal government capacity and viability over the last three decades.

While self-determination has been a successful form of decentralization in matters involving the Bureau of Indian Affairs and the Indian Health Service, there is still much to be done. For example, we are concerned that recent actions taken by the Department of Interior in the context of its trust reform efforts may effectively result in a departure from the policy of self-determination. The Department is seeking to centralize management and control over trust property and trust records in federal hands far away from the Tribal governments, limiting Tribes' ability to access information regarding their own land and

resources. In the absence of consultation with Tribes, the Department is pursuing a path that fails to address the real issues of accounting, collections, and improved procedures that are key to the success of this reform effort.

My own view is that the Department is headed in a backward direction in this effort. Trust reform will never truly take place until Tribal self-determination is made the centerpiece of the reform effort. Tribes own four-fifths of all trust property, and so it is the Tribes that have the greatest interest in ensuring that there is proper accounting and management. But astonishingly, BIA staff are telling Tribal leadership that the agency does not need to consult with Tribes on the BIA reorganization and management efforts in trust reform because these are "internal matters." We are deeply concerned that the Bureau of Indian Affairs has taken this stance on an issue that is so central to the mission of the Agency and the sovereignty and economic development of the Tribes.

NCAI would welcome the opportunity to assist in facilitating the government-to-government relationship between the Department of Interior and the tribes on this critical issue, and also seek the Committee's continued guidance to ensure that the BIA and the Special Trustee proceed with full respect for Tribal self-determination in every area of trust reform.

But NCAI is also greatly concerned about federal policies that are outside the scope of the Bureau of Indian Affairs and the Indian Health Service. There are a great many areas of general federal policy that impact the populace at large, including commerce, agriculture, taxation, human services, education, energy, transportation, and environmental protection, where the Tribal governments also have a unique and important role. In general, there has been a trend for the federal government to "decentralize" or "devolve" many federal authorities to state and local governments. This shifting of power and authority away from the federal government is intended to "bring government closer to the people," and make government more responsive to local needs. In recent years, social service and support programs as well as many environmental programs have been increasingly devolved from the federal government to states, and to differing degrees, to Tribal governments. This trend is likely to continue across a broad range of federal programs.

Unfortunately, the trend toward devolution of federal programs to states has often negatively affected Tribal governments. Depending on the mechanism through which programs are devolved (generally through federal law or regulations), Tribal governments may or may not be recognized as units of government with authority to directly receive the resources or administer the specific program. Although some authorizing laws--like many environmental laws and the welfare reform law--recognize Tribal governments as capable program administrators, other federal laws do not. For instance, sections of the Social Security Act authorize only state governments to administer Medicaid, Medicare and Children's Health Insurance Programs.

Even when Tribes are authorized to administer programs directly similar to state

programs, Tribes often are afforded proportionally fewer resources and subjected to greater oversight than the states. The welfare reform law of 1996 authorized Tribes to administer their own welfare programs through the submission of a Tribal plan. Plans must be approved by the U.S. Department of Health and Human Services. State welfare program plans require no such federal approval. Additionally, states are required to contribute a "state match" to their federal grant and are eligible for performance bonuses and supplemental grants, for which Tribes are not eligible. In this regard, many federal devolutionary policies are completely inconsistent with the sovereign status of Tribal governments and their capacities to carry out governmental programs.

Devolutionary policies also raise questions about diminishment of the federal treaty and trust responsibility to Tribes and a reduction of federal responsiveness to Tribal needs. State governments do not have these same legal obligations, and it is a great concern that states will simply overlook Tribal interests in their administration of formerly federal programs. To the degree that state governments in turn devolve programs to county governments or contract with private agencies, federal treaty and trust responsibility are even farther removed from the entities delivering programs and services to Tribal members.

It is NCAI's view that the problem is not with devolution per se, but rather that federal policies have inadequately protected Tribal concerns and that state governments are better organized and have more resources to influence federal policy-making. We also note that when state governments receive new grants of unfettered federal authority, they most often do not regard Tribal governments in terms of a "government-to-government" partnership, but view Tribes as merely part of the service population or as a local interest group.

If the Congress is to fulfill its responsibility to Indian Tribes by supporting Tribal self-government, it must do a better job of creating federal policies in a broad range of issue areas that support Tribal government authority. Increased authority alone is not particularly advantageous, however. There must also be a clear definition of the roles of the federal government, the state government, and the Tribal government. Not only must the governmental roles be defined, but the respect for Tribal self-government must be preserved. Tribes, for the most part, desire that both the federal and the state governments give greater consideration to Tribal self-government and unique Tribal needs as devolved programs are developed and implemented. Tribes are quick to rally around types of devolution that provide increased authority and flexibility to Tribes in the context of a respectful government-to-government relationship.

All too often, Tribes find themselves in a reactive mode in the development of federal policy because we do not have the same infrastructure or resources that states do for participating in and responding quickly to changes in federal policy. One way to solve this problem is to devote more organizing and resources toward the implementation of clearly

defined goals. In other words, I think it would helpful to begin developing a framework for "principled devolution" that could be applied across a broad range of federal policy.

The Structure of a Sound Policy

The devolution of federal programs to the Tribes is one of the surest ways to engage Tribes in capacity building and economic development. With increased management and administration opportunities, Tribes build the capacity that will allow them to construct long-term economic development projects. Many Tribes have used grants and loans from the federal government to address these difficulties, while others have used partnerships with private entities to retool for change and finance initial costs. It is important for policy to create a business-friendly environment in Indian Country, as such a working climate allows private investment in Indian Country, which results in increased economic development for Tribes and the nation as a whole.

It is NCAI's belief that federal policies, as they are developed, need baseline standards to follow in order to be successful in developing healthy government-to-government relationships and promote self-determination and economic development in Indian Country. NCAI believes that the following principles may serve as a starting point for the development of such sound federal policies:

- As a basic exercise of Tribal sovereignty, Tribal governments should have the option to control any programs, functions, services, or activities that are intended to benefit Tribes and Tribal service populations, in a manner that is similar to the level of authority and control of a state government.

- Federal policy should preempt the application of any state law that imposes a dual burden to comply with both Tribal law and state law within the boundaries of Indian Country. Duplicative state regulation or taxation will drive economic development away from Indian lands.

- In situations where Tribal governments opt not to administer particular programs, functions, services, or activities, state or county governments or private contractors who administer the programs must consult with Tribes over the delivery of services to Tribal members. Level and range of service delivery to Tribal members must be equal to services provided in other parts of the state.

- States must be encouraged through federal policy to relate with Tribal governments on a "government-to-government" basis, and not merely on the same terms as private

contractors.

- Federal policies should encourage the use of negotiated agreements between Tribes and the federal government or state governments, so that each Tribe can address its unique needs. Federal standards must give Tribes enough leverage to reach a successful and enforceable agreement.

- Tribal governments should have a right to all documentation or studies held by state governments or other institutions that are relevant to sustainability, fairness, safety, etc.

- Tribal governments should have their own independent experts present at the table as needed during a negotiation and assessment process.

- Tribal governments must be provided with adequate technical and financial support for administration of programs.

- Policies should also specifically continue to protect federal treaty and trust responsibilities.

Infrastructure Development

In addition to the application of these ground rules to all future policies, the federal government should develop polices that include plans for infrastructure development. The creation and maintenance of a viable infrastructure is the first step Tribes must take to foster a positive business environment that is inviting to outside sources of investment as well as local entrepreneurs. As you know, the need for infrastructure development in Indian Country is staggering, and the funding of projects that build the foundation of future development should be a priority. Tribes are in need of projects that construct or upgrade their roads, water and sewer systems, utility systems and electrical grids, commercial codes, licensing programs, phone systems, and technological improvements. These basic systems and structures are necessary developments that hold up forward movement in all other areas when they are left undone. They are the first steps toward developing mature governance systems that give Tribes the ability to exercise their sovereignty.

Training and Technical Assistance

All too often, Indian nations are prohibited from receiving training and technical

assistance to conform to new federal statutes. While some appropriations have provisions for such measures, most are underfunded. This lack of funding directly affects the success of the programs in question. If a Tribe is not provided with the knowledge and expertise to administer a program, it is usually doomed to be unsuccessful. The funding shortfall in the Administration's budget not just for technical assistance, but for feasibility studies, business infrastructure, and research for legal code issues creates a gap that Indian Country is often unable to fill.

Technical assistance, while bringing stability to programs, can also address other important issues. For example, Empowerment Zone technical assistance is a great example of a successful process. During the course of the program, the technical assistance provided a grass roots structure to communities to talk about governance. Community members provided the much needed input to ensure stability within their own government, furthering the idea that good governance is a result of good policy.

Financial Resources

The premise of providing equity in opportunity to financial resources is also imperative for self-determination. Tribes often are left out of opportunities for obtaining bond financing and loan guarantee components. State and local governments have long enjoyed the authority under federal tax law to issue tax-exempt bonds to fund a variety of government-owned projects. Indian Nations, like their state and local counterparts, provide a wide range of public services to their citizens, which costs money. However, Tribal governments for the most part have been limited to borrowing money through privately placed debt offerings. This limited access to capital has proved to be a severe hindrance to the economic development and self-sufficiency efforts of Indian Tribal governments.

Under current law, Tribes may issue tax-exempt government bonds only for facilities used in the exercise of an essential governmental function. State and local governments are not put under this constraint. In removing the restriction, Tribal governments would be able to issue governmental bonds--just as state and local governments can--to any faction that complies with the private use restrictions applicable to all other governmental bonds.

Loan guarantee components are vital for the success of Tribal businesses. Many individuals do not have the collateral for fully-secured loans during the start-up period of a business. Thus, Indian Nations need a loan guarantee component for under-secured loans. According to the preliminary findings of a Reservation Assessment for the state of Montana, many respondents noted that they "need more small business loans from commercial banking institutions."

Economic development in Indian Country requires not only successful Tribal government businesses and economic development initiatives, but efforts to foster successful grassroots entrepreneurial efforts in Indian Country. The problem that most banking institutions face when dealing with Tribal members who reside on the reservation is the uncertainty of enforcement jurisdiction if the borrower defaults on the loan. Therefore, NCAI encourages and supports hearings and briefings to be arranged between Indian Nations and off-reservation commercial banks to work out this recurrent issue, as banks are reluctant to lend in this high-risk environment.

Long Term Project Development

Another problem that we have identified is the tendency for Tribes to jump from project to project in an attempt to secure funding. Tribes have to change their direction of travel each time a new project is authorized. Unfortunately, the projects that Tribes are already involved in are left to wilt, as there is little continuous funding for projects in Indian Country. This "project jumping" does not lend itself to good governance practices because Tribes are not able to build experience with the administration of programs, nor are they able to create any kind of institutional memory as it relates to program management.

A solution for this problem is to provide Indian Nations with long-term tools. Policy goals must be long-term in nature and funded adequately. A short-term repair is not effective for true economic growth, especially on Indian Reservations. Good governance is not dependent upon quick fixes. Rather, good governance is dependent upon good policy that promotes long-term solutions.

The application of these tenets, among others that will be uncovered in the policy consultation sessions that will occur before the drafting of legislation, create a secure environment for Tribal governance and investment. By enacting these policies, the government is not only fulfilling their trust and treaty responsibilities, but is also giving the Tribes some of the tools they need to build their own capacity to govern.

Comprehensive Strategies

It has been the experience of NCAI that the Tribes who are best able to address the issues of economic development in their own communities are the ones who have comprehensive strategies that incorporate all the resources that the Tribe has at its disposal. If the Tribe is able to use all of their supportive services along with their resources, they are more likely to succeed in development. We have encountered problems in Indian Country where Tribes have not been using the services and skills of their people in concert to create effective enterprises. Though some of these Tribes have been relatively successful in the

area of economic development, they have not created an integrated Tribal plan that engages all the key players in their communities.

One of the main ways that Tribes can address this problem is by promoting the entrepreneurial efforts of the Tribal members. Ensuring that economic development is spread throughout all public and private sectors of the Tribal economy and developing comprehensive strategies to capitalize upon the interests and strengths of community members is a key way to jump start economic development on Indian lands. By creating policies that will enable Tribes to use all of their resources together, the Committee also creates an environment that is good for development in general.

Effectiveness Evaluation

While it is good that the governmental agencies have programs that offer incentives for business or companies who subcontract with Tribes, these programs need to be evaluated for effectiveness. Tribes have voiced concern that programs such as the Department of Defense 5% Tribal incentive program lack clear goals to ensure that the Department markets and promotes the program in the same manner as other incentive programs, creating a feeling that only a very few tribes ultimately benefit. We recommend that the Committee commission evaluations of programs such as this to make sure they are proficient in serving the needs of Indian Country.

Implementing Existing Law

At the end of the 106th Congress, legislation was passed that had been introduced by Senator Campbell in an effort to address some of the barriers facing tribal governments in their economic development efforts. This important legislation, PL106-447, the Indian Tribal Regulatory Reform and Business Development Act, establishes a 21-member federal authority charged with the identification and removal of obstacles to investment, business development, and the creation of wealth in Indian communities. It is critical that this Commission be brought up and running and begin its work promptly to address the important task of removing unnecessary barriers to economic development in Indian Country.

PL106-464, the Native American Business Development, Trade Promotion, and Tourism Act of 2000, established an Office of Native American Business Development within the Department of Commerce to coordinate programs that provide economic development assistance on Indian lands. Follow-through is also needed toward implementing this important office.

Conclusion

Capacity-building is the first step towards good-governance. Only when Indian Tribes have the ability to administer their programs and manage the affairs of their own people will they be able to move forward on the path of self-determination. The issue of Tribal economic development is not only one of increased standard of living in Indian communities, but is a larger issue of sovereignty. Allowing Tribes to engage in economic development initiatives by enabling the expansion of Tribes' capacity to govern is directly linked to Tribal sovereignty and self-determination.

The establishment of clear policies that define the roles of federal, state, and Tribal governments, that give Tribes authority to self regulate, that develop infrastructure and human resources, eliminate disincentives to investments such as dual taxation, create programs that are designed for the long-term, direct resources to set a high standard of action, and that preserve the federal trust and treaty responsibilities is the most effective means by which the federal government can support good governance within Tribal nations.

There is a need to work with Indian communities to develop comprehensive policies and analyze existing programs. NCAI is always available to cultivate the government-to-government relationship between the federal government and Indian Tribes, and we are ready to facilitate the discussions that will need to take place in order to create effective Indian policies. NCAI is here to serve as a link between the Indian people and you, and we look forward to working with you soon to begin a dialogue with Indian Country.

I hope this committee finds our testimony helpful in their work to assist the Indian people of this Nation, and I thank you for the opportunity to testify this morning.

Statement of
M. Brian Cladoosby
Chairman
Swinomish Indian Tribal Community

Before the
Committee on Indian Affairs
United States Senate

July 18, 2001

Chairman Inouye, Senator Campbell, members of the Indian Affairs Committee, guests and staff, I am honored to have the opportunity to appear before you and share my thoughts on "Good Governance and Economic Development" in Indian Country. I would also like to take this opportunity to welcome Senator Cantwell to this Committee. We in Indian Country, especially those of us from the Northwest, look forward to working with her in her new capacity and thank her for her support thus far. If your Senate operates anything like the Swinomish Senate, I'm sure that the last thing you all needed today was another Committee meeting. Amidst your hectic schedules and probably conflicting Committee meetings, I appreciate the time and attention you have offered to this important topic.

My name is Brian Cladoosby and I am Chairman of the Swinomish Indian Tribal Community that numbers about 900 members and is located in northwest Washington State. My Tribal Community is composed of descendents of the Swinomish, Kikialus, Samish and Lower Skagit Tribes who lived in the Skagit River valley of Western Washington and along the coastline and islands around the river's mouth. The Swinomish are "fishing people." Our culture and economy has historically centered around the abundant natural resources of the area, including salmon, shellfish, and other marine life as well as upland resources such as cedar, berries, ducks, deer, elk, and other wildlife.

Our reservation, the Swinomish Indian Reservation, is located on the Southeast portion of Fidalgo Island and covers an area of a little over 7,000 acres of uplands with around 3,000 acres of tidelands. This reservation area, just a fraction of our ancestral lands, was promised in the 1855 Treaty of Point Elliot and set aside by Executive Order in 1873 as the homeland of the Swinomish people. My grandfather's grandfather signed that treaty in the belief that this homeland would be for Indians only because that's what the treaty said. He was a trusting person who believed that honorable men kept their word.

However, today, as a result of General Allotment Act of 1887, Indian land ownership has been reduced to just over half of the area of the reservation. Our "exclusive homeland" is now, also, home to more non-Indians than tribal members. You are all familiar with the devastating impacts of this ill-conceived legislation. Other tribal leaders have told you of the multiple problems created by the "checkerboarded" lands,

fractionated ownership of Indian allotments, and the jurisdictional conflicts generated by this failed strategy of assimilation. While you have heard these accounts of lost lands, unmanageable resources, and eroded sovereignty on many occasions, the Swinomish people have lived it on a daily basis. Over the years, the Swinomish people have been involved in a variety of conflicts and confrontations over fishing and hunting rights, criminal jurisdiction, taxation and gaming issues and, the regulation of reservation land use. Our inherent right to exert jurisdiction over the lands we reserved in our treaty is constantly being questioned and threatened.

Recognizing that your hearing today is about "Good Governance and Economic Development" and I'd like to turn my remarks to my Tribe's efforts to make the best of the challenging context in which we now live. In recent years, the Swinomish Tribe has viewed inter-governmental cooperation as an important vehicle for increasing Tribal self-determination and expanding our capacity for good governance. We truly believe that cooperation and communication go a lot further than confrontation and litigation. We have entered into a number of agreements with neighboring jurisdictions for the provision of essential public services such as:

- a public water supply agreement with the City of Anacortes and Skagit County Public Utility District,
- a wastewater treatment agreement with the Town of La Conner,
- police cross-deputization agreements with Skagit County,
- a first of its kind in-stream flow agreement with Skagit PUD and the City of Anacortes,
- a cooperative relationship between our drug and alcohol program and Skagit County's drug and alcohol program to respond to the needs of our clinical referrals,

to name but a few. We have a long history of working well with our neighbors and believe firmly that respectful cooperation and coordination with other governments are central to our expression of self-determination.

Like many of you, our Tribe spends countless hours in deliberations, negotiations and policy development to devise dynamic forms of conflict resolution. Perhaps slightly different than many of you, most of our work is focused on the complex and often contentious historic divisions existing between jurisdictional interests operating within or around the boundaries of the Swinomish Indian Reservation. One important outgrowth of these efforts has been the Swinomish Cooperative Land Use Program. The program provides a framework based on a Memorandum of Agreement between the Tribe and Skagit County for conducting permitting activities within the boundaries of the reservation and a forum for resolving conflicts that might arise during the process. Land use issues confront virtually every tribe that has been impacted by the Allotment Act and this program provides a potential model for resolving those issues through a collaborative and cooperative process. Our Cooperative Land Use Program received a " High Honors" award from the Honoring Nations Program administered by the Harvard Project on American Indian Economic Development.

We are grateful for the recognition of the Harvard Project. In addition to providing encouragement to other governments with whom we might negotiate future agreements, participating in the Honoring Nations program has given us the opportunity to learn about the great work being done by Indian communities all across the country. We are told that this MOA is a first of its kind for agreements between tribal and county governments in the United States. Whether it is the first of its kind or one of a proud few, we hope that it indicates a growing belief in the benefits of working together, rather than against each other.

Establishing a viable, self-sustaining reservation economy is a primary goal of our Tribe. Unresolved jurisdictional issues arising from complex land tenure patterns can be serious obstacles to economic development by deterring investment and limiting the Tribe's ability to achieve our development goals. These conflicts impede our Tribe's ability to use our land and natural resources effectively and in a manner that fully benefits our Tribal members, and indeed benefits all residents of our reservation Indian and non-Indian alike. Only when our sovereignty is supported by sustainable economic development can the goals of self-government be fully realized.

The Cooperative Land Use Program is still a "work in progress" with a long history and hopefully, with more effort and continued cooperation from Skagit County, a bright future. The work actually began in the mid-1980's when the Tribe and the County found themselves in the midst of jurisdictional conflict. Both governments were administering zoning, permitting and regulation enforcement programs that affected non-Indian-owned lands within the Reservation's boundaries. The resulting confusion over jurisdiction and allowable land use engendered skepticism, anti-Indian and anti-non-Indian sentiments, a litigious atmosphere and serious difficulty in attracting investment. Rather than litigating these jurisdictional issues, the Tribe and the County agreed in 1986 to attempt to resolve the conflict by embarking on a joint planning program. The philosophy guiding the effort was to overcome inconsistencies through a mutually-agreed land-use policy for the Reservation.

Assisted with funding from the Northwest Area Foundation and a facilitator from the Northwest Renewable Resources Center, representatives from the Tribe and the County began discussions on issues of mutual concern related to land use. We agreed that it would be mutually advantageous to avoid costly litigation by resolving differences under a formal government-to-government relationship. While the talks proceeded slowly, they proved useful. Ultimately, our governments were able to craft a series of agreements including a 1987 Memorandum of Understanding recording our commitment to work together on a comprehensive land use plan; a Draft Comprehensive Land Use Plan, created in 1990, which was the first comprehensive planning effort attempted by a tribe and a county; and a 1996 Memorandum of Agreement between the Swinomish Tribe and Skagit County, which delineates a set of procedures for administering the Comprehensive Land Use Plan. In particular, the MOA requires joint review of proposals, provides dispute resolution mechanisms, and affirms that cooperative problem solving is the preferred means of decision-making. A copy of the MOA is attached to the text of my comments. I will spare you a reading of the MOA in its

entirety at this juncture.

Where the Cooperative Land Use Program has succeeded, one of the fundamental reasons for the success of the program is that it has "institutionalized" a process of collaboration. That is, the formal institutional mechanisms it created such as MOUs, MOAs, advisory boards and jointly administered comprehensive plans, have served as the foundation for productive, on-going government-to-government relations. The contents of these agreements specifically emphasize the importance of regional cooperation and the mutual benefits and obligations that the signatory governments share. Elected officials, both tribal and non-tribal, may come and go, but we hope that the agreements we have made will live on for generations to come.

As I stated earlier, the Swinomish Cooperative Land Use Program is a "work in progress." As you all know, it is always far easier to unravel the hard work of making agreements than it is to weave the consensus needed to bring an agreement to life. I won't kid you. The process of living up to the agreement we struck with our friends in County government has not been easy. Many vocal critics would like to see us fail. Frankly, I think that it is fair to say that we have sometimes been more committed to seeing the agreement through than our partners have been. The County Commissioners occasionally receive pressure from discordant voices that seem to prefer conflict to cooperation. Nonetheless, both governments have kept the dialogue going. We keep trying and we are encouraged when our partners make efforts to find points of common interest. Reinforcement from you to the states and their subsidiaries that it is better to work with tribes than against them would go a long way toward ensuring the longevity of these relationships.

It has been my experience that when parties approach our tribal government with a commitment to negotiating in good faith, we more often than not ultimately reach agreements that benefit both of us. Whether the other party is a Federal agency, the State of Washington, a city, county or private individual, good intentions and mutual respect will, most of the time, help us to overcome our differences and find ways to work together. Where suspicion and fear lead to mis-trust, creative problem solving is stifled and we can find ourselves at loggerheads, litigating our way toward solutions neither party may like. While we will always vigorously defend our treaty rights, we prefer the path of seeking mutual understanding. We may not always agree, but someone once told me that if two people agree about everything, only one of them is thinking. We may not always agree, but through respectful negotiating we can learn from and about each other and may even find that we have more in common than what divides us.

The signs of the times are mixed, however. I would like to share one recent positive example in addition to the success of our program with Skagit County: several months ago the Bonneville Power Administration was preparing to run new underground power transmission lines from Fidalgo Island, where my reservation is located, to the nearby San Juan Islands. While doing initial exploratory excavations for the power lines, they discovered some human remains. The BPA immediately stopped work and within two hours contacted the two local tribes. Our cultural resource staff worked with BPA to

come up with an excavation plan that would ensure that the remains and any other objects or remains that might be impacted would be protected and that their project would get completed. During the course of the excavation, in addition to unearthing numerous artifacts, the archeological team hired by BPA discovered a house estimated to be 3,000 years old within feet of prior excavations and directly under where the new power line is to run. Because of the care that was taken in this excavation and the artifacts that it uncovered, we will all learn more about the life ways of my Coast Salish ancestors and a relationship between a Federal Agency and the tribes has been reinforced. I believe that everyone involved saw the benefits of a cooperative approach proven conclusively through this process.

Other signs are not so positive. Recent Supreme Court decisions seem out of step with the support we have received from Congress and in recent Executive Orders for tribal sovereignty and self-government. When courts question tribal regulatory authority within our reservations, they undermine the economic vitality and social development that has emerged from tribal self-government. In an era where we look to local control for the best decision-making for local communities, such decisions do not acknowledge that tribes are the best stewards of the resources located on their lands. Court decisions that raise doubt the viability of tribal sovereignty fan the flames of the anti-Indian minority that seeks to undo the gains our tribes have experienced by exercising the principles of self-determination and self-governance. We need the assistance of this Committee and the full Congress to take legislative action to the remedy the uncertainties from recent Court decisions and clarify its support for our inherent sovereignty. I look forward to working with you to ensure that the good governance we celebrate today will be strengthened and that the economic development, so long in coming to Indian Country, that good tribal governance is fostering will continue.

In closing, I thank you for your attention to this important issue. There are many pressing issues on which could usefully have spent this time. Tribes need more and better housing, adequate schools, improved health care, greater support for tribal courts, respect for our treaty rights and a host of other issues that I know have occupied your attention in the past and will likely return for another day. While it may seem far away as we talk about all these *issues*, the problems that are behind the issues are the real challenges faced by real Indian families, parents, teenagers, grandparents and toddlers. The lesson of today's hearing is that the key to confronting these challenges is a strong, vibrant tribal government, rooted in culture and adaptive to modern needs. I thank each and every one of you, Senators, staff and guests, for your attention and support. I also invite you to visit our reservation at any time so that we have the opportunity to share with you our tradition of hospitality. I wish you the best in all that you do.

The Grand Traverse Band of Ottawa and Chippewa Indians
2605 N. West Bayshore Drive • Suttons Bay, MI 49682 • (231) 271-3538

I am Ardith "Dodie" Chambers, the Treasurer of the Grand Traverse Band of Ottawa and Chippewa Indians of Peshabestown, Michigan. I have served our tribe all of my adult life. In 1978, I accompanied a group from our community to carry the petition for federal recognition to Washington, D.C. On May 27th, 1980, the Grand Traverse Band of Ottawa and Chippewa Indians became the first tribe in the United States to successfully petition for Federal Recognition. Shortly, thereafter, I became our first Tribal Chairwoman. I am a descendant of Chief Peshaba, who founded the village of Peshabestown in 1852 along with a group of Ottawas.

The Grand Traverse Band consists of 3682 members. Half of our members live in our 6 county service area.

Today I will speak on the issue of separation of power in our tribe's governing structure. Keep in mind as I testify that I am neither a tribal judge nor an attorney.

By a 376-47 vote, tribal members ratified our constitution on February 24th, 1988. The U.S. Secretary of the Interior, Donald P. Hodel approved the tribal constitution on March 29th, 1988.

In "Tribal Court and Law Enforcement" from *Mem-ka-weh,, Dawning of the Grand Traverse Band of Ottawa and Chippewa Indians,* Chapter 6 by George Weeks [Exh A], our judicial system is explained. Significantly, "The Grand Traverse Band is

GRAND TRAVERSE CHARLEVOIX LEELANAU BENZIE MANISTEE ANTRIM

one of the few in the country that has mandated a separate branch for its tribal court system. It is the only one in Michigan that mandates that the appellate structure be part of the independent judicial system. Our appellate court consists of three judges.

Article V, Section 6 of our Tribal Constitution says: "The Tribal Judiciary shall be independent from the legislative and executive function of the tribal government and no person exercising powers of the legislative or executive function of government shall exercise powers properly belonging to the judicial branch of government..."

Two opinions from our tribal court will demonstrate the separation of power and the independence of the judiciary.

Tribal Councilor Removed from Office—Conflict of Interest

In Re: Referral of John McSauby, Tribal Councilor, to Tribal Judiciary for Removal from Office, Case No.97-02-001-CV-JR, [Exh B], a tribal councilor was ordered removed from the tribal council for misconduct in office. GTB Constitution, Article VIII, Sec. 2 (a) (3) [Exh. C] Mr. McSauby sold a piece of his property to the tribe while he was a member of the tribal council. The judiciary meeting *en banc* found that he violated the Constitution, Article XII, Section 1 [Exh. D] in that his personal financial interest in the property sale amounted to a prohibited conflict of interest. While the judiciary ordered him removed from office; it did allow reasonable attorney fees and costs to be awarded to Councilor McSauby's attorney.

Due Process Required Before Disenrollment Tribal Membership Upheld

In this appellate decision, *Angus A. DeVerney, Sr., et al,* Case No. 96-10-201 CV [Exh.E] the Court affirmed the lower court's decision that a member once enrolled is entitled to due process before he can be disenrolled. There is no automatic disenrollment.

Mr. DeVerney enrolled himself and his children as minors in 1982. An adult child attempted to enroll at a later date. The membership office discovered that Mr. Deverney and his children had been enrolled with another tribe since 1976. In 1996, the membership office attempted to automatically remove the family from the membership rolls.

On appeal, the Court found that the lower court's decision was not a violation of sovereign immunity as a direct grant of right under the Constitution was involved. As persuasive law, the court looked to the 6th Circuit Court of Appeals, *Bartell v. Lohiser, 215 F.3d 550 (6th Cir. Mich., 2000).*

The Court also found that the lowers court's ruling to pay the per capita funds to the DeVerneys did not violate sovereign immunity as the money was not damages, but rather it was an entitlement under the Claims Commission Docket Funds to members.

In reaching its decision, the Court cited Tribal Constitution, Article II, Section 2 "Dual Membership Prohibition" [Exh. F] and Tribal Ordinance 7 GTBC Sec. 202 (b) [Exh.G]

Peace Makers Court

In 1999, Harvard University, John F. Kennedy School of Government sponsored Honoring Nations: an awards program that identifies, celebrates and shares outstanding examples of tribal governance. The program conferred an award on our tribal court [Exh. H]. The group specifically mentioned our Peace Makers Program.

In the materials I've submitted with this testimony, I've included a description of our Peace Makers Program. [Exh I] The Peace Makers work with children and juveniles who are at risk or who commit criminal offenses. The unit is a division of our court

system . The Peace Makers utilize alternative conflict resolution strategies to assist young juveniles to accept responsibility for their actions and to restore to society what is due it. Community service and restitution are important.

A recent report from our Chief Peace Maker, Paul Raphael, dated June 1st, 2001, indicates that he works with 42 youths a week. [Exh.J]. there were 7 referrals from the court or tribal prosecutor.

The Peace Makers have been called to the local public school to help resolve conflicts between native and non-native youths. Young couples with marital problems utilize the Peace Makers. Landlord/tenant issues are also resolved.

For the period of January 2000 through July 2001, the Peace maker handled 14 court referrals involving: retail fraud (4), assaults (5), minor in possession (2). [Exh. K]

A sample Peace Making agreement is attached. [Exh. L}

CONCLUSION

I hope this brief survey has informed you of the workings of our court. We seek as a people to serve justice and to promote dispute resolution in a cultural context. Megwetch.

Mem-ka-weh

Dawning of the Grand Traverse Band of Ottawa and Chippewa Indians

By George Weeks

Introduction by Jim Harrison

Photography by Minnie Wabanimkee

Contributors:
Elizabeth T. Edwards
Gabrielle Shaw
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Exh. A

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Sleeping Bear: Yesterday and Today (1991)
The Milliken Years: A Pictorial Reflection (1988. Co-author)
Michigan: Visions of Our Past (1989. Contributing author)
A Handbook of African Affairs (1964. Contributing author)

CHAPTER 6

Tribal Court and Law Enforcement

The judicial power ... shall be exercised to the fullest extent consistent with self-determination and the sovereign powers of the Tribe.

– GTB Tribal Constitution, Article V, Section 2

Wednesday nights in the Governmental Center court room of the Grand Traverse Band of Ottawa and Chippewa Indians offer one of the most unusual judicial proceedings in all of Michigan.

With two exceptions, the scene looks much like that in any other United States court room. Like other judges, Chief Judge Michael Petoskey sits behind the bench, wearing a long black robe. But the robe is decorated at the yoke with beads in a traditional Woodland Indian floral design, and the seal behind him is not one of the United States or any state. It is the seal of the GTB. The uniqueness is more fundamental than robe and seal.

GTB has two branches of government, since its Tribal Council functions as both legislative and executive. The GTB Tribal Court, one of about 150 tribal court systems administering justice throughout the United States, is unique in Michigan. The Grand Traverse Band is one of the few in the country that has mandated a separate branch for its Tribal court system, and is the only one in Michigan that mandates that the appellate structure be part of the independent judicial system. Other tribal judicial systems in Michigan provide for appeals to be heard by the Tribal Council.

The GTB Tribal Court is a young institution, but based on variations of the old ways.

"The administration of justice within Indian societies is nothing new," Petoskey wrote in an article for the Michigan Bar Journal. "Indian people have had systems of governance since time immemorial." But he said:

> With few exceptions, today's tribal judicial systems are unable to trace their origins and functioning directly to traditional forums of dispute resolution. Tribal governments and tribal court systems, along with Indian societies, were devastated, for the most part, by vacillating federal Indian policy.
>
> Traditional tribal forums were community forums. They were very informal, ensuring that no self-imposed barriers could function to deny justice. Tribal custom and tradition, in effect tribal common law, formed the parameters for judicial proceedings. The cohesiveness of Indian society and its norms functioned effectively to deter wrongdoing and to punish wrongdoers. Typical punishment looked to restitution, victims' rights, community service, and ostracism.[1]

The real importance of having an appellate court is that it provides an opportunity to correct any error made by the lower court. But typically in Tribal court systems, they do not see much action.

While as of mid-1990 the GTB appeals judges had not handled any cases, Petoskey said: "I do think the cases they will hear will be significant cases that will involve fundamental questions about the Tribal constitution, or the rights of members or such things as that – governmental powers. What they will see will be

extremely important. What we've tried to do is to see, even though appellant judges have not been active, that they have the background and receive sufficient training that they can make these decisions when cases reach them."

The Tribal Court is a creation of the Tribal Constitution – which Petoskey said, "Philosophically, conceptually, constitutionally is the embodiment of the will of the people. To the Tribal Council they have delegated certain powers, and to the Tribal Court system they have delegate certain powers. So really, we are the creation of the people. We have mandated that the Tribal Court system be independent from the legislative and executive functions of government, and have tried to separate it from political considerations of government. Its members are appointed for a four year term by the Tribal Council.

Tribal Court Judge Michael Petoskey presides in 1990.

"One of the things we debated early on is whether the judges should be elected or appointed ... More and more governmental entities are going to appointed judges, for a variety of different reasons. But the reason I thought that was important in a small community like ours is that I don't want judges making decisions on the basis of whether it is popular or not. They've got to make the right decisions."

What are the guarantees that judges will make the right decisions? "There are no guarantees. But it takes a certain amount of faith that the people are going to elect the best people to the Tribal Council, and that the Council is going to appoint the best people it can to serve in the judges positions. And also that the Council is going to appoint the best people to the Election Board, who are serious about seeing that that part of government functions effectively. So all of this takes a certain amount of faith. There are no guarantees.

"But the system is there, and I think it is a good one." [2]

GTB's judicial system stems from Article V of the Tribal Constitution, which says in Section 2: "The judicial power shall extend to all cases arising under this Constitution, ordinances, regulations, and/or judicial decisions of the Grand Traverse Band and shall be exercised to the fullest extent consistent with self-determination and the sovereign powers of the Tribe."

Judicial independence is specified in Section 6: "The Tribal Judiciary shall be independent from the legislative and executive functions of the tribal government and no person exercising powers of the legislative or executive fuctions of government shall exercise powers properly belonging to the judicial branch of government ... "

Chippewa County Prosecutor Patrick M. Shannon, who has practiced before the GTB and other tribal courts, said:

Minnie Wabanimkee

GTB Attorney William Rastetter (standing) appears before the Tribal Court with Prosecutor William Gregory, head of the GTB Justice Division. On the bench with Judge Michael Petoskey are Court Administrator Mary Ann Antoine and Court Clerk Carrie Leaureaux.

> Generally, tribes have the exclusive authority to adjudicate civil disputes involving Indians. Because they are considered courts of general jurisdiction, tribal courts exert broad civil authority over tribal members, including power over marriage and divorce, contracts, torts, probate and child custody ... .
>
> Unlike tribal court criminal jurisdiction, civil jurisdiction extends to non-Indians. Rejecting arguments that Indian courts are generally prohibited by federal law from exercising jurisdiction in civil matters involving non-Indians, the Supreme Court held unanimously in *National Farmers Union Insurance v Crow Tribe* tribal courts are, in the first instance, the exclusive forums for determining their own jurisdiction ...
>
> Unlike state and federal courts, tribal courts many times lack formality. This does not mean they lack seriousness; rather, they sometimes lack peculiar procedures found in other courts. Regardless of where the decision is made, the outcome affects the participants with similar impact.

Shannon, in a comment that certainly describes the way the GTB Tribal Court operates, said the tribal court system "relies greatly on common sense and the common good."[3]

This was reflected in a 1990 assessment of the GTB Tribal Court by Anne Stanton of the *Traverse City Record-Eagle:*

> Tribal Judge Michael Petoskey metes out justice with a sense of love.
>
> Area Indians found guilty of an offense are usually ordered to get a job, take adult education classes, get counseling, enter treatment or work in community service ... But lately, parents of juvenile offenders have found themselves fined, making justice a family affair.
>
> "If I feel that hitting them in the pocketbook is the only way to get the message across, I'm not afraid to do it," Petoskey said.[4]

James A. Bransky, a staff attorney with Michigan Indian Legal Services in Traverse City, noted:

> Tribes have broad authority to regulate civil matters within their territory. Unlike the criminal area, Congress has imposed few limitations on tribal civil jurisdication.
>
> Tribes have broad powers over their members in the area of domestic relations,

> including marriages, divorces and child custody. In fact, tribal jurisdiction over domestic matters often extends beyond the physical boundaries of its territory.[5]

Criminal jurisdiction depends both on the identity of the parties and the nature of the crime. Bransky notes that if a non-Indian commits a crime against an Indian in Indian Country, the federal government has exclusive jurisdiction under the General Crimes Act. If a non-Indian commits a crime against a non-Indian in Indian Country, the state has jurisdiction under an 1882 Supreme Court ruling. The situation is particularly complex in Michigan, where reservations are fairly small, with many members living off-reservation and many non-Indians coming onto reservations for gaming and other activities. Bransky said in 1988:

> What are tribal authorities to do if a non-Indian becomes violently disruptive at a tribal bingo operation or attempts to rob a tribal art store? The Sault Ste Marie Chippewa tribe has effectively dealt with this situation by entering into a cross-deputization agreement with the county in which the reservation is located. Under the agreement, tribal law enforcement officers have the authority to act on behalf of the country and vice versa. Jurisdictional issues can be ironed out after the suspect has been apprehended.
>
> This cooperative arrangement works to the benefit of both the tribe and county governments, as it enhances the ability of both entities to promote public safety. Hopefully, similar agreements can be reached between other tribes and units of local government in Michigan.

Just such a mutual aid agreement was signed by GTB and Leelanau County in 1990. The agreement, approved by the GTB Tribal Council January 20, 1990 and the Leelanau County Board of Commissioners January 25, 1990 said: "The Tribe and County each wish to ensure better law enforcement personnel and resources in the jurisdictions. The County and Tribe intend to make trained and experienced law enforcement officers readily available to each jurisdiction and to provide increased protection for the public."

The GTB Law Enforcement Department, headed by Captain Joseph Chambers, operates out of the Government Center in Peshawbestown, where patrol cars are shown in 1990.

Cottage Book Shop of Glen Arbor

The importance of law enforcement and security was reflected on this page from the 1987-88 report of the GTB Economic Development Authority.

GTB/EDA

The agreement says "The County Sheriff and the Tribe's Chief of Police or their designees may request reasonable assistance from the other jurisdiction when reasonably necessary for efficient law enforcement." This includes authorization for "fresh pursuit ... across the boundaries of the reservation and Indian Country until the offender is apprehended."

As a further aid to law enforcement, particularly to deal with the problem of speeding and other traffic violations on the GTB's reservation, the Tribal Council on May 19, 1990 adopted the Michigan Vehicle Code for a one-year trial period. This enabled GTB officers to enforce the code on roads and highways with jurisdiction over members and non-members.

GTB Prosecutor William Gregory, head of the GTB Justice Division, said the mutual pact "is working very well" among law enforcement officers, as well as between officials of the Tribe and County.[6]

There are times when the Leelanau Sheriff's Department has only one patrol car on the road. If it is in the southern part of the county and there is a law enforcement need in the upper part of the county, the Leelanau dispatcher may call upon the GTB officers. GTB has two patrol cars.

The GTB Law Enforcement Department is headed by Captain Joseph Chambers. Officers are Robert Funmaker, Andrew Miller and Carlos Garza. Originally, GTB contracted for law enforcement, hiring former Leelanau County Sheriff Fred Buehrer as constable.

The Justice Division includes the Tribal Court, Conservation Court and Law Enforcement. Mary Ann Antoine is the Court Administrator, and Carrie Leaureaux the Court Clerk. Jo Jo McSawby assists in the courts and law enforcement, as does Shai Harter.

Petoskey presides in both the Tribal Court and Conservation Court. His legal background includes a law degree from the University of New Mexico (after an economics degree from Michigan State University), directorship of the Michigan Indian Legal Services and Secretary-Treasurer of the Great Lakes Tribal Judges Association. He directs the Native American Programs at Northwestern Michigan College and is a member of the Michigan Commission on Indian Affairs.

Upon his selection by the *Traverse City Record-Eagle* as one of its "Picks of '90" for regional community service, Petoskey said: "My role as tribal judge gives me the opportunity to help shape community values. My goal is to be objective, fair, and to provide the leadership necessary to develop a judicial institution that will serve the tribe well."[7]

GTB's first appeals judges were Greg Blanche, Henry Andrews and Eva Petoskey.

1. Petoskey, Michael D., "Tribal Courts," *Michigan Bar Journal,* May 1988, p. 366.

2. Petoskey, Michael D., in a 1990 interview with the author at Northwestern Michigan College, where Petoskey is director of Native American Programs.

3. Shannon, Patrick M., *"Tribal Court Advocacy," Michigan Bar Journal,* May 1988, p. 377.

4. Stanton, Anne, "Tribal court makes justice a family affair," *Traverse City Record-Eagle,* September 24, 1990, p. 3A.

5. Bransky, James A., "Trial Court Jurisdiction," *Michigan Bar Journal,* May 1988, p. 374.

6. Gregory, William, in a 1990 interview with the author in Peshawbestown.

7. Petoskey, Michael D., *Traverse City Record-Eagle,* February 28, 1990.

TRIBAL COURT
OF THE
GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS

In re: Referral of John McSauby, Tribal Councilor, to Tribal Judiciary for Removal From Office.

Case No. 97-02-001-CV-JR

OPINION OF TRIBAL JUDICIARY

This matter comes before the Tribal Judiciary, sitting *en blanc*, to consider two (2) issues. The first is whether Tribal Councilor, John McSauby, is entitled to court-appointed counsel and, if so, who should pay for the representation. The second issue is whether Tribal Councilor, John McSauby should be removed from office for misconduct. The Judiciary addresses these two (2) issues in that order and enters unanimous decisions on both issues.

I. COURT-APPOINTED COUNSEL AND ATTORNEY FEES:

Preliminary Trial Court Determinations:

The trial court made a preliminary determination that Councilor McSauby should be represented by legal counsel for the following reasons:

(1) Councilor McSauby was confused about how to defend against this removal action because there is another civil proceeding pending against him to rescind the land sale that is at the heart of the current controversy. For one untrained in the law and its processes, it is difficult to separate the two. There is a commonality of facts because the two legal actions arise from the same incident. However, the legal issues are different because the nature of the two actions are completely different. It was clear that Mr. McSauby's lack of understanding and familiarity with

Exh. B

the law and judicial process would result with an inability to focus cleanly on the issues as the Court would need to deal with them. The result would have been that the Court itself would have been forced by necessity to be pro-actively involved with guiding the case through the judicial process and, undoubtedly, guiding the defense if unrepresented to ensure fairness, due process, and to just get the appropriate legal arguments before the Court. Surely, that would have appeared to some as the Court being biased. More importantly, the Court itself was uneasy about the prospect of guiding, as its role of being decision-maker requires impartiality. Thus, without the appointment of counsel, the necessity of clearly focused proceedings would have resulted in the decision-maker's role being compromised and the helping hand to move the proceedings being viewed by some as biased. In a case of this importance to the tribal community neither of those consequences are acceptable.

(2) This is a matter of utmost importance to the Tribe. This is the first removal action. How the Tribal Judiciary handles this matter will be legal precedence for future removal actions. Thus, fundamental fairness is viewed not only important to the instant matter but for future matters as well. That being the case, fully-developed facts and legal arguments are important to the Court.

It is clear for the above-mentioned reasons Councilor McSauby would not be able to present either to the Court. This entire matter is an unfortunate happening. The last thing the tribal community needs is for bad law to develop on top of it. Good law results from the parties presenting their cases and arguments well. Otherwise, courts are basing decisions on partial facts and incomplete arguments.

Arguments Against Appointment:

Legal counsel for the Tribal Council presents the Judiciary with the following arguments why Mr. McSauby should not be appointed counsel paid by the Tribe:

(1) Indigent status is a prerequisite for court-appointed counsel;

(2) Tribal court should adopt the so-called "American rule";

(3) There is no constitutional or legislative authorization to pay court-appointed counsel;

(4) It results in adding insult to injury; and

(5) There is no budget authorization to pay court-appointed counsel.

***En Blanc* Determinations Regarding Appointment:**

The Tribal Judiciary expressly adopts the reasons cited by the trial court for appointing counsel to represent Mr. McSauby. In addition, there are at least two (2) more reasons for ensuring that Mr. McSauby is represented by legal counsel:

(1) This is an important matter to tribal voters. Councilor McSauby was elected to office. To deprive them of their elected voice is a very serious undertaking. Those who elected him to office are entitled to have their chosen representative be represented by legal counsel.

(2) Tribal Councilors with minority opinions should have protections in a system of checks and balances from a tyranny by Council majority. Checks and balances in government serve to ensure good government. One of checks and balances for Councilor removal is the referral to the Tribal Judiciary, but the check and balance would be incomplete without legal representation because the deck is stacked in favor of the majority. It will be represented by the tribal attorney staff. Tribal attorneys work for the Tribal Council using tribal resources, so tribal resources should also be used to "balance" the "check" against majority reprisals against minority office

holders.

The Tribal Judiciary by reasoning as above rejects all five (5) arguments made by counsel for the Tribal Council. All five (5) rejections are based on the reasoning above and respectively follow:

(1) Given that this matter is of the utmost importance to the tribal community as a whole for the reasons cited above, indigent status is not required. If Mr. McSauby has unduly profited, there are other remedies available for tribal redress.

(2) The "American rule" adopted by state and federal courts is rejected in its application to this case. If we are to be just like them, with wholesale adoption of their rules and laws, why do we continue to argue that Indian people have a very different perspectives than those of the society that surround us and thus, exercise self-government to incorporate our own values? The Tribal Judiciary's sense of what is fair and why can be different than those of other courts and is, as expressed above, in this case.

(3) The Tribal Court is a court of general jurisdiction. See Tribal Constitution, Article V, Sec. 1. As such, it has the inherent power to do whatever is reasonably necessary to fairly resolve any matter that is appropriately before it. This is a constitutional power. Thus, the Tribal Constitution gives the Court the power to do what is reasonably necessary. The Tribal Council's authorization is not necessary.

(4) There was no way of knowing whether insult would be added to injury prior to these matters being heard by the Judiciary. Even at the point of releasing this Opinion, much fact-finding must occur to fairly resolve the civil suit between the Tribe and Mr. McSauby. To this point, the stipulated facts and offers of proof presented to the Judiciary are only the tip of the

iceberg.

(5) That there is no budget authorization is a woefully inadequate reason to deny representation by counsel in a matter of this importance to the Band. It seems that the Tribal Council can find resources to do many other things that are not expressly included in prior appropriations. In this time of relative resource-rich ability to do many things for the community benefit and in light of the reasoning expressed above clearly pointing out the numerous benefits to the community as a whole, the Tribal Council must pay Defendant McSauby's attorney fees and court costs.

FOR ALL OF THE FOREGOING REASONS, reasonable attorney fees and costs are awarded to Councilor McSauby's attorney. A detailed invoice must be submitted to the Tribal Court for its review and approval prior to submission to the Tribal Council for payment.

II. REFERRAL FOR REMOVAL:

The referral to the Tribal Judiciary of the removal from office of Tribal Councilor John McSauby was premised on the suspicion that he might have engaged in misconduct. The *En Blanc* Hearing before the Tribal Judiciary on June 18, 1997 only involved the suspicion of misconduct that implicates violations of the Tribal Constitution and tribal law.

It is both unfortunate and surprising that the conflict-of-interest aspects of this matter went unnoticed by those involved until tribal members brought them to the attention of the Tribal Council. "Red flags" should have been jumping up all over and flapping like crazy. It is also clear

that this matter would not have gotten this far if Tribal Council would have: (1) worked more closely with legal staff in order to ensure that Council has the legal guidance it needs; and (2) refrained from using polling forms to conduct business and posted the proposed action for public notice. Legal counsel for the Tribal Council acknowledged that mistakes were made but argued that such should not excuse Councilor McSauby. We agree.

Constitutional Interpretation:

The pertinent language upon which the decision of the Tribal Judiciary rests in deciding this matter is: "*In carrying out the duties of tribal office, no tribal official ... shall make* ***or participate in making*** *decisions ...*". GTB Tribal Constitution, Article XII, Sec. 1 (bold added for emphasis). The question that must be answered is whether Councilor McSauby either made or participated in making the decision to purchase the land from himself.

The Judiciary expressly gives its definitive interpretation of that language as follows:

(1) "...make..." means affirmatively voting on the issue; and

(2) "...participate in making..." means engaging in any activity directed toward any decision-maker to influence, directly or indirectly, a decision which involves a personal financial interest.

The Tribal Judiciary rejects the prevailing interpretation of the conflict-of-interest provision that was argued by both counsel during oral argument at the Hearing on June 18, 1997. The pertinent portion involved in that dominant interpretation is "... *which require balancing a personal financial interest, other than interests held in common by all tribal members, against the best interests of the Band.*" GTB Tribal Constitution, Article XII , Section 1. The arguments centered upon whether the personal interest of Councilor McSauby was outweighed by the benefit

to the Band. This interpretation is fostered by the word "balancing" which leads some to think that a balancing test is required to ascertain whether there is in fact a conflict-of-interest. We think not. The mere fact a personal financial interest is involved is sufficient to create a conflict-of-interest. The benefit to the Band is irrelevant. The word "balancing" simply means that the benefit to the individual must be weighed against the benefit to the Band. The outcome of the balancing is not determinative of a conflict-of-interest. The conflict-of-interest arises because a balancing of Councilor McSauby's personal financial interest against the interest of the Band must occur. Who does the balancing or at what juncture is irrelevant. The promoter of a personal financial interest would not push for action or decision if he/she had not balanced the interests in his/her mind in order to develop the justification to sell the promotion to others. That kind of balancing is inherent in promotion of any personal interest.

Offers of Proof Applied to Constitutional Interpretation:

The Stipulation of Facts and Offers of Proof do not implicate Councilor McSauby in actually casting a vote for the land purchase. However, there is much to show that he actively engaged in promotion of the land purchase to the other members of the Tribal Council, that he pushed the process to make the ultimate decision, and that he influenced the decision. Councilor McSauby's offer of proof is very telling. He offers to prove that he:

(1) discussed the project with individual Tribal Councils members, the Tribal Chairman and aggregates of Tribal Council members;

(2) subsequently met Tribal Council members to present proposed plans, an itemization of costs and benefits, the engineering site plans, marketing analysis, and discussed the status of the project through several conversation;

(3) took a proposed polling voting form that he prepared to the Tribal Chairman's office;

(4) presented the polling form to a Tribal Council member at a subsequent Gaming Commission Meeting for that Council member's vote;

(5) met with another Council member, who was about to leave town, in order to get her vote;

(6) asked a third Council member to vote;

(7) personally submitted the polling form to the Gaming Commission Accounting Department for the preparation of a check request;

(8) on a later date, December 4, 1996, personally took the signed check request form to the Tribal Chairman's office for his signature, at the request of the Gaming Commission Accounting Department;

(9) returned the signed check request form to the Gaming Commission Accounting Department;

(10) signed the check issued by the Gaming Commission Accounting Department to Leelanau Title Company to purchase the land; and

(11) delivered the signed check to the Leelanau Title Company closing officer.

All of the above are conflict-of-interest activities. (1) through (6) are misconduct in violation of the constitutional prohibition of participating in the making of a decision. (7) through (10) are activities that demonstrate Councilor McSauby's personal financial interest in seeing the deal through. Normally, the (7) through (10) activities are ones which would be handled administratively which points out that this entire matter was handled outside of procedural norms. Councilor McSauby's land sale to the Band was not placed on any Tribal Council agenda for

presentation, discussion, consideration, public input, or Tribal Council decision. Those who serve the Tribe can be reasonably expected by its membership to operate within commonly accepted government and administrative procedures. The Judiciary understands that the Tribal Council has taken steps to ensure procedural safeguards for the future by the adoption of the "*Tribal Council Meetings Ordinance*". It is a good step in the right direction. The Tribal Constitution is clear about open meetings, public notice of meetings, a reasonable opportunity to be heard, and that the Tribal Council shall act only by ordinance, resolution, or motion.

The tribal community has every right to expect that tribal officials and employees will avoid conflicts-of-interest. Tribal members have a right to loyal service and fulfillment of confidence placed in officials and employees. Tribal officials have a fiduciary responsibility to tribal membership. Good government will require that even the appearance of a conflict-of-interest be avoided. In that regard, the Tribal Council is urged to seriously consider the adoption of a code of ethics for tribal official and employee conduct to provide additional guidance beyond that offered in this Opinion.

Removal Authority:

Councilor McSauby was referred to the Tribal Judiciary for removal because it was suspected that he might have engaged in misconduct. Having found that there was indeed misconduct, the Tribal Judiciary finds grounds for removal. Having found that grounds for removal exist, the Judiciary must remove Councilor McSauby from office. The removal is mandated under Article VIII, Sec. 2(f) of the Tribal Constitution.

FOR ALL OF THE FOREGOING REASONS, IT IS THE FURTHER ORDER OF THE TRIBAL JUDICIARY that Councilor John McSauby be removed from office.

No Appeal Right:

Consistent with the Trial Court's previous Order in this matter to provide for an *en blanc* hearing before the entire Tribal Judiciary, there shall be no appeal right in this matter.

7/29/97

DATED

Michael Petoskey
Chief Judge
signing for the entire
Grand Traverse Band Tribal Judiciary

CONSTITUTION

Section 2. Removal: Dismissal From Office Initiated by the Tribal Council

(a) The Tribal Council may, by an affirmative vote of five (5) members of the Council, refer to the Tribal Judiciary for removal from office any member of the Tribal Council for any of the following reasons:
  (1) Failure to attend three (3) consecutive meetings without a valid excuse;
  (2) Gross misconduct;
  (3) Misconduct in office;
  (4) Incapacity from physical or mental disability, to the extent that he/she is incapable of exercising judgment about or attending to the transactions of the Tribal Council;
  (5) Cessation of membership in the Grand Traverse Band;
  (6) Failure of the Council member to maintain residence in the six-county primary service area of the Tribe; or
  (7) Conviction of any felony by a court of competent jurisdiction.

(b) The official sought to be removed shall be notified in person or by registered mail, restricted delivery to the individual involved, at least ten (10) days before any meeting at which the tribal official's referral for removal from office is to be considered.

(c) The notice of intent to refer for removal shall set forth, with specificity, the alleged grounds for removal and inform the official that he/she may appear to defend against such referral.

(d) If the Tribal Council votes to refer to the Tribal Judiciary a tribal official for removal, the grounds for removal shall be set forth with specificity and the tribal official shall be suspended from office until the Tribal Judiciary rules on the referral.

(e) Before the Tribal Judiciary rules on any referral for removal from office, it shall afford the accused a hearing upon due notice at which he/she may answer the charges.

(f) If the Tribal Judiciary finds that grounds for removal as stated by the Tribal Council exist, the Tribal Judiciary shall remove the tribal official from office.

(g) If the Tribal Judiciary finds that grounds for removal as stated by the Tribal Council do not exist, the suspended Council member shall be fully reinstated to the Council.

Section 3. Vacancies in the Tribal Council

(a) The office of any Tribal Council member who dies, resigns, is convicted of any felony by a court of competent jurisdiction while in office, is recalled, or is removed shall automatically be deemed to be va-

h C. Tribal Constitution
Article VIII, Sec. 2

Section 3. Article Construction

This Article shall not be construed to deny the Tribal Council its power and authority to regulate activities on tribal land.

Article XII - Conflict of Interest

Section 1. Personal Financial Interest

In carrying out the duties of tribal office, no tribal official, elected or appointed, shall make or participate in making decisions which involve balancing a personal financial interest, other than interests held in common by all tribal members, against the best interests of the Band.

Section 2. Employment Prohibitions

No Tribal Council member may be employed in a position that conflicts with his/her role as a Council member. Such conflicts include, but are not limited to, the following:

(a) employment in a program that is controlled by the Tribal Council directly or indirectly through a tribal manager; and
(b) employment in a program management position unless such employment is by a subordinate for-profit business organization chartered by the Tribe.

Section 3. Financial Disclosure

Within ninety (90) days of being elected/appointed, the Chairperson and any other salaried Tribal Council members shall be required to file financial disclosure statements similar to those required of certain officials of the federal government.

Article XIII - Sovereign Immunity

Section 1. General Prohibition

The Tribal Council shall not waive or limit the right of the Grand Traverse Band to be immune from suit, except as authorized by this Article or in furtherance of tribal business enterprises upon a resolution approved by an affirmative vote of five (5) of the seven (7) members of the Tribal Council.

Exh. D. Tribal Constitution
Article XII, Sec. 1

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS
TRIBAL COURT - CIVIL DIVISION
APPELLATE DIVISION

Angus A.. DeVerney, Sr., et al., **CASE NO: 96-10-201 CV**

Plaintiffs,

v. **ORDER AFFIRMING TRIAL COURT DECISION**

Grand Traverse Band of Ottawa and Chippewa Indians, Tribal Council of the Grand Traverse Band of Ottawa and Chippewa Indians , and Gail Manzano, Membership Coordinator of the Grand Traverse Band of Ottawa and Chippewa Indians ,

Defendants.

Justice Ronald G. Douglas,

The Appellate court having met and heard oral arguments in the is matter, the trial court Order is affirmed.

STATEMENT OF CASE

This matter was filed in 1996 in response to an administrative action taken to "automatically" remove the membership status of the primary Plaintiff and his children who had been enrolled by him in 1982 as minors. Mr DeVerney and his children had been enrolled with the Sault Ste Marie Band of Chippewas in 1976 and failed to rescind that membership before enrolling in the Grand Traverse Band of Ottawa and Chippewa Indians. This matter arose when another child who was an adult in 1976 attempted to enroll and was noted as a member of the Sault Ste Marie Band of Chippewas, as well as the other Plaintiffs. A letter of disenrollment was issued and this matter later filed in tribal court.

The DeVerneys all later rescinded their membership in the Sault Tribe and were accepted as members of the Grand Traverse Band of Ottawa and Chippewa Indians with all rights unquestioned after that date. The case continued to consider their rights as members during the period between the letter in 1996 and the later decision of membership. These include whether the Plaintiffs were authorized to receive per-Capita and Docket funds which were paid out to tribal members during that period.

The Trial court was asked to determine whether all rights were "automatically" terminated under the Tribal Constitution in April of 1996, Void Ab Initio, or subject to due process requirement of a judicial decision before termination. There was a finding of jurisdiction of the court rejecting the argument than this is a political issue. The court held that Plaintiff's defense of valid membership due to a mistake of law was error and that there should not have been a grant of membership in 1982. The Trial Court held that the Constitution could only be read to require that the membership of all Plaintiffs were valid until the due process requirement was met at its

Exh. E

decision on December 21, 1999. It denied the argument of automatic disenrollment or that the membership was Void ab Initio and found they "...have been members of the Grand Traverse Band continuously since 1982 and are entitled to receive per capita distributions for the years 1994, 1995, 1996 and 1997." The court did not grant any relief on the counter Claim for funds in 1994 and 1995, and made no specific statement. Finally, the Trial Court ordered payment of the funds held in escrow and other funds allocated to members but not set aside in escrow.

DECISION

The finding of jurisdiction of the Trial Court is Affirmed. The finding that the DeVerneys remained as members of the Sault Tribe is Affirmed. The finding of a requirement that there be a completion of Due Process before the membership is terminated, even though improperly granted to someone already enrolled in another federally recognized tribe rather than being void ab initio, is Affirmed. (This does not include any finding regarding automatically disenrolling members who are enrolled in this tribe and later become members of another federally recognized tribe.)

The finding that the Plaintiffs were entitled to an equal share of funds disbursed to tribal members between April of 1996 and their later valid enrollment is Affirmed. The denial or dismissal of the Tribe's Counter Claim for funds distributed in 1994 and 1995 as wrongfully granted is also Affirmed.

The Appellants argued that the children were not properly Plaintiffs in this matter as they did not file as Plaintiffs until beyond the sixty day appeal period after the letter of disenrollment was sent. The Trial Court's finding in this issue is affirmed as the relief sought in the appeal included the children's membership and the trial judge's finding of this as a matter of law clearly follows the tribe's traditions in allowing liberal interpretation of Complaints. This is especially in light of the notice letter's vague requirement of merely telephoning the tribal court rather than setting out a clear procedure for an appeal to the trial court. Therefore, the finding has a rational basis and is supported by valid evidence of notice of the children's appeal and must be Affirmed.

The Appeal raises the argument that this decision is a violation of tribal sovereign immunity. This court considers sovereign immunity as an essential attribute of Indian tribes and to be highly supported unless clearly waived. It serves to avoid interruption of tribal government and agents in improper law suits and to protect public funds from improper distribution under the Tribal Constitution. However, in these cases, there is a specific rule overriding immunity when a direct grant of a right under the Constitution is involved. The tribal court is required to hear the matter and grant whatever relief that would be required for a violation of that Constitutional right.

This court finds that sovereign immunity does not apply and that the order to distribute the funds escrowed and an amount equal to what should have been paid in 1996 and 1997, and not paid, has a rational basis, supported by evidence and is not an error of law. It is Affirmed.[1]

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[1]The court notes that although Michigan law allows a payment of interest, there is no tribal law regarding judgment interest and no finding of the court that any fact required it in this case as well as any costs.

This is a case of first impression for this court. Most jurisdictions, including the United States and the State of Michigan have held that sovereign immunity is overruled by constitutional mandates or specific directions setting out rights and court jurisdiction over the matter. A recent case expressed that rule where a Michigan agency or officer had been sued and government immunity was asserted. The Sixth Circuit Court of Appeals used a two-step analysis to determine whether immunity of a government agency or public official is proper or to be denied.

In *Bartell v. Lohiser*, Electronic Citation: 2000 FED App 0194P (6th Cir 2000), that court reviewed whether a clearly established constitutional right was violated and whether the official acted objectively unreasonably. This case involves the action and immunity of the Tribal Certifier and the tribe itself, but a right to due process is clearly spelled out in the Tribal Constitution and membership is a "property right" subject to due process once it is granted. The Certifier's actions in terminating a Constitutional right was not reasonably right meeting that two-step reasoning.

The Tribe further argues that the order to pay money is a violation of the Tribe's sovereign immunity where there was not a clear waiver of it. The members' interest in the per-capita and Docket funds is clearly beyond immunity in the funds escrowed in 1997. There cannot be immunity as the funds were allocated to the members and are no longer treasury funds to be protected. The 1996 per-capita funds were identified but not escrowed and remain tribal funds. However this is not a "damages" claim where funds come from the general treasury. It is a claim to funds earmarked by the tribe and by the Claims Commission Docket Funds to members, which include the Plaintiffs in this matter.

This policy complies with other tribal cases such as the trial court's rulings in motions for *D.F. Novak Construction v. GTB* and in *Turner v. Leelanau Sands Casino* as this case does involve Constitutional waiver of immunity for "enforcing rights and duties established by tribal law in suits by tribal members". This does not interpret the federal Indian Civil Rights Act to include an express waiver of sovereign immunity. It involves only expressed rights such as those in this case which are specifically, clearly described in the Tribal Constitution.

In light of the identification of the funds for distribution as a membership benefit, those funds would also be beyond sovereign immunity as clearly waived by the Per-Capita Act requiring distribution. It is a property right spelled out in tribal law and already intended for distribution. In short, these funds were allocated as belonging to these members, but with distribution being delayed. Immunity would not apply to such funds and the Order to distribute them is Affirmed.

There is an argument that the Certifier did not have the right to grant the membership in the first place so that they are void. This case is distinguished from *James Raphael v GTB*, Case No. 90-01CV. The lessor in that case had no legal authority to act as an agent for the tribe where the Certifier in this case has such authority and must be granted some discretion. While the record does not clearly indicate what was told to the Certifier in 1982, the family tree showed that the minor's mother was a member of another federally recognized tribe. He or she chose to act without further verification and the tribal government accepted that decision. Therefore, the grant of membership was not Void ab Initio.

The highest power of a tribe is in granting membership rights and setting out the requirements for membership. This was affirmed in *Santa Clara Pueblo v. Martinez*, U.S 49 (1978). This court does not want to limit the tribe in its political authority to create laws on membership and will interpret the laws in every way possible to defer to the Tribal Council's political authority to grant membership.

However, once membership is granted, the court must give due process except where the Tribal Constitution expressly removes the court discretion or jurisdiction. This was clearly done in the second part of Article II, Section 2 of the Tribal Constitution for members who become members of another tribe after becoming members of this tribe. The Constitution sets out the remedy in that situation, but does not set out a remedy in the first part of that section. Since the parties framing the Constitution set out the remedy in one situation and knew how to apply it, the court cannot add it to another situation. This is particularly strong policy in this case where the tribe passed Ordinance 7GTBC 202 (b) six weeks after the Constitution was ratified. The argument that it only applies to people enrolled under Article II, Section 1, is rejected as part (b) is unambiguous and does not speak to any such limitation on its face. This general reference is continued in 7 GTBC Sections 203 and 204 as to "any" person disenrolled.

The Tribe must be given the power to exercise its discretion in making a membership decision. A later-discovered error by the Certifier must be corrected as the particular case requires. It cannot be automatic and remove the Certifier's discretion or judgment. This court denies the argument that both parts of Section 2 are automatic and self-executing. This also is a rejection that both parts of Article II, Section 2 makes membership errors void ab initio.

Dated: November 15, 2000

Ronald G. Douglas Associate Justice

Concurrence granted:

Date: 11/10/00

Quinton Walker, Chief Justice

Gregory Blanche, Associate Justice, recused and not participating.

Filed by the Appellate Clerk

Date: 11-22-00

(4) Membership Rights of Children Who Have Been Adopted

a. Membership rights of children of Indian descent who are legally adopted by members of the tribe. Any child of Indian descent who is legally adopted by a member of the Tribe shall have membership rights as though he/she were the natural child of the adopting parents.

b. Membership rights of Indian children who are legally adopted by non-Indian families. Any child eligible for membership who is adopted by a non-Indian family shall be eligible for membership in the Tribe, notwithstanding such adoption.

Section 2. Dual Membership Prohibition

No person shall be eligible to be a member of the Grand Traverse Band if that person is enrolled in another federally-recognized Indian Tribe, Band, or Group. Any member of the Grand Traverse Band who applies to be and is accepted as a member of another federally-recognized Indian Tribe, Band, or Group shall thereby automatically forfeit membership in the Grand Traverse Band and thereby also forfeit all rights and benefits to which Band members are entitled by virtue of their membership.

Section 3. Membership Procedure

The Tribal Council shall promulgate ordinances governing enrollment, disenrollment, and adoption; provided that the Tribal Council shall have no power to change or establish substantive requirements for membership in addition to those established in this Article.

Section 4. Right of Appeal

Any person whose application for membership has been denied, who has been disenrolled by the Tribal Council, or whose membership has been deemed to be automatically forfeited shall have a right of appeal to the Tribal Judiciary; provided that such appeal rights do not extend to any person whose petition for membership by adoption into the Tribe has been denied.

Tribal Constitution
Exh. F Article II, Sec. 2.

adoption of the Tribe's Constitution, as prescribed in Article II, Section 1(b)(2)b.

History: Tribal Act #88-612, enacted by Tribal Council on April 20, 1988.

§ 104 - Appeals of Enrollment Denials

Persons whose applications for membership are denied shall have a right of appeal to the Tribal Judiciary. Such appeal must be filed within sixty (60) days of the membership coordinator's determination that the applicant is not eligible for enrollment.

History: Tribal Act #88-612, enacted by Tribal Council on April 20, 1988.

Chapter 2 - Disenrollment

§ 201 - Requirements for Membership

The substantive requirements for membership in the Tribe are prescribed in Article II, Section 1 of the Tribe's Constitution.

History: Tribal Act #88-618, enacted by Tribal Council on May 18, 1988.

§ 202 - Incorrectly Enrolled Members

(a) The membership coordinator shall inform the Tribal Council in writing of any person(s) not satisfying the membership requirements prescribed in Article II, Section 1 of the Constitution, incorrectly enrolled as member(s) of the Tribe.

(b) The Tribal Council shall cause any person incorrectly enrolled to be informed in writing of the reason(s) why he/she is not eligible for membership in the Tribe and therefore must be disenrolled.

History: Tribal Act #88-618, enacted by Tribal Council on May 18, 1988.

§ 203 - Appeals

(a) Any person receiving notice of disenrollment shall have a right of appeal to the Tribal Judiciary.

(b) Such appeal must be filed within sixty (60) days of receiving notice of disenrollment.

History: Tribal Act #88-618, enacted by Tribal Council on May 18, 1988.

§ 204 - Effective Date of Disenrollment

The disenrollment of any person pursuant to this ordinance shall become effective sixty (60) days after receiving written notice of disenrollment or upon final action of the Tribal Judiciary if an appeal is pursued.

History: Tribal Act #88-618, enacted by Tribal Council on May 18, 1988.

Chapter 3 - Adoption

§ 301 - Requirements for Adoption into Tribe

(a) The constitutional requirements for membership by adoption into the Tribe are prescribed in Article II, Section 1(b)(3)(a) of the Tribal Constitution of the Grand Traverse Band of Ottawa and Chippewa Indians: "Any person may be adopted into the Grand Traverse Band by a majority vote of the Tribal Council, if that person is at least of one-fourth (1/4) Indian blood and if that person can also demonstrate, by other means, substantial community ties to the Band."

(b) Prerequisites for demonstrating substantial community ties to the Tribe are that:

(1) the applicant must have at least one-eighth (1/8) blood quantum traced to the historic Grand Traverse Bands; and

(2) the applicant must have been a resident within the Tribe's six county service area for two (2) years prior to submitting application for adoption into the Tribe (such two-year period shall not commence until the effective date of the amendments enacted August 18, 1998).

History: Adoption Ordinance (GTB Ordinance #88-008), as amended by Tribal Council on August 18, 1998.

§ 302 - Dual Membership Prohibition

No person shall be eligible for membership by adoption into the Tribe if he/she is an enrolled member of any other federally-acknowledged Indian Tribe. He/she may seek membership if requirements of adoption into the Tribe are met and a copy of a conditional relinquishment letter is on file with the Tribe's membership office.

Tribal Ordinance
Exh. 6. Sec 202
Incorrectly enrolled
Members

ded by Tribal Council o

84

Exh. H. Honoring Nations Award 1999

Tribal Court

Grand Traverse Band of Ottawa and Chippewa Indians

The vagaries of U.S. government policy toward American Indian nations in the 1900s had a particularly damaging effect on the Grand Traverse Band of Ottawa and Chippewa Indians (GTB). During various and overlapping periods, they existed as a self-governing Indian community, a non-profit corporation, and a state-recognized Band with lands held by the local county government to meet the housing needs of the immediate Indian community. Finally, in 1980, the Band obtained federal recognition and, in 1988, developed a constitutional government.

In this process, GTB's leaders were acutely aware that developing a constitutional government was not about constitution writing alone. The challenge also was to develop a government that accorded with community members' beliefs about who should hold authority and how it should be exercised, so that the system outlined in the written constitution would be both workable and sustainable. For example, GTB leaders involved in the development of the Band's constitutional government felt there was substantial value in having a separate and independent tribal judiciary, and therefore wrote provisions for one into the Band's constitution. But for the Court truly to operate as the fundamental institution of government envisioned by its founders, it would need to be used by tribal members, operate in a way tribal members appreciated, and be able to exercise its independence effectively. This "constitutionalization" of the Court is occurring at Grand Traverse and deserves recognition.

When the GTB Tribal Court opened its doors in 1988, it heard very few cases. The Chief Judge worked only part-time in the evenings, with little or no staff. Just over ten years later, the Court has grown into a well-functioning and oft-used institution, hearing as many as 500 cases a year. The Chief Judge now works full time, as does his staff, which includes an Associate Judge, three court clerks, and a tribal court administrator. The Band also has established an Appellate Court, comprised of three appellate justices.

Despite this remarkable maturation, the Chief Judge became concerned

[Exh H]

that, in some cases, the Court's western dispute resolution mechanisms did not serve the community well. His experiences on the bench convinced him that tribal members would value a system that relied on more indigenous practices. Thus, the GTB Court recently has begun to incorporate Ottawa and Chippewa culture into the legal system through Peacemaker Courts. As in other communities, peacemaking is a non-adversarial, traditionally based process of conflict resolution. At GTB, the procedure is for two peacemakers to be present to facilitate the session, but not to decide issues in the case; for all parties to the dispute to participate; and for participants to rely on and use emblems of blessing, comfort, open conversation, listening, wisdom, and peace in their conversation.

While the Peacemaker Court is still in its development phases, the peacemakers themselves already have had an impact on the community. Because their initial jurisdiction involved juvenile offenses, they have worked to become more involved with GTB youth. In 1999, for example, the director of the Peacemakers and the tribal prosecutor conducted a 150-mile canoe trip for at-risk youth to help them develop social skills and confidence. At the end of the trip, the peacemaker asked each participant to become the "caretaker" of an eagle feather, in an effort to remind the youths to be good stewards of the community's values. Later, when one trip participant ran afoul of the law, the Court was able to officially remind him of his stewardship responsibilities—evidence of a creative synergy between the western-style court and the peacemakers' preventative work.

Finally, and perhaps most importantly, the GTB Court is effectively establishing its independence. A true separation of powers, in which the branches of government serve as a check on the actions of the others, is difficult for many governments to achieve. All too often, American Indian nations' judiciaries succumb to the volatile influences of tribal politics. But the Grand Traverse Tribal Court is achieving status as a separate and independent branch of government. Rulings that adversely affect the Tribal Council have been respected and followed by the elected leadership, instead of devolving into political tuge-of-war. While building precedents in the area of political-judicial relations takes time, the GTB Court and Council are laying a strong foundation for government constituted on a respectful separation of powers.

The Grand Traverse Tribal Court is growing, adapting to tribal culture by pursuing Ottawa and Chippewa approaches to conflict resolution, and establishing itself as a strong, separate and independent branch of government—a combination that has, and will continue to, serve the Grand Traverse Band well.

For more information contact:

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GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS MNAWEEJEENDIWIN (PEACE MAKER) DIVISION

PURPOSE

Grand Traverse Band of Ottawa and Chippewa Indians has established a Grand Traverse Mnaweejeendiwin (Peace Maker) Division (hereafter referred to as the Peace Maker Division) under the Grand Traverse Band Tribal Court as authorized by the Grand Traverse Band of Ottawa and Chippewa Indians Children's Code in order:

1. To provide community-based alternatives to incarceration of youthful offenders,
2. To assist in the treatment and rehabilitation of juvenile offenders,
3. To actively involve parents in matters concerning their children,
4. To address the needs of young victims and the community by providing them with a safe and supportive environment through which they can confront perpetrators,
5. To create a forum which requires offenders to take responsibility for their wrongful behavior, be held accountable for correcting their behavior, and making amends to the victims of their wrongful acts,
6. To reduce juvenile crime, violence and victimization,
7. To use sanctions and solutions that are based on the standards and concepts of law and justice of the Grand Traverse Indian community

Additionally, Peace Makers will be involved with the community through feasts and presentations. The Peace Makers will assist in the resolution of conflicts within families, departments of tribal offices, or any groups. Peace Makers will work with these groups only when their participation is requested.

MISSION STATEMENT

The mission of the Mnaweejeendiwin is to develop an environment to serve the physical, mental health, spiritual, emotional, and educational well being of Anishnaabek through development of traditional processes of handling conflicts involving children and families. By meeting and serving the needs of all, Mnaweejeendiwin will promote healthier lifestyles.

VISION STATEMENT

Mnaweejeendiwin is established as an alternative to the "present" Tribal/State Juvenile Court System. Mnaweejeendiwin is a group composed of individuals, who by using traditional methods of conflict resolution and problem-solving, will provide youth and their families an opportunity to resolve problems and conflicts through consensus,

Exh. I

thereby enhancing family responsibility. Through this process, it is anticipated that the family will learn to work towards a solution together and in harmony. It is the hope of Mnaweejeendiwin that this consensus building will make for a stronger, healthier family and in the process a strong healthy community.

GOALS AND OBJECTIVES

The goal of the Mnaweejeendiwin is to reduce youth crime, violence, and victimization by strengthening families and developing community-based responses to handle problems and conflicts involving youth. In addition, the following are goals established to:

1) decrease the number of delinquent youth sent away from the community for intervention,
2) provide a safe environment to handle cases involving children and/or youth,
3) improve family functioning, and
4) promotion of positive parent/child interaction.

OBJECTIVES

To reach these goals the following objectives need to be achieved:

1) Systematic screening to identify high risk youth,
2) Incorporation of non-adversarial methods and techniques to process cases involving youth,
3) Establishment of a referral processes for cases involving youth to the Mnaweejeendiwin Peace Makers,
4) Linkage of identified families to appropriate legal and social services where they can assist more intensive and long term assistance,
5) Case coordination of a wide range of community services with human services agencies or programs aimed at providing supportive services to youth and families-in-need.
6) Development of a process to collect and manage client information,
7) Identify and/or develop programs located in the community that promote the cultural needs and strengths of youth and families, and
8) Intensive training and supervision of locally recruited professionals and paraprofessionals to administrator and provide Peace Making facilitation and other direct services.

JURISDICTION AND PROGRAM ELIGIBILITY CRITERIA

JURISDICTIONS

The Grand Traverse Band of Ottawa and Chippewa Indians has exclusive original jurisdiction over all children, youth and family proceedings in which an Indian child is alleged to be a child-in-need-of-care as defined in Chapter 2, Definitions 2,003 (E) Et. Et. Seq

ELIGIBLE TARGET GROUP

The primary target group are children-in-need-of-care who are at-risk of being processed formally through the Grand Traverse Tribal Court; children and youth who are at-risk of placement or are returning from such placement, including those juveniles handled or placed by other court jurisdictions or agencies; and youth referred by other agencies. Identified youth may fall into the following categories:

1) Abused and/or neglected children,
2) Child-in-need-of-care,
3) Status offenders, or
4) Delinquent offenders who have committed minor offense.

STAFFING AND PEACE MAKERS

The Mnaweejeendiwin will be under the Grand Traverse Tribal Court. Administrative oversight will be provided by the Peace Making Coordinator. The Mnaweejeendiwin will be staffed by a core of facilitators, hereafter referred to as Peace Makers. Below are the basic duties and responsibilities of each position:

- **Peace Making Coordinator** - Responsible for administrative oversight, program management and supervision of program staff and consultants, including maintenance of program standards, program evaluation, quality assurance, training needs, and seeking supportive financial and structural resources.
- **Peace Makers** - Provide direct facilitation services in child-in-need-of-care cases. Upon receipt of a case, is responsible for identifying available dates to facilitate the case, recording case outcomes and agreements, conduct periodic review of cases as needed, and process referrals for treatment and intervention.
- **Qualitative Criteria for Peace Makers** - Must be nonjudgmental and have respect for other people's beliefs. Must exhibit tolerance, recognition, and respect for other people's beliefs and practices. Must be willing to learn. Must participate in community activities and events. Must be a role-model for others and mindful of their role as Peace Maker. Must be supportive to other Peace Makers, especially not to abuse drugs or alcohol. Must demonstrate caring and respect for fellow Peace Makers, especially as it is a reflection of the entire group.

PROGRAM COMPONENTS

REQUEST FOR SERVICES

To promote custom and tradition, all requests for Mnaweejeendiwin services shall be requested with offerings of tobacco, sweet grass, cedar, or sage. This will be done to acknowledge the traditional way that help or assistance is requested. The Peace Makers will accept this offering and use it as part of the opening session or for other functions conducted for or on behalf of the Mnaweejeendiwin.

The Peace Makers will inform potential service recipients unfamiliar with this traditional process for requesting services so that they may learn and use the proper protocol for obtaining services.

PRELIMINARY INTERVIEW AND ASSESSMENT

The Coordinator will review case referrals and questionnaires given to potential clients. The purpose of the Preliminary Assessment is to obtain vital information about the case and determine whether it is an appropriate case for the Mnaweejeendiwin to handle. The following are essential activities that need to be followed in each case

1) The Coordinator reviews all case referrals to determine whether the case is appropriate for the Mnaweejeendiwin to handle
2) If a case is not accepted, a letter is sent immediately to the referral agent or individual notifying them of the Mnaweejeendiwin/Coordinator's decision to decline the case indicating the reason(s) for their decision.
3) If a case is accepted, the referral agent and affected parties are notified in writing immediately to inform them of the Mnaweejeendiwin process along with a time limit for the parties to respond indicating their willingness to use the Mnaweejeendiwin process to handle the case.
    a. Information about the Mnaweejeendiwin process should include a description of the procedures and protocols that participants need to fulfill as part of their agreement to participate. These include requirements for donations or gifts that should be made by requesting parties to the Mnaweejeendiwin.
    b. All donations and gifts made to Peace Makers are accepted on behalf of and belong to the Mnweejeendiwin and are not considered the sole possession of any Peace Maker who receives a gift or donation in exchange for the services provided.
4) Upon acceptance of a case, a client questionnaire shall be administered to compile as much information as possible concerning the case, the youth and the family.

PEACE MAKING SESSION

- Once the case is accepted and scheduled, the Peace Makers will hear the case.
- Peace Makers should arrive a ½ hour before the parties and prepare for the session.
- Peace Makers will go through the rules, answer questions with the parties and then proceed.
- Peace Makers may request one or more sessions to complete the process.

REACHING AN AGREEMENT

After the Peace Making session with the parties and reaching an agreement, the Peace Makers will draft the agreement and plan a time to meet the parties for signatures.

The Peace Makers will return the signed contract to the Coordinator within seven (7) days. The Coordinator will mail the contract to the appropriate parties.

NO AGREEMENT REACHED

After the Peace Making session with the parties and if an agreement is not reached, the Peace Makers will submit a written letter to the Prosecutor notifying the court that an agreement has not been reached. The case will proceed in Tribal Court.

ROLES AND RESPONSIBILITIES OF A PEACE MAKER

PROCESS TO BECOME A PEACE MAKER

1) Individuals interested in becoming a Peace Maker should attend a Mnaweejeendiwin meeting to introduce themselves, voice their desire to become a Peace Maker, and learn more about the Mnaweejeendiwin process.
   a. Interested individuals should be provided with information about the Mnaweejeendiwin process, including the purpose, mission, goals and objectives. Individuals should be informed clearly of the personal expectations of Peace Makers to serve as positive role models and including time commitments and the roles and responsibilities of Peace Makers.
   b. A resume with references shall be submitted to obtain information from the prospective candidate and a release of information form signed by the candidate to conduct a criminal background check, with special emphasis on work with children and youth.
   c. Interested candidates must submit a letter of intent outlining their reasons for wanting to be a Peace Maker..
   d. Candidates will be interviewed by the Peace Makers.
   e. Candidates will undergo six months of training and include a mentorship with a senior Peace Maker.
   f. Candidates must be over twenty-one (21) years of age.

ABSENCE/REMOVAL OF PEACE MAKERS

If a Peace Maker will be absent from a meeting they must call the coordinator prior to the meeting.

1) Absences
   a. Unexcused absences: If a Peace Maker misses a meeting or Mnaweejeendiwin session, they must have a legitimate excuse. At all times, unless an emergency situation occurs, absences must be reported ahead of time. This is especially important when Mnaweejeendiwin cases are scheduled.
   b. Excused absences: A leave of absence, for a specified period of time may be requested by a Peace Maker and be granted for cause by consensus of all the Mnaweejeendiwin Peace Makers.
   c. Excused absences may include: death, illness, personal problems, weddings, work, and other legitimate reasons for not being available to attend meetings of conduct session.
2) If more than three (3) meetings or Mnaweejeendiwin sessions are missed without an excuse, the Coordinator will contact the Peace Maker to explain their absences and to reaffirm their commitment to continue as a Peace Maker or to withdraw from service.

a. Upon conducting this personal meeting, the Coordinator shall make a decision to excuse the absences or to determine whether the absent Peace Maker should be retained or removed from service.
b. The decisions of the Coordinator shall be documented and filed.

3) Inappropriate use of alcohol and/or drugs shall immediately be addressed by the Coordinator and the individual Peace Maker. There will be a meeting between them to discuss the issue. At the next regular scheduled meeting the Coordinator will present the facts and discuss the issues with the Peace Makers. The final decision will be made by the Coordinator and it shall be documented and filed.

COMPLAINT PROCESS

If anyone should have a complaint with any individual Peace Maker or the Peace Making process, the complaint should be submitted in writing to the Peace Making Coordinator. The complaint will be addressed at a meeting between the Coordinator and the complainant. A written response will be sent to all interested parties. If anyone has a complaint with the Coordinator, the complaint should be submitted in writing to the Associate Judge/Chief Judge. The complaint will be addressed and a written response will be sent to all interested parties.

To : Donna Warren

Date : 6 / 1 / 01

From : Paul Raphael Paul Raphael

On a weekly base the Peace Maker Coordinator on the average works with 42 youth a week. These tribal youth are from Peshawbestown, Benzie, Traverse City and East Jordan. During these meetings youth discuss and participant in conflict resolutions, environmental and plants and trees, Bird Language, Tracking, Fire making, solo time and keeping a journal. These activities are culturally based so our youth understanding who they are as native people.

Peace Making has had seven (7) referrals cases either sent by the court or tribal prosecutor in which three (3) of those cases are still active and being monitored by Peace Makers.

The Peace Maker Coordinator has been called by school staff from Suttons Bay and East Jordan schools where native and non-native students have had conflicts with each other. We continue to work with East Jordan school on a weekly base.
The Traverse City title nine coordinator Sherri Domine, also had problems with tribal youth we our working with her to resolve the problems.

We have also work with adults from the community with problems extending from Landlord / Tenant work with them three weeks trying to resolve their issue so the matter wouldn't go to court, neither party would give in case went to court.

Two different young couples who where having problems in their relationship and wanted help in staying together also have called us upon.
First couple meeting with Peace Makers to learn what their problem was and how to move forward. Peace Makers set up second meeting with the young couple with older couples that have married anywhere from fifteen years to twenty years. They continued to meet once a week for month.
Second couple went through similar process meeting with older couples except this time we where able to have an elder couple willing to participant who have married over sixty years.
Both couples are doing well and still struggle now and than but are thankful for the Peace Makers and older couples who came to helping them out in keeping their families together.

Exh. J

To : Eileen Shimizu

Date: 07 / 12 / 01

From: Paul Raphael Paul Raphael
Peace Maker Coordinator

This report covers from January 2000 thru July 2001

Up date of the past year cases Peace Maker handled and closed out. Peace Makers had fourteen (14) cases that was processed by family decision making.
These cases extended from vandalism, theft, and assaults, minor in Possession

1) 4 cases involved retail fraud

2) 3 cases involved vandalism

3) 5 cases involved assaults/ harassment

4) 2 cases involved minor in possession

In the fourteen-(14) cases we handled in the past year three (3) of those cases came back into the court system. All of these cases are juveniles and first time offense.

All cases are monitored on the average(0 to 6 months)

Exh K

Peace Maker

GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS

PEACE MAKING COURT

Date: 1 / 24 / 01

In the matter of (Client)

Case No.#

The Peace Making agreement:

1.) Pay Restitution to Housing - Restitution Paid - See Attachment

2.) No CSW - CSW Performed with Elders - See Attachment

3.) Peace Making Session/Traditional Counseling

Client Name

Parents

Steve Lewis
Peace Maker

Sheri L. Vezina
Peace Maker

Exh L

Statement of

Andrew J. Lee
Executive Director
The Harvard Project on American Indian Economic Development
John F. Kennedy School of Government, Harvard University

before the

Committee on Indian Affairs
United States Senate

July 18, 2001

Good morning Mr. Chairman, Mr. Vice Chairman and Members of the Committee. Thank you for the opportunity to appear before you today to discuss an issue of tremendous importance to Indian Country – effective tribal governance and its impact on economic development and the well being of Native citizenry. My name is Andrew Lee, and I have the pleasure of serving as the Executive Director of the Harvard Project on American Indian Economic Development (the Harvard Project) at the John F. Kennedy School of Government, Harvard University.[1] The Harvard Project is co-directed by Prof. Joseph Kalt (Harvard University), Prof. Stephen Cornell (University of Arizona) and Dr. Manley Begay (University of Arizona).

The Harvard Project on American Indian Economic Development seeks to understand and nourish the conditions under which sustained, self-determined social and economic development is achieved on American Indian reservations. Since the Project's creation in 1986, we have been working for and with tribes and tribal organizations to research and document how tribes are building healthy, prosperous Indian nations. Our service to Indian Country centers on four activities. We administer three of them collaboratively with the Udall Center for Studies in Public Policy at the University of Arizona: comparative and case research, pro bono advisory services, and executive education for tribal leadership. The fourth is the Harvard Project's awards program, *Honoring Contributions in the Governance of American Indian Nations* (also known as Honoring Nations). Honoring Nations, as discussed below, identifies, celebrates and shares outstanding examples of tribal governance.

I would like to take this opportunity to talk about three issues: the importance of good tribal governance, some characteristics of it, and the specific nexus between governance and economic development in Indian Country. My testimony concludes with a presentation of broad policy principles for the Federal government to consider that my

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[1] The Harvard Project is housed at the Malcolm Wiener Center for Social Policy at the John F. Kennedy School of Government, and is a project of the Harvard University Native American Program, a University-wide interfaculty initiative.

colleagues and I believe will encourage and facilitate American Indian economic development.

The Importance of Tribal Governance

Like other nations around the world, tribes and their leaders struggle to preserve and enhance their political sovereignty, establish sound economies, and ensure the well being of their citizenry. Events and trends of the last decade have forced tribes to spend an unprecedented amount of time and resources fighting critical legislative and court battles to protect their inherent sovereignty, challenge misperceptions of vast and widespread casino wealth, and navigate through evolving relations with other governments at the federal, state and local levels. While all important matters, I would like to suggest that the most ambitious challenge facing Indian Country can be posed in a single question: How can Indian tribes build and sustain healthy, prosperous nations?

In its decade-and-a-half of research and fieldwork, the Harvard Project has come to a fundamental conclusion: Successful Indian nations assert the right to govern themselves and exercise that right effectively by building capable and culturally appropriate institutions of self-governance. Neither economic development nor the other cultural and social goals of Native nations can take hold without sovereignty backed by effective self-government. The importance of effective self-governance and governmental performance to the American Indian nation building process cannot be overstated. Although the need to continue defending tribal sovereignty in outside arenas remains pronounced, too little attention has been placed on exercising the very sovereignty tribes seek to preserve. Sovereignty is hollow unless it is backed by institutions that, at the most basic level, can "get things done."

Governing institutions (which are tribal-specific but include legislative, executive and judicial components) are the backbone of the nation building process. That good governance and American Indian *national* success go hand-in-hand should not be surprising. Like others in the community of governments, tribal governments' responsibilities are tremendous. They create and institutionalize the "rule of law" rather than the rule of personalities and politics; they manage human and natural resources often in the midst of jurisdictional uncertainty; they administer social and cultural programs upon which citizens depend; and they negotiate with other governments and entities. The degree to which an Indian nation is able to perform these and other functions effectively has a direct impact on the nation's overall well being and future outlook. Indeed, a core challenge of any nation, whether in Eastern Europe, Latin America, Africa or Indian Country, is to build governing institutions that advance the common good and meet the needs of the citizens they serve. Therefore, if we are concerned about the future of Native America, we need to take seriously questions of tribal governance.

Fortunately, a growing number of governance success stories from Indian Country are rising up as examples to lead by and as a source of optimism. Today, we see Indian nations replacing the decision-making power of outsiders with tribal institutions of self-governance. These institutions not only get the job done, but do it better. More and

more tribes, several of which are represented at this hearing today, are putting into place effective policies and codes, designing and building their own social and economic programs, improving governmental services and forging innovative partnerships at the international, federal, state and local levels. Slowly but surely, excellence in tribal governance is becoming the norm, not the exception.

Characteristics of Good Tribal Governance

Recognizing that governmental excellence deserves attention and encouragement, the Harvard Project launched *Honoring Contributions in the Governance of American Indian Nations* (Honoring Nations) in 1998. Primary sponsorship comes from the Ford Foundation, which supports similar programs in Brazil, Chile, the Philippines, South Africa and the United States. Supplemental support comes from the Rockefeller Foundation.

Honoring Nations was created to fulfill a simple mission: to identify, celebrate and share information about outstanding practices of tribal government. At the heart of Honoring Nations are the principles that tribes themselves hold the key to positive social, political, cultural and economic prosperity, and that self-governance plays a crucial role in building and sustaining strong, healthy Indian nations. The program serves as a vehicle for shifting focus from what does not work to what does work in tribal governance, bringing greater access to innovative ideas and effective approaches that can serve as models of inspiration and knowledge. Since its creation, Honoring Nations has completed two rounds of awards cycles (1999 and 2000), honoring a total of thirty-two tribal government programs (see attached list of honored programs). Although the awards program is young, numerous characteristics of good tribal governance have already emerged. Let me describe these briefly:

- *Governmental excellence requires tribal governments to identify key problems facing their nations and craft solutions with measurable results.* Whether confronting extraordinarily high rates of suicide or developing an economic development corporation to counter environmental degradation on subsistence lands, it is important for tribal governments to possess clearly defined missions for addressing compelling problems. Equally important, effective tribal governments seek – and produce –outcomes that can be measured. From greatly improving the preparedness of Native high school students to attend institutions of higher education to building partnerships with other Indian nations to address common concerns, exemplary tribal government programs are administered by public servants who understand that tribal government activities must produce positive and clear results. Missions and measurements allow tribes to understand where they are and provide a roadmap for where they are going.

- *Good tribal governance involves "real" exercises of sovereignty.* Exemplary tribal government programs strengthen their nations' abilities to exist as self-governing sovereigns. When tribal governments spend most of their time insisting that "others" are responsible for creating and solving their problems, they miss opportunities to develop sovereign solutions. The truly path-breaking Indian nations control or offer

fruitful input to hard problems, work to increase the respect that other governments have for them, and build institutions that transform sovereignty into a practical reality. The exercise of sovereignty creates a cultural shift towards self-reliance with quantifiable results. For example, some tribes have overseen the development of new information management systems, and others have developed government-to-government memoranda that ensure Indian nations a seat at the table. Other examples include tribally initiated small business development strategies and partnerships with colleges and universities that lead to a more educated and well-trained citizenry – one that is prepared to move the tribe's interests forward.

- *Effective tribal governments are agents of innovation and are willing to break the status quo.* Successful tribal government initiatives are frequently those that craft a distinctly "Indian" solution, whether that is the incorporation of old ways or new Native approaches. Culture and tradition can, and often should, serve as the foundation upon which programs are built. For many Indian nations, the efficiency and efficacy of governmental activities – from wildlife management to health and wellness programs, and from victim services to support for the arts – is greatly improved when cultural appropriateness is considered. Tribes can achieve astonishing success (on their own terms) if they are willing to take risks or draw from Native cultural tradition to develop innovative approaches to pressing, and often long-standing, community needs.

- *Successful tribal government activities are institutionalized.* In Indian Country, it is frequently the case that tribal government initiatives have a lifespan only as long as the political life of their most active supporters. Yet to be truly successful, innovations must outlast their initial implementers. Because short-lived quick fixes fail to solve problems and deplete the resources and capacity of governing institutions, tribal leaders and program managers should institutionalize programs, practices and initiatives to assure their ongoing success. Examples include economic ventures that are protected with a firm separation from tribal politics, social and cultural programs that live on through a "code of service" internalized by volunteers, and governmental agreements that perpetuate based on an initial track record of success. Institutionalization may also be achieved when programs enjoy stable policies and codes, pursue financial self-sufficiency, develop performance indicators, and create mechanisms for ensuring accountability and transparency.

The Link Between Good Governance and Economic Development

The experiences of our Honoring Nations winners underscore the Harvard Project's research finding that tribal institutions "make or break" the health and prosperity of Indian nations. Not surprisingly, there is a strong and close relationship between tribal governance and economic development.

In our work, we often encounter two very different approaches to economic development. The first is what we call the "planning and projects" approach, and it is based on the idea that economic development is about getting the next big federal grant

or picking the "winning" project that will bring jobs and income to the reservation. This approach generates familiar stories: an enterprise starts up, but fails to live up to the community's high expectations. Or the tribe gets the big federal grant to initiate a "federal flavor-of-the-day" project, but it cannot survive beyond one cycle of investment. Or the investor shows up on the reservation, gets entangled in tribal politics, and eventually vows never to do business with another Indian tribe. This pattern is both cyclical and destructive. It encourages tribes to become experts in the grantsmanship game; provides incentives for governing institutions to reflect the desires of outsiders; effectively reduces tribal governments to mere appendages of the federal apparatus; and produces strings of failure that sap the energy and expectations of all involved.

The second approach we find – one that is supported strongly by the research results – is the nation building approach. Tribes that take this approach recognize that economic development is first and foremost a political challenge, and that the task of building a healthy economy hinges on the creation of an environment that encourages economic development to take root and become sustainable. These nation building tribes do not exhaust their resources looking for grants or seeking the one big project that will serve as a panacea. Rather, they seize control over decision making and turn sovereignty into a practical reality; establish capable and culturally appropriate governing institutions; maintain a strategic orientation that incorporates community priorities, concerns, circumstances and assets; and empower leaders who will implement a strategic and community-defined vision for the future. In short, these tribes recognize that governance and economic development are inextricably linked.

Importantly, the Harvard Project research provides incontrovertible evidence that the nation building approach, with its focus on questions of governance, produces economic results. Effective self-governance goes a long way in explaining why some tribes like the Mississippi Band of Choctaw, Cochiti Pueblo, Citizen Potawatomi, the Salish and Kootenai of the Flathead Reservation, and the Mille Lacs Band of Ojibwe are able to build the foundation that allows them to break free from dependency, poverty and their related pathologies – while others languish.

Institutional Attributes that Encourage Economic Development

So what institutional attributes are most conducive to economic development in Indian Country? The research of the Harvard Project finds that there are at least five,[2] each briefly outlined with examples below:

Stable Institutions and Policies. Experiences from the developing world are blatant reminders that if governing institutions are in a constant state of turmoil it is nearly impossible to attract investment from within (i.e., educated, empowered citizens or entrepreneurs) or outside (i.e., corporations) the nation. Tribes with unclear "rules of the

[2] See Cornell and Kalt, "Sovereignty and Nation Building: The Development Challenge in Indian Country Today" in *American Indian Culture and Research Journal* 22:3 (1998) 187-214 or accessed at www.ksg.harvard.edu/hpaied. See also, Cornell, Stephen and Joseph Kalt, *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, University of California, 1992.

game" – which stem from frequent or abrupt turnovers in government, policies set on an ad hoc basis, or from elected officials changing the rules to serve their own interests – have difficulty attracting investors to put their energy, time and capital into the tribal economy. The task, therefore, is to implement policies through a process that clearly defines the rights and responsibilities of all affected parties. Some tribes are doing exactly this.

The experience of the Swinomish Indian Tribal Community is instructive. Up through the 1980s, the Tribe and the surrounding county were administering conflicting and ill-defined zoning, permitting and regulation enforcement programs. The resulting confusion over jurisdiction and allowable land use engendered anti-Indian and anti-non-Indian sentiments, a litigious atmosphere and serious difficulty in attracting investment. In response, the Tribe worked with the county to design a framework for conducting permitting activities within the boundaries of this highly "checkerboarded" reservation, and formally institutionalized processes through memoranda of agreement and understanding. Today, both Indians and non-Indians alike benefit from a predictable land use process, which affords tribal leaders the freedom to focus on other sovereignty enhancing pursuits (such as tribally directed economic development, job creation and improved livelihoods for tribal citizens).

Fair and Effective Mechanisms for Dispute Resolution. Governing institutions have to be able to provide consistently non-politicized and fair dispute resolution in order to assure people that their claims and disputes will get a "fair shake." Unfortunately, many tribes possess inadequate court systems, and in some cases, the court and its decisions are under the direct control of tribal politicians. This is not a promising environment for potential investors. At the Harvard Project, we have examined 67 tribes for which comparable information is available, and have found that those tribes with strong, genuinely independent judicial systems economically outperform those that do not. If you control for the effects of other factors on employment, you find that simply having an independent judicial system reduces unemployment, on average, by five percentage points. This suggests that of the quickest ways to reduce unemployment on reservations is to establish a strong, genuinely independent judiciary.

Some tribes have made such investments. The Navajo Nation and the Grand Traverse Band of Ottawa and Chippewa Indians, for example, possess genuinely independent (i.e., institutionally separated from other branches of government) courts. These courts send a reassuring signal to investors – whether the tribal member looking to start up a small business on the reservation or the joint venture partner – that if a contract dispute arises, the ruling will not be predetermined or subject to overturn by tribal politicians. Yet the need for effective judiciaries does not equate with the need to develop "western" looking courts; it merely requires that the courts be consistent and enforceable. The Navajo and Grand Traverse courts are distinctly Native. Both possess peacemaking divisions, and Navajo common and statutory laws are the "laws of preference" in the Navajo Nation's Supreme Court.

Separation of Politics from Business Management. Many reservations possess centrally controlled economies, and consequently, the tribal government controls tribal enterprises. Business decisions are made by the tribal council; personnel issues are referred to the council or president for resolution; and elected politicians play a central role in the day-to-day running of tribal enterprises. This scenario is economically unproductive. In fact, the Harvard Project has surveyed about 125 enterprises on more than 30 reservations. The results are striking: tribal enterprises that were insulated from political interference – generally through a managing board of directors and/or a corporate charter beyond the direct control of council members or the tribal president – were four times as likely to be profitable than those that were not.

The Winnebago Tribe of Nebraska's Ho-Chunk, Inc. is a shining example of the benefits of separating politics from business management. The mission statement of this tribally owned economic development corporation is telling: "Ho-Chunk was established so that Tribal business operations would be free from political interference and outside the bureaucratic process of the government." The results speak for themselves. In 2000, the Corporation's actively managed enterprises, joint ventures and passive investments produced $25 million; operating cash flow was $1.5 million; and net income was $1.2 million. Such performance enabled Ho-Chunk, Inc. to make a $225,000 dividend payment to the Tribe for governmental services. These results are especially impressive when contrasted to the early 1990s, when the sole source of tribal income was derived from land leases and amounted to less than $180,000 per year.

A Capable Bureaucracy. The twin policy principles of self-determination and self-governance, first articulated through federal legislation in the 1970s, provide excellent opportunities for tribes to take over program management. The responsibilities of "638 contracting" and self-governance compacting, however, require tribes to possess capable bureaucracies. Regularized and efficient policies guiding natural resource management, robust labor grievance procedures, financial management systems and the like are crucial to a tribe's ability to govern itself and thus undertake the process of economic development.

Many of the Honoring Nations winners possess capable bureaucracies deserving of mention. The Kayenta Township on the Navajo Reservation, for example, has done something that the Navajo central government has not: it put into place a streamlined bureaucracy for handling business site leases. Almost immediately after the Township reduced the dozens of steps and signatures typically required, it saw new businesses lining up to locate within its borders. The Jicarilla and White Mountain Apache tribes have developed sophisticated yet pragmatic codes and policies for managing their abundant wildlife resources. Their respective investments in institutional effectiveness and technical capacity produce bottom line results: some of the healthiest elk herds in the world live on their reservations, and both tribes are able to bring in hundreds of thousands of dollars from trophy hunts they coordinate – which can command as much as $38,000 for a single elk tag.

Cultural Match. Our research keeps uncovering the result that successful economies in Indian Country stand on the shoulders of culturally appropriate institutions. Institutions have to be legitimate in the eyes of the people they serve. Constitutions and governing structures that have been imposed upon tribes from outsiders (e.g., IRA constitutions), are unlikely to match the prevailing norms in the community about how authority should be organized and exercised. The *self* in self-governance cannot be forgotten, and it is no coincidence that tribes functioning under essentially "foreign" governing systems have a sad history of economic failure. The trick for Indian nations is to equip themselves with the institutional tools that fit their unique societies and modern circumstances. We cannot expect that a highly centralized government found at Mississippi Choctaw or Mescalero Apache will produce healthy economies for reservations like Pine Ridge or Rosebud Sioux, where district and sub-tribal allegiances remain strong. History proves that a "one-size fits all" approach in simply unfeasible.

Implications for Federal Indian Policy

The foregoing research findings, examples and lessons from our Honoring Nations winners serve to highlight several broad principles and guidelines that should undergird the Federal government's policies with respect to facilitating economic development in Indian Country.

First, self-determination should continue to serve as the cornerstone of federal Indian policy. Self-determination is both the ends and the means of a coherent policy toward American Indian nations. As our research findings demonstrate, self-determination is not only compelling on legal and moral grounds, but it is the only policy in over a century of federal Indian policy that has brought systematic positive changes to the health and well being of this country's indigenous peoples. I think my colleague Prof. Joseph Kalt perhaps said it best when he testified before this Committee in September 1996 and stated, "One of the quickest ways to bring development to a halt and prolong the impoverished conditions of reservations would be to further undermine the sovereignty of Indian tribes." Indeed, to stray from the twin policy pillars of self-determination and self-governance would not only be a disservice to Indian nations, but would ultimately burden the Federal government and America at-large, who would likely witness the reversal of the positive socioeconomic advances made in the past thirty years. In short, to withdraw from self-determination is to condemn reservations to existing as communities of dependency with a citizenry that is disenchanted and downtrodden, and to relegate tribal governments to little more than ineffectual appendages of the Federal government.

Second, the Federal government should expand opportunities for tribes to control programs through compacting and contracting of programs and services that have historically been the exclusive domain of federal agencies. Our Honoring Nations winners demonstrate that programs serving tribal citizens are most effective in meeting their objectives when the tribes themselves are in control and accountable for the results. This factor, more than any other, accounts for the success of foster care placement at Fond du Lac, junior and senior high school education at Hopi, health care at Mississippi

Choctaw, Coeur d'Alene and Puyallup, and natural resource management at Nez Perce, the Pueblo of Sandia, Jicarilla and White Mountain Apache. Increased program effectiveness is due, in large part, to the fact that tribal control shortens the lines of accountability. Tribal leaders and managers have an incentive to perform: if their programs fail, they are held accountable. Of course, putting tribes in greater control over their projects and programs does not guarantee positive results. But when given the opportunity, tribes are more likely manage their own affairs effectively than when their affairs are managed even the most well-intentioned federal agencies.

Third, the Federal government should break free from the "planning and projects" mentality. As noted above, our research finds that economic development in Indian Country is first and foremost a political challenge. Those tribes that think economic development is primarily about attracting federal grants and or about picking *the* "winning" project rarely end up with sustainable, healthy economies. In contrast, those tribes that recognize importance of de facto sovereignty, combined with capable, culturally appropriate institutions of self-governance, are far more likely to succeed economically. For the Federal government, block granting and performance-based funding (as opposed to a pre-grant checklist approach) are appealing approaches for shifting accountability for program success away from Washington, DC and to the citizens for whom the programs are intended to serve.

And finally, the Federal government should support institutional capacity building for tribal governments. Our work of the past fifteen years suggests that tribes must have capable institutions of governance, including functioning and legitimate constitutions and governing systems, genuinely independent judicial systems and bureaucracies that can get the job done effectively and predictably. There is no clearer illustration of this fact than the long legacy of tribes' institutional dependence and the accompanying economic development failures. It is important to recognize that what works for the Navajo Nation may fail miserably at Onondaga. The Federal government can, however, support tribes' efforts at constitutional, governmental and bureaucratic reform, as these are investments whose pay offs are likely to come in the form of healthy tribal economies that can flourish independently, contribute to local economies and require fewer federal resources.

Let me conclude by expressing my appreciation to this Committee and its leadership for bringing attention to the importance of tribal governance. To be certain, it is a topic deserving of discussion both in these chambers and throughout Indian Country. I join my colleagues at both Harvard University and the University of Arizona in respectfully urging that questions of governance be included in any discussion about and legislation directed toward economic development in Indian Country.

Once again, thank you for this opportunity to testify. I trust that you will not hesitate to call upon me or my colleagues if we can be of assistance to the Committee or its distinguished members.

HONORING NATIONS

The Harvard Project on American Indian Economic Development

HONORING CONTRIBUTIONS IN THE GOVERNANCE OF AMERICAN INDIAN NATIONS

An Awards Program that Identifies, Celebrates & Shares Outstanding Examples of Tribal Governance

2000 HIGH HONORS

Economic Development Corporation

Ho-Chunk, Inc., Winnebago Tribe of Nebraska

The mission of Ho-Chunk, Inc. is to promote economic self-sufficiency for the Winnebago Tribe of Nebraska and to create job opportunities for its members. Chartered under the laws of the Winnebago Tribe and wholly owned by the Tribe, Ho-Chunk, Inc. was launched in 1994 to diversify the Tribe's business interests while maintaining a separation between business and tribal government. The general purpose company promotes economic self-sufficiency by creating jobs through its actively managed, joint ventures and passive investments which include hotels, convenience stores, web-sites and a temporary labor service provider. Ho-Chunk, Inc. currently employs and trains 140 tribal members and operates under a tribally oriented management team. The demonstrated growth and profitability of Ho-Chunk, Inc. has invigorated tribal pride while establishing a successful business model within Indian Country.

Elders Cultural Advisory Council

Forest Resources, San Carlos Apache Tribe

The Elders Cultural Advisory Council was formed by a resolution of the San Carlos Tribal Council in 1993 to advise that body on culturally related matters, to consult with off-reservation entities and to administer and oversee cultural preservation activities. As a source of traditional wisdom, the Elders Council plays an active role in the Tribe's governance by providing insight on issues as diverse as resource management, leadership responsibilities, cultural practices and repatriation of sacred objects. The values of self-reliance and respect and a deep connection to nature are central to traditional Apache life, and are underlying themes in all Elders Cultural Advisory Council activities, consultations and messages. In establishing the Elders Cultural

Advisory Council, the San Carlos Tribe gains access to an important source of traditional knowledge and enables a key constituency to have a voice in tribal affairs.

Navajo Child Special Advocacy Program

Division of Social Services, Navajo Nation

Responding to high rates of child abuse and neglect, the Navajo Child Special Advocacy Project was launched in 1990 to provide Western and Navajo therapy to child victims of sexual abuse between the ages of 3 and 17. With five offices on the Reservation, the Project administers Navajo diagnosis, treatment and traditional healing as well as sand play, art therapy and forensic interviews to help create a safe environment that restores and nurtures children and families' emotional, mental, physical and spiritual well-being. Prior to the creation of the Navajo Child Special Advocacy Project, child victims of sexual abuse and their families lacked adequate support and help. Today, the Program has accomplished the almost insurmountable task of coordinating the efforts of separate agencies by forming a core discipline group to address child sexual abuse. The results of this effort ensure that law enforcement, prosecution, child protective services and advocates can work together for the benefit of the child.

Poeh Center: Sustaining and Constructing Legacies

Poeh Cultural Center, Pueblo of Pojoaque

Faced with the common challenge of raising funds for construction of a cultural center and museum, the Tribal Council created the Pojoaque Pueblo Construction Services Corporation in 1993. The Corporation's chartering mandate was to generate revenues for cultural activities and to oversee the construction and maintenance of the Poeh Center and Museum. Having completed a variety of local construction initiatives (including the Poeh Center) and having received its 8(a) certification, today the Pojoaque Pueblo Construction Services Corporation bids profitably on commercial projects throughout New Mexico and provides a sustainable funding stream for cultural and artistic activities. As a result, the Poeh Center is able to offer training and studio space to Pueblo artists and stimulate knowledge of Pueblo legacies and traditions. By blending culture revitalization and economic development in a unique partnership, the Pueblo is creating new revenues and employment opportunities through its construction company and providing support to cultural activities for years to come.

Swinomish Cooperative Land Use Program

Office of Planning and Community Development, Swinomish Indian Tribal Community

The Cooperative Land Use Program provides a framework based on a memorandum of agreement between the Tribe and Skagit County for conducting permitting activities within the boundaries of the "checkerboarded" reservation and establishes a forum for resolving potential conflicts. The process, which began in the mid-1980s, was the first of its kind in the United States and illustrates a promising alternative in land use conflict resolution by promoting between-government jurisdictional coordination. Since 1996, the tribal and county governments have jointly adopted a Comprehensive Land Use Plan and procedures to administer the plan, which together foster a mutually beneficial government-to-government relationship. Significantly, the model also has served to improve relationships between the Tribe and *other* contiguous local governments. To date, the Swinomish Indian Tribal Community has instituted

more than a dozen separate agreements with federal, state, county and municipal authorities in the areas of land use, public safety, public health, environmental protection and utility regulation.

Hopi Jr./Sr. High: Two Plus Two Plus Two

Hopi Junior/Senior High School, Hopi Tribe

Developed in 1997, the Two Plus Two Plus Two college transition program is a partnership between Hopi Junior/Senior High School, Northland Pioneer College and Northern Arizona University. The program recruits junior and senior high school students to enroll in classes (including distance learning courses) that offer concurrent college level credits. Upon graduation, students enrolled in Two Plus Two Plus Two can earn up to thirty transferable credits to any state or out-of-state accredited community college or university. The Program has led to a growing demand for math and science courses by students within the school and to increased college enrollment (forty-five percent of this year's graduating class will attend two or four year institutions of higher education). Two Plus Two Plus Two is helping Hopi students attain advanced educational degrees and, in so doing, empowering them with technological and academic skills that they can bring back to the rural reservation.

White Earth Suicide Intervention Team

White Earth Chippewa Tribe

The White Earth Suicide Intervention Team (WESIT) was created in 1990 in response to an extraordinarily high rate of suicide attempts and completions among tribal members living on the White Earth Reservation. With the Tribal Council's official support, a group of volunteers came together following a series of grassroots community meetings and adopted the mission of "suicide intervention." Their volunteer program is designed to provide support and care to clients and family members and to ensure that appropriate intervention and treatment occurs in the event of suicide ideation or a suicide attempt. In 1990, there was great despair among members of the White Earth Reservation that they might not be able to overcome this difficult problem; today, WESIT's effectiveness is best demonstrated through a renewed level of community hope. While it is impossible to eliminate *all* suicides in any community, WESIT has turned the tide of opinion at White Earth, showing that, with compassion, coordinated resources and proper training, something can be done.

Yukaana Development Corporation

Louden Tribal Council

The Louden Tribal Council created the Yukaana Development Corporation in 1998 to address the concerns of environmental degradation, environmental justice, training and employment. Under a contact with the U.S. Air Force, the tribally owned Corporation cleans contamination caused by a local military base and collaborates with other agencies to train Natives in environmental remediation. Given Alaska Natives' unique political context, assertions of tribal self-governance must be creative and have broad-ranging benefits. Within this framework, the Louden Tribal Council has been extremely resourceful in marshalling the necessary resources to fulfill its twin objectives of starting a for-profit corporation and undertaking environmental remediation on its

traditional hunting and fishing lands. The Yukanna Development Corporation is both improving the environment and creating new job opportunities in this rural area in the interior of Alaska.

2000 HONORS

Coeur d'Alene Tribal Wellness Center

Benewah Medical Center, Coeur d'Alene Tribe

Created in 1998, the Wellness Center aims to promote healthy lifestyles by offering programs in fitness, aquatics, rehabilitation, childcare and community health to 3,000 Indian and non-Indian clients. By employing the medicine wheel, or whole-life, approach to health and by focusing on preventative care, the Center complements the acute and chronic illness care provided by the Benewah Medical Center, which was created in 1990 through a joint venture between the Tribe and the City of Plummer, Idaho. Together with the Medical Center, the multi-purpose Wellness Center is the culmination of the Tribe's goal to provide affordable health care services for all residents on the Reservation. Program participation is growing, tribal citizens are enthusiastic and the Center is positively impacting members' health—evidence that the Coeur d'Alene Tribe has successfully integrated primary health care, prevention and wellness care.

Enhancing Government-to-Government Relationships

Intergovernmental Affairs Department, The Confederated Tribes of Grand Ronde

The Intergovernmental Affairs Department has achieved positive intergovernmental relationships with federal, state and local governments by pursuing a five-pronged strategy of communication, education, cooperation, contributions and presence. Since the Department's creation three years ago, the Tribe has raised public awareness, built coalitions and forged partnerships with the Oregon Department of Environmental Quality and the U.S. Forest Service. By establishing a strong presence at the state capitol, forming a skilled team of tribal advocates and developing a legislative tracking system that informs the Tribal Council of important bills and initiatives, the Department is now in a position to take a proactive role in state and federal Indian affairs and to earn credibility and respect for the Tribe amongst all governments.

Grand Traverse Band Planning and Development

Planning & Development, Grand Traverse Band of Ottawa & Chippewa Indians

Faced with a growing land base and an increasing number of visitors to the Reservation, the Grand Traverse Band Tribal Council established the Planning and Development Department in 1997 to build capacity within the community to accommodate new needs. The Department addressed its challenge by embarking on a comprehensive planning process that relies on community involvement at both the reservation and off-reservation levels to help identify key community needs. Since its inception, over 400 tribal members have taken part in the Department's participatory planning process. Together with the community, the Department has overseen the development of tribal regulatory standards, housing initiatives, state-of-the-art public works projects and plans for public spaces and public buildings. In sum, the Planning and

Development Department improves the Band's internal governance capacity and lays the groundwork for sound community growth well into the future.

Navajo Nation Archaeology Department – Training Programs

Navajo Nation Archaeology Department, Navajo Nation

The Navajo Nation Archaeology Department was created in 1977 to facilitate historic preservation on Navajo Nation lands as mandated by both U.S. and tribal government legislation. In 1988 and again in 1993, the Department expanded to include training programs, undertaken in partnership with Northern Arizona University and Ft. Lewis College, which are designed to give Navajo students the professional skills needed to conduct these important historic preservation activities. The training programs provide field and laboratory experience to Navajo graduate and undergraduate students concentrating in anthropology or archaeology. By combining academic training with practical application on the Navajo Reservation, and western technical skills with traditional Navajo knowledge and oral history, the programs are preparing a pool of qualified Native professionals to assume cultural resource positions that historically have been filled by non-Navajos.

Pharmacy On-Line Billing Initiative

Human Services Division, Fond du Lac Band of Lake Superior Chippewa

In 1995, faced with rising pharmaceutical costs, limited Indian Health Service (IHS) funds and an inability to bill and collect from third party insurers, the Human Services Division contracted with a private sector firm to design and implement a computerized pharmacy billing system. The first of its kind for Indian Country, Fond du Lac's on-line system not only increases the Division's revenue stream, but also updates prices automatically, interfaces with the Indian Health Service's Resource Patient Management System for health record-keeping and warns of drug interactions. This initiative and its spin-offs at Fond du Lac (in dentistry, for example) demonstrate the Tribe's capacity to direct complicated technological innovations that significantly improve existing management information systems. The initiative also is noteworthy for the changes it augured in IHS policy and for the partnership it created between the Band, the IHS and the private sector in searching for monetary support that went beyond the usual sources of tribal health care funds.

Small Business Development Program

Corporate Commission, Mille Lacs Band of Ojibwe Indians

The Small Business Development Program assists Band members in developing the private sector economy by providing low-interest loans up to $75,000 to businesses that are at least 60 percent owned and operated by Band members located on or near the Reservation. The Program offers both "micro" loans to serve as seed money for business development and "macro" loans for more extensive business start-up or expansion needs. Additionally, it offers assistance with business plan development, marketing, accounting and management. Since its inception in 1996, the Program has provided loans and training to more than 30 businesses, including construction companies, coffee houses, a septic service, lawn care and snow removal businesses, a karate studio, a horse breeding operation, a hair salon and an art gallery. Together, the Mille Lacs Corporate Commission and the Small Business Development Program help diversify the tribal

economy by providing economic development opportunities that span beyond government jobs and the gaming industry.

Treaty Rights/National Forest Management Memorandum of Understanding

Member Tribes of the Great Lakes Indian Fish and Wildlife Commission

The Great Lakes Indian Fish and Wildlife Commission (GLIFWC), a tribally chartered intertribal agency, negotiated a memorandum of understanding (MOU) with the U.S. Forest Service that both recognizes and implements treaty-guaranteed hunting, fishing and gathering rights under tribal regulations and establishes a consultation process for National Forest management decisions that affect treaty rights. Under the MOU's government-to-government process, there is increased communication, consultation and integration of the tribes into National Forest decision-making on issues such as sugar bush management and timber harvesting. The MOU establishes standards and processes by which the Forest Service and the Tribes will act consistently across the four National Forests located within areas ceded by the Chippewa in the Treaties of 1836, 1837 and 1842. The MOU provides a model for other tribes seeking to exercise tribal self-governance and to protect treaty resources through a negotiated agreement with a partnering agency from another jurisdiction.

White Mountain Apache Wildlife and Recreation Program

Wildlife and Outdoor Recreation Division, White Mountain Apache Tribe

The White Mountain Apache Wildlife and Recreation Program fulfills the dual role of performing all wildlife conservation and management and serving as a self-sustaining business enterprise based on the Tribe's recreation/tourism industry. The Program's effective wildlife management techniques have allowed the Tribe to gain management control over its wildlife and recreation resources and to better manage them in accordance with Apache values. The conservation management and regulatory component of the Wildlife & Outdoor Recreation Division consists of the Fish & Wildlife Management Department and the Law Enforcement Department; the Division's enterprise component consists of two profit centers, the Outdoor Recreation Department and the Tribe's Trophy Hunting Program. The program has successfully linked effective conservation with enterprise profitability in a mutually beneficial relationship.

1999 HIGH HONORS

Idaho Gray Wolf Recovery Program

Wildlife Management Program, Nez Perce Tribe

By developing a plan that includes monitoring, outreach, species management/control, and research, the Tribe is now leading the statewide recovery of the endangered Gray Wolf. The recovery program, which meets the guidelines developed by the U.S. Fish and Wildlife Services, has resulted in a wolf population that is three times larger than it was five years ago. The Idaho

Gray Wolf Recovery Program has brought recognition to the Tribe's ability to manage a complex, and often controversial project. By asserting treaty rights as co-managers of fish and wildlife resources, the Tribe has forged solid working relationships with the federal and state governments, and importantly, the Gray Wolf is rapidly nearing delisting.

New Law and Old Law Together

Judicial Branch, Navajo Nation

The Judicial Branch seeks to revive and strengthen traditional common law, while ensuring the efficacy of the nation's western-based court model adopted by the Nation. With over 250 Peacemakers among its seven court districts, the Judicial System utilizes traditional methods of dispute resolution as the "law of preference," which allows the courts to be more responsive to people, issues, and traditional institutions. Responding to a desire for others to learn how the Navajo judicial system operates and to teach others how to effectively utilize common law, since 1992, the Supreme Court has held more than 13 sessions in off-Reservation venues. The Branch has also developed the Navajo Nation Bar Association, comprised of over 300 members who are licensed to practice in the Navajo Courts.

Off-Reservation Indian Foster Care

Human Services Division, Fond du Lac Lake Superior Band of Chippewa

By creatively reacting to state laws regarding foster home licensing, the Band established a foster care agency that dramatically reduced the number of Indian children in non-Indian foster care, and increased the number of Indian children in Indian foster care. The agency has successfully channeled nearly $2 million for foster care reimbursement to Indian families in northeastern Minnesota. While the Fond du Lac Government had been able to license homes within the boundaries of the reservation, this was the first time an all-Indian board sponsored by a tribal government had been able to recruit and license homes outside of reservation boundaries.

Ojibwe Language Program

Department of Education, Mille Lacs Band of Ojibwe

Created in 1995, this Tribally-funded program serves 350 students (from toddlers to teenagers) and uses elder-youth interaction, song books, and comic books to teach the Ojibwe language. In addition, the Program broadcasts language classes to local public schools in an effort to teach the Ojibwe language, history, and culture to non-Indian children. Teaching the Band's children their traditional language has allowed Mille Lacs Band members to pass on Tribal values more effectively. At the same time, it has served as an important tool in both preserving the Band's culture and strengthening bonds between Band members.

Pte Hca Ka, Inc.

Pte Hca Ka, Inc., Cheyenne River Sioux Tribe

This tribally chartered corporation developed a culturally compatible management system for reestablishing buffalo as a focal point for socio-economic development, community cohesion, and self-determination. Pte Hca Ka Inc. operates a mobile meat processing facility, and is currently

seeking acquisition of 22,000 acres for a buffalo habitat that would become the first tribal national park. By integrating Lakota traditions into an economic development strategy, Pte Hca Ka, Inc. not only operates a profitable enterprise, but is also restoring cultural values into the Tribal economy and fostering pride and dignity among Tribal citizens. Pte Hca Ka, Inc. has been featured in numerous documentaries and has won widespread praise as a culturally appropriate development effort.

Tax Initiative Economic Development

Kayenta Township Commission, Navajo Nation

The first township on the Navajo Nation to take advantage of new opportunities for local governmental authority, in 1997 the Township implemented a 2.5% retail tax that brings in hundreds of thousands of dollars annually. This revenue has enabled the Township to: build a solid waste transfer station; obtain leveraged financing for economic development projects; and support a local government office that oversees business and homesite leases, and creates local laws and ordinances. As the only self-sufficient "township" located on an Indian reservation in the United States, the Kayenta Township demonstrates how local empowerment and governance can foster self-determined, self-sustaining economic development that addresses community-specific needs.

Water Quality Standards

Environment Department, Pueblo of Sandia

Responding to the severe contamination of the Rio Grande River that threatens human health and ceremonial uses of the water, the Pueblo was awarded "treatment as state" status in 1990. Subsequently, the Pueblo developed and implemented U.S. EPA approved water quality standards that give it control over local and regional water issues, as well as management of water quality improvement efforts. In 1997, the Pueblo of Sandia received EPA's "Partnership in Environmental Excellence Award" for "outstanding success in developing an environmental management program to protect and manage tribal resources." Most importantly, the Pueblo is acting to ensure the program's future success. By having the Pueblo's grade school students tour the river and test its water quality as part of the school science projects, the Pueblo of Sandia is helping to create a new generation of water quality guardians.

Wildlife and Fisheries Management Program

Jicarilla Game and Fish Department, Jicarilla Apache Tribe

Recognized by state game and fish agencies as being one of the best of its kind, JGFD's Program includes a game and fish code and a wildlife management fund for habitat enhancement projects. The Program restored the reservation's mule deer population, trophy trout, and established a commercial elk hunting ranch that produces over $1 million for the Tribe annually. The Jicarilla Tribe's Wildlife and Fisheries Management Program is regarded by both Indians and non-Indians as a model program. In 1987, the Southwest Section of the Native American Fish and Wildlife Society honored the Jicarilla Game and Fish Department with its "Outstanding Program of the Decade" award.

1999 HONORS

Cherokee Tribal Sanitation Program

Tribal Utilities, Eastern Band of Cherokee

Working with its neighboring counties, the Band developed a waste management system that includes a Tribally-owned transfer station, waste collection and recycling, bio-solids and food composting, and an education component. This revenue-generating system has enabled the Band to shut down open dumps, reduce levels of illegal dumping, and avoid the need for a tribal landfill. In addition to revenue from sales of recycling and compost materials, the station also services two neighboring counties lacking federally-certified landfills. Environmentally, the waste management program has been extremely effective in cleaning up the reservation. Whereas two years ago there were five dumps on the reservation, today there is only one. Finally, the Tribe is helping to ensure the program's future success by educating its youth about the need for recycling.

Choctaw Health Center

Choctaw Health Center, Mississippi Band of Choctaw Indians

After transferring all health care decisions from Indian Health Services to tribal control over a ten-year period, the Band significantly improved its health care delivery system. Its state-of-the-art Health Center provides health and dental care, behavioral health care and community health promotion, education and prevention programs, and the first-ever on-reservation disability clinic. In addition, the Tribe has implemented an efficient billing and records system that has reduced the "red-tape" typically associated with third party billing. By taking a more active role in its reservation health care, the tribally-controlled Choctaw Health Center is improving community health and meeting the specific health care needs of its citizens. In 1997, the Choctaw Band's Disability Clinic received the Vice President's prestigious Hammer Award for the Clinic's effective disability determination process.

Institutionalized Quality Improvement Program

Puyallup Tribal Health Authority, Puyallup Tribe of Indians

Following a major Tribally-initiated restructuring in the early 1980s that created a quality improvement committee and a flatter organizational structure, the PTHA has increased patient access for urgent care visits, reduced "no show" rates, created clinical objectives, increased dental treatments, and incorporated the use of traditional healers into health care delivery. The Puyallup Tribe's Quality Improvement Program has enabled the PTHA to address effectively many of the health care needs of the community that were previously unmet under the Indian Health Service's management. With 6 full time physicians and a staff of 210, the PTHA has become a model for other Indian nations seeking to create and sustain health systems that meet the highest standard of excellence.

Land Claims Distribution Trust Fund

Chairman's Office, Grand Traverse Band of Ottawa and Chippewa Indians

After 26 years of negotiation with the U.S. government over how monies from a land claims settlement would be distributed, the Band assumed financial control over the settlement by creating a Trust Fund system that will provide annual payments in perpetuity to Band elders to supplement their social security benefits. The Land Claims Distribution Fund was created to not only provide an additional, permanent, safety net for the Tribe's elders, but also to honor their lifetime contributions and sacrifices. The Fund also enables the Tribe to effectively manage its own settlement award rather than having it remain under the management of the U.S. government.

Minnesota 1837 Ceded Territory Conservation Code

Department of Natural Resources, Mille Lacs Band of Ojibwe

In 1997, the Band successfully developed a conservation code that enables the tribe to exercise its treaty rights to hunt, fish, and gather. The Code sets out detailed hunting and fishing regulations for Band members that protect the natural resources while allowing for traditional practices to continue. The Conservation Code has endured challenges in district courts, appeals courts, and the Supreme Court, which ruled in March 1999 that Band citizens retain their rights to hunt, fish and gather in east-central Minnesota under Band regulations. Crucially, goodwill between Band members and non-Indians has developed. The Code demonstrates that tribes can successfully develop, implement and monitor important natural resources programs in cooperation with non-Indian governments. It provides a model for other Indian nations to strengthen their regulatory mechanisms and improve their government-to-government relations.

Navajo Studies Department

Rough Rock Community School, Navajo Nation

Created in 1966 as the first contract school in the country, Rough Rock is a Navajo-run institution that combines traditional Navajo learning with Western education. Its Navajo studies curriculum, which addresses such subjects as culture, history, and language, was named by the Tribal Council as the only "Navajo Studies" program on the reservation., and today students from any of the Nation's 110 chapters are eligible to attend. As the first school to be controlled entirely by a local Indian community, Rough Rock Community School paved the way for the approximately 200 contract/grant schools that have subsequently opened on Indian reservations across the United States.

Rosebud Sioux Tribal Education Department and Code

Education Department, Rosebud Sioux Tribe

Responding to disproportionately low academic attendance, achievement, and attainment levels, the Tribe created an education department (TED) in 1990 and developed a Code that regulates and coordinates various aspects of the tribal schools, public schools, and federally-funded Indian education programs on the reservation. Since the TED was established and the Code enacted,

drop-out rates have declined substantially and graduation rates have increased. By supplementing state and federal law, the Tribal Education Department and Code enables the Rosebud Sioux Tribe to play a greater role in the education of its youth. The Tribe is now responsible for critical components of formal education– curriculum, staffing and funding– which, for decades, had been assumed by non-tribal governments.

Tribal Court of the Grand Traverse Band

Tribal Court, Grand Traverse Band of Ottawa and Chippewa Indians

Constitutionally separated from the political influences of government, the Tribal Court hears more than 500 cases per year, and utilizes "peacemaking" to mediate in cases in which dispute resolution is preferred to an adversarial approach. The Court adjudicates on such issues as child abuse, juvenile delinquency, guardianships, contract disputes, constitutional issues, personal and property injuries, and employment disputes. By turning to the Peacemaking system, the Tribe has been able to resolve often contentious legal issues in a manner which helps retain the social fabric that ties the community together.

HARVARD UNIVERSITY
JOHN F. KENNEDY SCHOOL OF GOVERNMENT

Andrew J. Lee
Executive Director

The Harvard Project on American Indian Economic Development

August 22, 2001

Hon. Ben Nighthorse Campbell
Vice Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Senator Campbell:

Thank you for the opportunity to testify before the Committee on July 18, 2001 on Indian tribal good governance practices as they relate to economic development. I am responding to your letter of July 23, which included a series of questions. I will address each in turn below.

Question 1
I would like to commend the Harvard Project on their American Indian Economic Development Project as it has proven to be an invaluable resource for this Committee and for tribes in pursuit of robust economies. In your testimony, you state that Self-Determination contracting and compacting are more effective in the delivery of tribal services because they "shorten the lines of accountability." What do you mean by that term and why is it important?

When the Federal government is responsible for direct management and delivery of programs on Indian reservations, accountability stretches all the way to Washington, DC. This is because federal employees are accountable to their parent agencies (e.g., BIA, IHS) rather than to the tribal governments receiving services. The unfortunate consequence of these long lines of accountability is that development decisions will tend to reflect outsiders' agendas. Bureaucratic standards of success (e.g., protecting a budget, expanding authority) are likely to be given more weight than tribal standards of success. By contrast, when tribes assume control of service delivery from Federal agencies – through self-governance compacting and "638" contracting – the link between decision making and its consequences is tightened, thus shortening the lines of accountability. Tribes and tribal employees possess stronger incentives to make appropriate development decisions because their nations will most directly bear the consequences of those decisions. Time and again, tribal leaders and managers tell us some version of the following: "Compacting and contracting is a double-edged sword. When we're in control of how programs are managed, we can improve efficiency and efficacy – but if we don't, tribal members hold us accountable for failures." Transferring control over decisions to tribes does not guarantee success, but the corresponding shift in accountability greatly increases the likelihood of efficient program delivery.

In fact, the Harvard Project's research consistently finds that compacting and contracting have been successful in both promoting economic development and enabling tribes to achieve their governing goals. In the early 1990s, a Harvard Project study conducted by Dr. Matthew Krepps analyzed the performance of 75 tribal forestry operations. The statistical evidence shows that, under PL-638 contracting, output rises by as much as 40% for tribes which moved to complete tribal control, and these tribes were able to receive prices as much as 6% higher than under BIA management – amounting to hundreds of thousands

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of dollars per year in extra income for the typical forestry program. Evidence from our Honoring Nations winners, which span a broad cross-section of programs, also underscores the benefits of compacting and contracting. The Mississippi Band of Choctaw tell us that since taking over their health services, they have seen a dramatic improvement in tribal citizens' health; the Jicarilla and White Mountain Apache tribes attest that their respective wildlife and fisheries programs are now both well-managed and profitable; and the Hopi Nation points out that as soon as it shifted management of its junior/senior high school from direct service to "grant" school status, student achievement and graduation rates rose and the school was able to compete with some of the best in Arizona. In sum, compacting and contracting encourage accountability at the local level, which in turn fosters efficiency in program service delivery.

Question 2

The Harvard Project has determined in its findings that a tribal business whose day-to-day business decisions are not influenced by tribal politics will increase their profitability by about 400%. What are some good examples of tribes who are separating day-to-day business operations from tribal politics?

A characteristic of capable, effective governing institutions is the separation of politics from business (and program) management. On many reservations, the tribal council or chairman makes the business decisions, handles administrative and personnel disputes, and intervenes in day-to-day business management. Perhaps predictably, such a scenario often produces economic development failures. The Harvard Project has been conducting an ongoing survey of tribally owned businesses on reservations, and the results are compelling. Tribally owned businesses formally insulated from political interference – typically by a managing board of directors and/or a corporate charter beyond the direct control of council members or the tribe's chief executive – are four times as likely to be profitable than businesses directly controlled by politicians.

An excellent example of a tribe that has successfully separated business from tribal politics is the Winnebago Tribe of Nebraska, which won an Honoring Nations award in 2000 for its tribally owned conglomerate, Ho-Chunk, Inc. (HCI). HCI was launched in 1994 to diversify the Tribe's business interests while maintaining a separation between business and tribal government. The founding document of HCI is instructive: "Ho-Chunk, Inc. was established so that tribal business operations would be free from political influence and outside the bureaucratic process of the government." HCI's five-member Board of Directors (two of whom are Tribal Council members) acts independently of the Council to select HCI's Chief Executive Officer, who oversees day-to-day management and makes all major strategic decisions for the Corporation. The Board is also responsible for providing the Council with an annual report, audited financial statements and an annual development plan. The Tribal Council, in turn, understands that it needs to protect HCI's autonomy to ensure its profitability. This separation of business from politics – both formally articulated in the corporation's founding documents and practiced by the Tribe – is an appropriate division of labor. It frees Tribal Council members to focus on questions of governance and enables the business experts at HCI to focus on maximizing the profitability of the Corporation's enterprises, joint ventures and passive investments. And it is paying off. In 2000, the Corporation's revenue was $25 million, its operating cash flow was $1.5 million, and its net income was $1.2 million. These figures are especially impressive when one considers the fact that as recently as the 1980s, the Winnebago Tribe's entire tribal non-transfer income was derived solely from land leases and amounted to less than $180,000 per year.

Question 3
Harvard's findings are compelling, but what does this all mean in terms of Federal policies and initiatives that should be considered? For instance, if Good Governance works so well, should we go as far to say that the U.S. should require tribes to institute these practices as a condition of receiving Federal development assistance?

There is no simple answer to this question; however, we believe the challenge for the Federal government is to strike a delicate balance between promoting good governance and fulfilling its trust responsibility.

While it is appropriate for Federal authorities to be concerned about how resources are employed and to make efforts to ensure development aid fosters positive change, there are a number of reasons why aid should not be conditioned upon a rigid set of Federally derived standards. First, the diversity of Indian Country simply does not allow for the reduction of good governance to a common set of ingredients or checklists. Second, given that many tribes are just starting to develop their capacities to self-govern, conditioning aid upon a set of "good governance criteria" would effectively preclude aid to those tribes in the greatest need of support for their nation building efforts. And finally, the notion of conditional aid can easily, and perhaps correctly, be seen as an abrogation of the Federal trust responsibility, particularly if tribes were suddenly forced to satisfy new criteria for Federal services and funding guaranteed by treaty rights.

The Federal government can and should, however, encourage tribes to focus more intently on good governance and assist in tribal efforts to build self-governing capacity. For instance, aid should be made available for tribes to build core institutions of self-governance (e.g., support for the design and implementation of independent judicial systems, constitutional and governmental reform, administrative capacity building, personnel system development, etc.). Because of the connection between good governance and economic development, we argue that these kinds of investments hold the most promise for addressing the chronic social and economic problems found throughout Indian Country. At the program/project level, Federal support should be directed toward *tribally* conceived projects and initiatives in which the tribes themselves set appropriate goals, benchmarks and performance indicators. By affording tribes the freedom to develop their own criteria, rather than imposing federally derived pre-grant checklists, the Federal government will facilitate the kind of self-determination and institutional capacity building that puts tribes on the path toward self-reliance. Similarly, the Federal government should expand opportunities for tribes to control their own programs through compacting and contracting of services that have historically been almost the exclusive domain of federal agencies. As I stated in my testimony, the policy of Self-Determination is the only one that has worked to improve the economic health of Indian nations.

This notion of development aid strays far from the "planning" mentality, which requires or encourages tribes to jump through the hoops set out in the micro-management criteria of Federal programs. It also strays from the idea that the problems found in Indian Country can be solved by "flavor of the day" federal initiatives (ill-fated immobile capital projects) that have a long history of failure (strings of dilapidated motels). Both history and the Harvard Project's research provide ample support for the assertion that even the most well-intentioned Federal initiatives and aid will fail unless they are coupled with support for building capable institutions of self-government.

Based on the Harvard Project's research and fieldwork, the Federal government should employ a strategic lens for policymaking. When considering particular initiatives, projects, programs or policies, Federal officials should ask: "Does it support good governance goals? Does it underwrite the attributes that both contribute to and are evidence of good tribal government? Among these attributes are:

Institutional capacity. Collective action toward shared ends ultimately requires, for example, the civil, governmental, cultural and economic institutional capacity to get things done. Federal assistance directed at particular problems is critical, but policymakers should give priority to those initiatives that leave legacies of institutional capacity.

Leadership development. Self-directed building of the capability for effective self-determination requires leadership development in communities where leadership has long been externally derided and suppressed.

Policy development. Beset by so many problems and challenges, self-determination also requires policy development for addressing both the internal and external relations of Native communities. Indian Country is crying out for information about plausible policy directions and opportunities to work with other tribal and non-tribal governments on the development of brand new strategies, both for management of internal tribal and community affairs and for the management of external constraints on self-determination.

Asset-building. One of the legacies of centuries of chronic poverty and Federal policy failure is a backlog of under-investment in Indian capital – human, financial, infrastructural, and commercial. Indian capital formation of all but the most immobile varieties must be recruited, refreshed and reinvested in the underdeveloped areas or it will migrate to more productive uses – be they labor markets or off-reservation retail markets for example.

Cultural integrity. The essence of Native self-determination implies the capacity for protecting and promoting cultural integrity as institutions are built and reformed, as policies are developed and implemented and as leadership is chosen and exercised. Absent support for the cultural integrity of Indian nations and communities, self-determination will lack cohesion, and the collective action and social cohesion needed to build healthy lives and strong communities will languish and degrade into factionalism and dispute.

Question 4

What do you recommend for tribes, such as the Navajo Nation, who are practicing good governance by having a stable government, business codes and uniform processes, and an independent judiciary, yet they continue to be mired in high unemployment and stagnant economies?

The Harvard Project recently completed a study of economic development barriers on the Navajo reservation at the behest of the director of the Nation's Temporary Aid to Needy Families (TANF) Program. This study reaffirmed that while the Navajo Nation has made great progress in instituting good government practices (e.g., a genuinely independent judicial system), it has yet to achieve the scope and breadth of good governance that is necessary to stimulate nation-wide economic growth.

Three sets of economic development barriers at Navajo deserve mention. The first is a set of barriers commonly found in Indian Country, which includes inefficient business leasing, lack of infrastructure, uncertain land title, lack of tax base, lack of land use planning, an inefficient bureaucracy, and the like. Second, but inextricably tied to the first, the Navajo Nation continues to struggle to overcome a legacy of Federal involvement in its governmental affairs. From relatively early in the 20th century to the passage of the Local Governance Act, the distribution of Navajo Nation governing authority and responsibilities was largely an artifact of the Federal government's involvement – involvement that was largely driven by the Government's interest in resource extraction on the Reservation. And finally, like many other Indian nations, the Navajo Nation's economic development has also suffered from a series of U.S. Federal and Supreme Court decisions significantly reducing its ability to raise revenues (most recently, *Atkinson Trading Co. v. Shirley*).

The Navajo Nation government is now confronting many of these longstanding problems and challenges – and witnessing some isolated development victories – but we can expect that economic progress at the national level will come slowly. One of the most exciting governing "experiments" at Navajo (and indeed, in Indian Country) comes from the Kayenta Township – a place I know you are familiar with. The Kayenta Township is the first city in Indian Country, and as such, it has its own tax base and government infrastructure. Because it operates under an effective governing structure that is relatively isolated from Window Rock, it has taken off economically. Two governing successes deserve special attention. First, Kayenta has significantly streamlined its business land leasing process. Prior to 1996, leases required a recommendation by the local chapter, tribal administrative review and recommendation, approval by the Tribal Council, the signature of the President, and finally, review and approval from the BIA Area Office. With the establishment of the Kayenta Township, now business site leases enjoy a streamlined process, and perhaps not surprisingly, the Township is now able to attract businesses and investment. Second, the Township enacted a 2.5 percent retail sales tax, which brings in hundreds of thousands of dollars that are used for infrastructure projects and to leverage external investment from the bond market, commercial banks and private investors. The

Moving forward, the Navajo Nation needs to discuss and answer to fundamental governing questions: What will be the role of the Navajo Nation's central government in building the Nation's economy? And, how will the Nation's political authority be organized? More specifically, the Nation is challenged to: (1) continue its efforts to make credible its commitment to treat investors fairly and expeditiously, addressing excessive delay, red-tape and uncertainty in regulation, taxation and policy; (2) continue to engage in the process of decolonization by reforming and improving its governing structure to make it more accountable, structurally robust, and critically, more Navajo; and (3) engage in a continuing strategic dialog regarding economic development policy that brings together all stakeholders (businesspeople, mom-and-pop entrepreneurs, potential joint venture partners, etc.) for a candid discussion about the barriers that currently exist. While these are all initiatives that must be led by the Navajo Nation itself, it is clear that the U.S. government can either help or hinder these efforts. Unfortunately, decisions by U.S. courts are severely constraining the Nation's ability to function as a self-determined sovereign. Recent trends in the courts place a greater responsibility upon the Congress to find innovative legislative solutions that expand the Nation's ability to function as a nation.

Question 5

There are a number of tribes who are "direct service" tribes who choose to avoid 638 contracting and compacting. Are these tribes further delaying economic development by fostering federal decision making and control?

At the risk of being blunt, the answer is a resounding yes.

The Harvard Project's research, coupled with the experiences of our Honoring Nations winners, is very clear on this point. Economic development in Indian Country is only possible when tribes seize control of their futures by exercising their sovereignty, governing themselves on their own terms instead of those set by the Federal government, and doing so with capable and culturally appropriate institutions. Successful Indian nations assert their right to govern themselves, which includes choosing to engage in self-governance compacting and "638" contracting. When engaged compacting and contracting, Indian nations shift toward a culture of self-reliance – with quantifiable results – by developing, for example, new information management systems, government-to-government memoranda that ensure Indian nations a seat at the table, tribally-initiated small business development strategies, and partnerships with colleges and universities. On the other hand, when tribal governments spend most of their time insisting that "others" are responsible for creating and solving their problems, they miss opportunities to advance their own economic development by failing to establish the institutional capacity required to better serve their

citizens. Tribes that choose to avoid compacting and contracting are, in essence, avoiding opportunities to build healthy nations – politically, economically, socially and culturally.

It is also important to note that some tribes may not be ready to contract, and in particular, they probably have yet to develop a "sovereign" mindset. In a major study of policing in Indian Country, the Harvard Project found that some tribes are not willing to contract law enforcement from the BIA for fear of giving the Federal government an opportunity to withdraw from its trust responsibility. Continuing to receive direct service was viewed as means of holding the Federal government to its promises – even if it meant forgoing better policing. This phenomenon can probably be generalized to many situations in which tribes choose direct service over contracting or compacting.

Thus, if the Federal government wishes to discourage direct service and encourage greater use of the opportunities for contracting and compacting, it must also be much clearer about its commitment to the fulfillment of trust, where "trust" is broadly defined and not restricted to the government's fiduciary responsibility over money.

Question 6
Please provide more detail regarding your testimony on page 9 where you discuss "performance based" standards and shifting program accountability from the federal government to the tribes.

While it is necessary for Federal authorities to avoid mistakes and ensure compliance with procedure in the event a mistake or poor outcome arises, this outlook can inappropriately manifest itself in a "checklist" approach to the planning, application, and award stages of program development. Such a development approach inappropriately provides incentives for tribes to design their institutions and projects to fit those Federally derived checklists. Consequently, Federal bureaucratic procedure ultimately drives tribes' choices of development strategies and the design of tribal institutional capacity, (as it has for decades) only adding to the long list of well-intended efforts resulting in institutional dependence among tribes' governmental systems and programs.

To break this long-standing cycle of institutional dependence, tribal authorities must be responsible to their citizens, rather than to Federal authorities. Two options for the Federal government are appealing: utilizing block grants and instituting performance-based standards. Block granting minimizes micromanaging in the allocation of funds and permits tribes to allocate resources and choose activities based on the particular needs and priorities of their citizens. This, in turn, changes tribal leaders' incentives because they must face enhanced accountability vis-à-vis their citizens. If resources are wasted, it is the fault of the tribal decision makers. In addition to block granting, incentives and accountability can be improved by making funding and, more importantly, continued or additional/bonus funding contingent upon recipient tribes' actual performance. Tribally developed performance indicators would center on outcomes in the tribal community and might include employment sustained, income generated, etc. This approach recognizes that demonstrating what has gone right can be far superior to "checklist" screening that seeks to avoid what can go wrong.

Question 7
In the 107th Congress, Senator Campbell has introduced a consolidated funding bill (S.343). Could the Harvard Project provide the Committee with some comments on how that bill could be modified to include performance based incentives?

One way of including performance-based incentives in this bill is to provide tribes an opportunity to define success in their own terms – and hold them to those tribally defined goals and benchmarks. As noted above, when tribal leaders are in control of programs and projects, which includes setting goals and benchmarks, the likelihood of success is greatly improved. This does not imply that the Federal

government should play no role in the goal setting and performance indicator development process, but it does mean that tribes themselves should hold primary responsibility for designing appropriate performance indicators.

By its very nature, performance-based funding means that certain Indian nations will fail to satisfy standards (even those they set). Although it is extremely difficult to completely eliminate the kinds of single-cycle investments that have long sapped tribes' human and institutional infrastructure, the Federal government can simultaneously encourage efficient performance *and* minimize the harmful effects of single-cycle or single-year investments by developing a two-tiered funding system. For example, the Federal government might commit to multi-year "core funding" which is preserved in all but the most severe compliance failures, and develop a pool of "performance funding" that tribes can be awarded on a the basis of exemplary performance. Differentiating "core funds" from "performance funds" minimizes the negative impacts felt by tribal citizens when their governments fail to perform (e.g., lost jobs) and provides incentives for tribes to demonstrate good performance according to the standards determined by the tribe and agreed to by the Federal government prior to implementation. A blue ribbon consultation commission could be established to help applicants work out the appropriate performance standards for their particular funding requests.

Again, thank you for the opportunity to testify in July and for your follow-up questions. If you have any additional questions or if there are any ways the Harvard Project can be of further assistance to you or your colleagues, please do not hesitate to let me know.

Sincerely,

Andrew J. Lee

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Jeff Tomhave

MISSION

To recognize and advocate for the sovereign relationship between all federally recognized tribal governments and the United States government, to be proactively involved in the national decision making and regulatory processes, enabling participation by tribes on an equal level and as decision-makers on all solid waste and emergency response issues.

July 31, 2001

Senate Committee on Indian Affairs
838 Hart Senate Office Bldg.
Washington, DC 20510

Dear Chairman Inouye and Vice Chairman Campbell:

On behalf of the 103 member Tribes of TASWER, I thank you for this opportunity to submit written testimony for the record of this Committee's hearing on Tribal Economic Development, Good Governance and Capacity Building that was held July 18, 2001.

TASWER is a national tribal nonprofit organization that is dedicated to: (1) reducing the human health effects of solid and hazardous waste contamination in Tribal communities; (2) limiting the regulatory and administrative burden on Tribal public health departments; and (3) reconciling the inconsistencies within federal agency Tribal environmental policies.

One of the most serious problems facing all Tribes is the public health consequence of improper solid waste disposal. Unfortunately, these health problems are not a priority under the Indian Health Care Improvement Act. According to the explicit language of the statute, drinking water and waste water treatment are the top two priorities for the Indian Health Service to address.

The problem is that safe drinking water depends on a clean environment. Tribes continually risk infecting their ground water drinking supply because they do not have the resources to develop proper solid waste disposal systems. The solution TASWER respectfully submits to this committee is to make solid waste disposal a priority that is equal to drinking water and waste water. This can be done with a simple amendment to Section 1632(g)(4)(C) through (E) of the Act. Please see attached.

By taking this small step, the Senate Committee on Indian Affairs could help Tribal governments exercise the most fundamental act of good governance, which is to protect the health and environment of their citizens. Thank you for your consideration.

Sincerely

Jeff Tomhave
Executive Director

1001 CONNECTICUT AVENUE, NORTHWEST, SUITE 400 WASHINGTON, DC 20036-5504 (202)331-8084 FAX (202)331-8068

TASWER Attachment

Consider amending 25 United States Code 18, section 1632(g)(4)

(4) For purposes of this subsection, the sanitation deficiency levels for an Indian tribe or community are as follows: .

(A) level I is an Indian tribe or community with a sanitation system -
(i) which complies with all applicable water supply and pollution control laws, and
(ii) in which the deficiencies relate to routine replacement, repair, or maintenance needs;

(B) level II is an Indian tribe or community with a sanitation system -
(i) which complies with all applicable water supply and pollution control laws, and
(ii) in which the deficiencies relate to capital improvements that are necessary to improve the facilities in order to meet the needs of such tribe or community for domestic sanitation facilities;

(C) level III is an Indian tribe or community with a sanitation system which -
(i) has an inadequate or partial water supply and a sewage disposal facility that does not comply with applicable water supply and pollution control laws, or
(ii) has ~~no~~ *an inadequate* solid waste disposal facility;

(D) level IV is an Indian tribe or community with a sanitation system which -
(i) lacks either a safe water supply system or a sewage disposal system;
(ii) lacks a safe solid waste disposal facility; and

(E) level V is an Indian tribe or community that -
(i) lacks a safewater supply and a sewage disposal system~~.~~ *; or*
(ii) lacks a solid waste disposal facility.

FOUNDATION NEWS & COMMENTARY
JULY/AUGUST 2001

WAY TO GIVE

Smoothing Out the Road

By Rebecca L. Adamson

Self-determination, growing needs and new wealth have paved the way for development of new models for giving among Native Americans.

Giving has always been integral to Native American culture, but by "giving" more is meant than the conventional sense of charity as almsgiving. Traditionally, Native Americans had to ground themselves in mutual duties that maintained tribe and community for generation after generation.

Giving and the many immemorial feasting traditions of tribes had much in common with such familiar forms of generosity as "neighboring back and forth" and "barn raising"—forms of community-building that had equivalents in the activities of every tribe. But formal philanthropy—the structured attempt to standardize the process of providing for others—historically had no equivalent among Native Americans.

The advent of formal philanthropy among tribes today is a different story. It requires a different approach even though it derives from the same basic instinct—to help one's neighbor. Instinct may have been enough in the past, but now tribes are recognizing the necessity of controlling the assets and resources that come with self-determination and, in the case of some tribes, new wealth. As demands and opportunities grow, knowledge of tax codes and formal philanthropic structures becomes as necessary as business know-how.

Strengthening Native American Philanthropy

Despite the perception of the general public, not all tribes have become wealthy from gaming. The real impact of gaming on Native American philanthropy has been important but limited: Only about one-third of the 561federally recognized tribes are engaged in gaming. Of those, only a handful are highly successful, due to their location near large urban areas or major traffic arteries.

Gaming operations for most tribes are carried out in remote rural areas. The operations barely cover expenses, and any profit goes toward housing, education, healthcare and infrastructure on tribal lands. The comparatively few gaming tribes with accumulated wealth are developing their own, more formal ways of using some of their profits for Indian and non-Indian philanthropic endeavors.

Until the 1980s, it was rare for tribes to have a large block of money to use for tribal needs. Thus, often there was no long-term planning and investment for future needs.

This began to change dramatically in the early 1970s when then-President Richard M. Nixon responded to Indian demands by ordering that federal policy recognize self-determination. Nixon stated that federal services to Indians were not charity, but solemn treaty obligations. The goal was to take tribal programs from bureaucrats and give them to tribes. There have been bumps along the implementation road, but the thrust of U.S. Indian policy ever since has been toward self-determination.

Part of what self-determination means is economic self-reliance—the ability to make one's own decisions based on resources sufficient to meet one's needs and plans for the future. The presence of gaming wealth among some Native Americans provided just this economic traction to self-determination for a number of tribes. Gaming wealth, along with the proliferation of tribal nonprofits due to the needs of a growing population and the rising tide of self-determination, led First Nations Development Institute to establish a program,
called Strengthening Native American Philanthropy (SNAP), which encourages tribal foundations and formal philanthropy among Native Americans.

Emerging Structures

SNAP seeks to increase Native American and tribal participation in private philanthropy through workshops, regional conferences (to build assets and networks between tribes and mainstream foundations), and option papers (for individual tribes to use in devising philanthropic structures that reflect the unique constitutional status of tribes).

A number of tribes with income from gaming and other tribal enterprises have started to develop their own philanthropic institutions as a new type of tribal asset. In response, SNAP has sought clarity on the tax code's treatment of tribes and Native American organizations for tax-exempt purposes. In these early stages of philanthropic development, three principal nonprofit structures have emerged:

- incorporated under state law with federal income-tax exemption
- incorporated under tribal law (which often parallels state requirements) with federal tax-exemption under 501(c)(3), and
- 7871 status under federal law

.

Until recently, the few tribal foundations that existed were established under state law and secured federal tax exemption under Section 501(c)(3) of the Internal Revenue Code. An Internal Revenue Service (IRS) information letter issued to First Nations in 1998

confirmed that 501(c)(3) status is clearly available to nonprofits established under tribal law. In another information letter to First Nations, the IRS confirmed that because tribal governments are to be treated like states under the 1982 Tribal Tax Status Act (codified in the tax code as Section 7871), contributions to 7871 organizations are generally tax deductible. For most practical purposes, 7871 status under federal law is the same as 501(c)(3) status, except that it exempts the nonprofit from state oversight.

Section 7871 treats Indian tribes as states for purposes of determining "whether and in what amount" a contribution to a tribal government is deductible as a charitable contribution. To receive tax-deductible charitable contributions from individuals or corporations, the Indian tribe must be federally recognized as one that exercises sovereign powers. The only other limitation is that the contribution must be made for exclusively public
purposes.

This new option reinforces tribal sovereignty, a growing and important part of tribes' efforts to increase their asset base to meet their future needs. As such, Section 7871 has become a viable option for the formation of tribal foundations and funds, but its use may require a greater commitment to public outreach and the education of donors and foundations, who are used to conducting their charitable giving under 501(c)(3).

Section 7871 and More

So, how are tribes meeting the new challenges of philanthropy? Here are a few examples that show the diversity of available options.

[9]A Section 7871 Project: Spirit of the Salmon Fund of the Columbia River Inter-Tribal Fish Commission. First Nations has been building awareness of Section 7871 through a project with Columbia River Inter-Tribal Fish Commission (CRITFC), a consortium in Portland, Oregon. The consortium comprises the Nez Perce, Warm Springs, Umatilla and Yakama nations in the Columbia River Basin. In 1989, CRITFC was created as a 7871-eligible "political subdivision" of its four member tribes, because it exercised one of the three sovereign powers identified by the IRS, in this case the "power to enforce" fishing rights throughout the Columbia River Basin.

In the late 1990s, CRITFC began to realize that it needed additional funds to support its work. Of crucial importance was the 1998 IRS information letter to First Nations that confirmed that private foundations could treat as "qualifying distributions" grants to tribes. In 1999, CRITFC's Spirit of the Salmon Fund approached First Nations' Eagle Staff Fund to create a 7871 campaign to increase awareness among charitable donors that tribes, as well as political subdivisions of tribes and tribal or inter-tribal "charitable restricted funds," could receive "qualifying distributions" from private foundations.

•Hopi Education Endowment Fund. In what may be a sign of things to come for sovereign tribal philanthropy, the Hopi Tribal Council in November 2000 unanimously approved an ordinance establishing the Hopi Educational Endowment Fund under Section 7871. The council also endowed the fund with $10 million in initial principal, which will help pay for the education of Hopi youth in perpetuity. The first scholarships and grants are scheduled to go out in autumn 2001.
Barbara Poley of the Hopi Foundation, a member of the team within the tribe that helped create the fund, said that after establishing a non-profit fund under Section 7871, " We will now be a resource for other tribes."

•A 501(c)(3) Under Tribal Law: Cherokee Nation Education Corporation. This nonprofit is the first example of an Indian tribe setting up a 501(c)(3) under tribal law, rather than under a state's jurisdiction. In 1996, the Cherokee Nation of Oklahoma developed a Tribal Code providing for the incorporation of a tribal nonprofit entity. It then incorporated the Cherokee Nation Education Corporation as the first such entity, and sought to have this corporation recognized by the IRS as a 501(c)(3). It received a determination letter from the IRS in 1999.

•A 501(c)(3) Under State Law: The Chickasaw Foundation. The Chickasaw Foundation was founded in 1971 and filed its bylaws with the state of Oklahoma. A 501(c)(3) nonprofit, the foundation operated until January 1999 with a voluntary board of trustees. The current seven-member board includes several tribal officials. In each of the past two years, it has received operational grants from the Chickasaw Nation.

The Chickasaw Foundation has a strong commitment to education, and since 1994 the foundation has received more than $1 million to develop programs for the recruitment and retention of Native Americans at colleges and universities. There are six educational scholarship funds from six donor sources. All donors share Chickasaw citizenship and a desire to give back to the nation after enjoying business success.

•A Subdivision of Tribal Government:The Forest County Potawatomi Community Foundation (Wisconsin). This foundation is an interesting example of a smaller gaming tribe that has modest resources for investment and charitable giving. The key element of the foundation's structure is that it is a direct subdivision of tribal government. The foundation receives its resources directly from the Forest County Potawatomi tribe's annual budget, not individual donors. Thus, it is not incorporated under the state laws of Wisconsin or separately recognized by the federal government under Section 7871.

Until 1999, tribal giving was rather informal. By then, however, growing resources within the tribe —based on its casino operation—and growing requests for help had led tribal elders to set up a more formal structure for giving.

The foundation is located in Milwaukee, about 200 hundred miles from the Forest County Potawatomi Community, and operates like a community foundation. In fact, almost all of its resources are distributed in and around the city of Milwaukee. According to Co-Executive Director Tom Krajewski, the foundation's **annual** budget is divided into two accounts. The goal of the larger fund of $2 million is to eliminate poverty, and these funds can only be used in Mil-waukee's poorer neighborhoods for economic development projects. The smaller fund of $1 million supports a more eclectic assortment of projects, including initiatives on the environment, Native American causes, healthcare, and other issues. Last year 150 applications were approved out of a total 500. The average grant was $20,000.

In addition to the foundation, the Potawatomi Bingo Casino donates to charitable causes throughout the Milwaukee area to the tune of $1.5 million. The Potawatomi's major educational project is an annual payment of $27 million to the Indian Community School in Milwaukee.

Growing Resources, Growing Needs

Over the last decade, tribal needs have grown in concert with the increase in tribal resources. Deploying those resources to meet future needs effectively has helped to create the climate for organized philanthropy among Native Americans. Tribal communities realize that there are more nonprofit options than in the past, and they are casting a wide net in their quest for effective models of charitable giving.

One milestone in these efforts was last April's Wisdom of the Giveaway Conference in Seattle. This first-of-its-kind conference brought together tribes, tribal charitable funds and foundations, and mainstream foundations from the Pacific Northwest, Alaska, Idaho, Montana and northern California to share experience, knowledge and networks. More than 170 representatives attended.

Wisdom participant Alan Rabinowitz, of A Territory Resource Foundation, noted the dramatic change from 20 years ago, when efforts to organize a similar conference on Native American-specific philanthropic issues "went nowhere." Rabinowitz added his voice to numerous others urging that the Wisdom conference series continue in other regions of the country.

Rebecca Adamson is president and founder of First Nations Development Institute in Fredericksburg,
Virginia. First Nations Information Services Associate John D. Roney and Associate Director, Information Services Jerry Reynolds assisted in writing this article.

Web Bonus: The two IRS general information letters obtained by First Nations are available

online at www.foundationnews.org.

Resources for Native American Giving

Organizations

First Nations Development Institute
The Stores Building
11917 Main Street
Fredericksburg, VA 22408
Phone: 540/371-5615
E-mail: info@firstnations.org
Web site: www.firstnations.org

Native Americans in Philanthropy
P.O. Drawer 1429
Lumberton, NC 28359
Phone: 910/618-9749
E-mail: NativePhil@aol.com

Publications

***Giving with Honor: A Legal Reference on Charitable Activities of American Indian Tribes*. Council on Foundations and Native American in Philanthropy. 1998. By Kathleen M. Nilles, Douglas B.L. Endreson, Amy Locklear, Jeffrey A. Trexler. Council members: $25; nonmembers: $45. Copies may be ordered online at www.cof.org or by calling 888/239-5221.**

WAY TO GIVE

Smoothing Out

Self-determination, growing needs and new wealth have paved the way for development of new models for giving among Native Americans.

Giving has always been integral to Native American culture, but by "giving" more is meant than the conventional sense of charity as almsgiving. Traditionally, Native Americans had to ground themselves in mutual duties that maintained tribe and community for generation after generation.

Giving and the many immemorial feasting traditions of tribes had much in common with such familiar forms of generosity as "neighboring back and forth" and "barn raising"—forms of community-building that had equivalents in the activities of every tribe. But formal philanthropy—the structured attempt to standardize the process of providing for others—historically had no equivalent among Native Americans.

The advent of formal philanthropy among tribes today is a different story. It requires a different approach even though it derives from the same basic instinct—to help one's neighbor. Instinct may have been enough in the past, but now tribes are recognizing the necessity of controlling the assets and resources that come with self-determination and, in the case of some tribes, new wealth. As demands and opportunities grow, knowledge of tax codes and formal philanthropic structures becomes as necessary as business know-how.

The photos on these pages highlight the work of Native nonprofits.

The California Indian Basketweavers Association (Nevada City, California) helps weavers gain greater access to gathering sites for basket weaving materials, food and Native medicines. It also increases the ability of Native gatherers to manage plant resources by traditional methods.

Strengthening Native American Philanthropy

Despite the perception of the general public, not all tribes have become wealthy from gaming. The real impact of gaming on Native American philanthropy has been important but limited: Only about one-third of the 561 federally recognized tribes are engaged in gaming. Of those, only a handful are highly successful, due to their location near large urban areas or major traffic arteries.

Gaming operations for most tribes are carried out in remote rural areas. The operations barely cover expenses, and any profit goes toward housing, education, healthcare and infrastructure on tribal lands. The comparatively few gaming tribes with accumulated wealth are developing their own, more formal ways of using some of their profits for Indian and non-Indian philanthropic endeavors.

Until the 1980s, it was rare for tribes to have a large block of money to use for tribal needs. Thus, often there was no long-term planning and investment for future needs.

This began to change dramatically in the early 1970s when then-President Richard M. Nixon responded to Indian demands by ordering that federal policy recognize self-determination. Nixon stated that federal services to Indians were not charity, but solemn treaty obligations. The goal was to take tribal programs from bureaucrats and give them to tribes. There have been bumps along the implementation road,

New outlets for charitable giving have popped up quickly in recent years. In future issues of new approaches to giving are changing philanthropy.

the Road

BY REBECCA L. ADAMSON

but the thrust of U.S. Indian policy ever since has been toward self-determination.

Part of what self-determination means is economic self-reliance—the ability to make one's own decisions based on resources sufficient to meet one's needs and plans for the future. The presence of gaming wealth among some Native Americans provided just this economic traction to self-determination for a number of tribes. Gaming wealth, along with the proliferation of tribal nonprofits due to the needs of a growing population and the rising tide of self-determination, led First Nations Development Institute to establish a program, called Strengthening Native American Philanthropy (SNAP), which encourages tribal foundations and formal philanthropy among Native Americans.

Emerging Structures

SNAP seeks to increase Native American and tribal participation in private philanthropy through workshops, regional conferences (to build assets and networks between tribes and mainstream foundations), and option papers (for individual tribes to use in devising philanthropic structures that reflect the unique constitutional status of tribes).

A number of tribes with income from gaming and other tribal enterprises have started to develop their own philanthropic institutions as a new type of tribal asset. In response, SNAP has sought clarity on the tax code's treatment of tribes and Native American organizations for tax-exempt purposes. In these early stages of philanthropic development, three principal nonprofit structures have emerged:

- incorporated under state law with federal income-tax exemption
- incorporated under tribal law (which often parallels state requirements) with federal tax-exemption under 501(c)(3), and
- 7871 status under federal law.

Until recently, the few tribal foundations that existed were established under state law and secured federal tax exemption under Section 501(c)(3) of the Internal Revenue Code. An Internal Revenue Service (IRS) information letter issued to First Nations in 1998 confirmed that 501(c)(3) status is clearly available to nonprofits established under tribal law. In another information letter to First Nations, the IRS confirmed that because tribal governments are to be treated like states under the 1982 Tribal Tax Status Act (codified in the Tax Code as Section 7871), contributions to 7871 organizations are generally tax deductible. For most practical purposes, 7871 status under federal law is the same as 501(c)(3) status, except that it exempts the nonprofit from state oversight.

Section 7871 treats Indian tribes as states for purposes of determining "whether and in what amount" a contribution to a tribal government is deductible as a charitable contribution. To

The Jamestown S'Klallam Tribe (Sequim, Washington) is one of the top three oyster producers in the Pacific Northwest. Its Section 7871 Dungeness Oyster House project is helping the tribe establish an ecologically sound enterprise.

undation News & Commentary, "Way to Give" will continue to look at how people with

The Thakiwa Foundation (Cushing Oklahoma; Sac and Fox tribal members) established two land management demonstration sites, developed a model indigenous seed garden and a traditional seed bank, and encourages environmental protection.

receive tax-deductible charitable contributions from individuals or corporations, the Indian tribe must be federally recognized as one that exercises sovereign powers. The only other limitation is that the contribution must be made for exclusively public purposes.

This new option reinforces tribal sovereignty, a growing and important part of tribes' efforts to increase their asset base to meet their future needs. As such, Section 7871 has become a viable option for the formation of tribal foundations and funds, but its use may require a greater commitment to public outreach and the education of donors and foundations, who are used to conducting their charitable giving under 501(c)(3).

The real impact of gaming on Native American philanthropy has been important but limited.

Section 7871 and More

So, how are tribes meeting the new challenges of philanthropy? Here are a few examples that show the diversity of available options.

■ **A Section 7871 Project: Spirit of the Salmon Fund of the Columbia River Inter-Tribal Fish Commission.** First Nations has been building awareness of Section 7871 through a project with Columbia River Inter-Tribal Fish Commission (CRITFC), a consortium in Portland, Oregon. The consortium comprises the Nez Perce, Warm Springs, Umatilla and Yakama nations in the Columbia River Basin. In 1989, CRITFC was created as a 7871-eligible "political subdivision" of its four member tribes, because it exercised one of the three sovereign powers identified by the IRS, in this case the "power to enforce" fishing rights throughout the Columbia River Basin.

In the late 1990s, CRITFC began to realize that it needed additional funds to support its work. Of crucial importance was the 1998 IRS information letter to First Nations that confirmed that private foundations could treat as "qualifying distributions" grants to tribes. In 1999, CRITFC's Spirit of the Salmon Fund approached First Nations' Eagle Staff Fund to create a 7871 campaign to increase awareness among charitable donors that tribes, as well as political subdivisions of tribes and tribal or inter-tribal "charitable restricted funds," could receive "qualifying distributions" from private foundations.

■ **Hopi Education Endowment Fund.** In what may be a sign of things to come for sovereign tribal philanthropy, the Hopi Tribal Council in November 2000 unanimously approved an ordinance establishing the Hopi Educational Endowment Fund under Section 7871. The council also endowed the fund with $10 million in initial principal, which will help pay for the education of Hopi youth in perpetuity. The first scholarships and grants are scheduled to go out in autumn 2001.

Barbara Poley of the Hopi Foundation, a member of the team within the tribe that helped create the fund, said that after establishing a nonprofit fund under Section 7871, "We will now be a resource for other tribes."

■ **A 501(c)(3) Under Tribal Law: Cherokee Nation Education Corporation.** This nonprofit is the first example of an Indian tribe setting up a 501(c)(3) under tribal law, rather than under a state's jurisdiction. In 1996, the Cherokee Nation of Oklahoma developed a Tribal Code providing for the incorporation of a tribal nonprofit entity. It then incorporated the Cherokee Nation Education Corporation as the first such entity, and sought to have this corporation recognized by the IRS as a 501(c)(3). It received a determination letter from the IRS in 1999.

■ **A 501(c)(3) Under State Law: The Chickasaw Foundation.** The Chickasaw Foundation was founded in 1971 and filed its bylaws with the state of Oklahoma. A 501(c)(3) nonprofit, the foundation operated until January 1999 with a voluntary board of trustees. The current seven-member board includes several tribal officials. In each of the past two years, it has received operational grants from the Chickasaw Nation.

The Chickasaw Foundation has a strong commitment to education, and since 1994 the foundation has received more than $1 million to develop programs for the recruitment and retention of Native Americans at colleges and universities. There are six educational scholarship funds from six donor sources. All donors share Chickasaw citizenship and a desire to give back to the nation after enjoying business success.

■ **A Subdivision of Tribal Government: The Forest County Potawatomi Community Foundation (Wisconsin).** This foundation is an interesting example of a smaller gaming tribe that has modest resources for investment and charitable giving. The key element of the foundation's structure is that it is a direct subdivision of tribal government. The foundation receives its resources directly from the Forest County Potawatomi tribe's annual budget, not individual donors. Thus, it is not incorporated under the state laws of Wisconsin or separately recognized by the federal government under Section 7871.

Until 1999, tribal giving was rather informal. By then, however, growing resources within the tribe—based on its casino operation—and growing requests for help had led tribal elders to set up a more formal structure for giving.

The foundation is located in Milwaukee, about 200 hundred miles from the Forest County Potawatomi Community, and operates like a community foundation. In fact, almost all of its resources are distributed in and around the city of Milwaukee. According to Co-Executive Director Tom Krajewski, the foundation's annual budget is divided into two accounts. The goal of the larger fund of $2 million is to eliminate poverty, and these funds can only be used in Milwaukee's poorer neighborhoods for economic development projects. The smaller fund of $1 million supports a more eclectic assortment of projects, including initiatives on the environment, Native American causes, healthcare, and other issues. Last year 150 applications were approved out of a total 500. The average grant was $20,000.

In addition to the foundation, the Potawatomi Bingo Casino donates to charitable causes throughout the Milwaukee area to the tune of $1.5 million. The Potawatomi's major educational project is an annual payment of $27 million to the Indian Community School in Milwaukee.

Growing Resources, Growing Needs

Over the last decade, tribal needs have grown in concert with the increase in tribal resources. Deploying those resources to meet future needs effectively has helped to create the climate for organized philanthropy among Native Americans. Tribal communities realize that there are more nonprofit options than in the past, and they are casting a wide net in their quest for effective models of charitable giving.

One milestone in these efforts was last April's Wisdom of the Giveaway Conference in Seattle. This first-of-its-kind conference brought together tribes, tribal charitable funds and foundations, and mainstream foundations from the Pacific Northwest, Alaska, Idaho, Montana and northern California to share experience, knowledge and networks. More than 170 representatives attended.

Wisdom participant Alan Rabinowitz, of A Territory Resource Foundation, noted the dramatic change from 20 years ago, when efforts to organize a similar conference on Native American-specific philanthropic issues "went nowhere." Rabinowitz added his voice to numerous others urging that the Wisdom conference series continue in other regions of the country. ■

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*Rebecca Adamson is president and founder of First Nations Development Institute in Fredericksburg, Virginia. First Nations Information Services Associate John D. Roney and Associate Director, Information Services Jerry Reynolds assisted in writing this article. Web site: **www.firstnations.org**.*

WEB BONUS

The two IRS general information letters obtained by First Nations are available online at **www.foundationnews.org**.

RESOURCES FOR NATIVE AMERICAN GIVING

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PUBLICATIONS

Giving with Honor: A Legal Reference on Charitable Activities of American Indian Tribes. Council on Foundations and Native Americans in Philanthropy. 1998. By Kathleen M. Nilles, Douglas B.L. Endreson, Amy Lockleer, Jeffrey A. Trexler. Council members: $25; nonmembers: $45. Copies may be ordered online at **www.cof.org** or by calling 888/239-5221.

Spirit of the Salmon Fund
OF THE COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION*

EAGLE NOTES

7871 awareness: a two-way stream

Rebecca Adamson
President
First Nations Development Institute

In 1982, Congress passed the Indian Tribal Governmental Tax Status Act, codified as Section 7871 of the Internal Revenue Code, treating tribal governments as state governments for a variety of specified tax purposes.

At First Nations Development Institute we are building awareness of Section 7871 through a project with Columbia River Inter-Tribal Fish Commission, a consortium of the Nez Perce, Warm Springs, Umatilla and Yakama nations in the Columbia River Basin. The commission received a letter ruling from the Internal Revenue Service confirming its tax treatment under Section 7871 all the way back in 1989, but hasn't made use of it because proper supports were not in place to mount an educational campaign concerning 7871 tax treatment. Only recently, in January 2000, has CRITFC established a restricted fund, Spirit of the Salmon Fund by name, to develop the asset of Section 7871 tax treatment.

This alone would argue the time is right for greater "7871 awareness" within philanthropy, which is certainly one of our goals. But we hope to build such awareness among tribes as well. For if professional philanthropy is going to support tribal sovereignty through 7871 grantmaking, 7871 organizations must demonstrate a more sophisticated accountability than the letter of any law.

Complexity is the middle name of any tax law, but the key provisions of Section 7871 are easy enough to remember: 1) 7871 offers many of the same tax benefits as IRC Section 501(c)(3) for practical tax purposes, meaning 2) all donations to a 7871 organization, whether a tribal government or its "political subdivisions" or "integral parts" (in the relevant terms of tax law) are tax deductible and 3) foundations can make grants to such organizations.

We should also commit it to memory that under Section 7871, tribal organizations can maintain a greater degree of sovereignty than under IRC Section 501(c)(3); for 501(c)(3) are generally chartered by a state, thus subjecting them to the

*The CRITFC is recognized under IRC 7871(a) as an arm of tribal government entitled to receive tax-exempt, charitable donations. A private letter ruling to this effect, from the IRS dated July 18, 1989, is available upon request.

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supervision of a state attorney general's office, where jurisdiction over "expressly public and charitable purposes" generally resides. Not so with Section 7871. It follows that grantmaking to 7871 tribal governments and their political subdivisions can be a way to support tribal sovereignty.

In return, tribal organizations should take upon themselves the regulatory safeguarding, for accountability's sake, of donated funds. A 7871 letter ruling from the Internal Revenue Service points the concerned donor to a law stating that his or her donation is tax-exempt. For the donee, it also lightens the so-called compliance burdens of 501(c)(3) status, which requires that organizations fill out IRS form 1023 initially and file reporting form 990 annually with the IRS. These and other requirements, customary to 501(c)(3) nonprofits, do not apply under Section 7871.

But because they make good sense and are so familiar to funders, Columbia River Inter-Tribal Fish Commission has voluntarily adopted them. Bylaws state that every donor will receive a letter of acknowledgment – standard practice throughout philanthropy, though not strictly necessary under the terms of Section 7871. For grantmakers and other donors who value the information available on the IRS 990 forms that most 501(c)(3)s file annually, the bylaws state that the commission's Spirit of the Salmon Fund shall make such data publicly available, though again the terms of 7871 do not strictly require it. For good measure, CRITFC formally forbids political lobbying by Spirit of the Salmon Fund.

In such ways, through resolutions and bylaws, tribal 7871 organizations can mitigate the concerns of donors who are more comfortable with the established routines of 501(c)(3) grantees – while retaining the advantages of self-regulated sovereignty.

Now let's consider the state of 7871 awareness within philanthropy. Eleven years ago, when Columbia River Inter-Tribal Fish Commission obtained a letter from the IRS ruling it eligible to receive tax-deductible contributions, the Commission found that program officers were not familiar with the provisions of Section 7871. They did not fully grasp the tax benefits it conferred. They sometimes understood that grants to tribal governments were tax-deductible, but they did not extend that understanding to other organizations. That CRITFC was an inter-tribal organization — a political subdivision of four separate tribal governments — raised another hurdle.

Section 7871 does not grant income tax exemption to tribal governments, nor to their "political subdivisions" and "integral parts." That exemption had already been granted by IRS prior to enactment of 7871. Rather, Section 7871 grants tribal governmental units the other tax benefits that states possessed — tax deductibility of charitable contributions and treatment as a state for purposes of private foundation rules. Just as any tribe with a 7871 letter ruling from the IRS is qualified to receive tax-exempt donations for "expressly public charitable purposes," so are their "political subdivisions" exercising one of three primary attributes of sovereignty: the power to tax, the power of eminent domain, or the power to police.

By virtue of enforcing fishing regulations for four sovereign tribes, Columbia River Inter-Tribal Fish Commission has been delegated the power to police, making it a sovereign political subdivision of four tribal governments. It is one of the few inter-tribal political subdivisions recognized by the IRS since 1982.

Editor's Note: Normally our Eagle Notes column is not a part of another organization's letterhead. But this Spirit of the Salmon Fund letterhead, in addition to being almost a work of art in its own right, provides some 'visuals' on the subject of Section 7871. Note at the top of the facing page the clear indication that Spirit of the Salmon Fund is a creation of CRITFC. Note at bottom the offer to confirm the tax deductibility of charitable donations.

SOVEREIGNTY AND NATION-BUILDING: THE DEVELOPMENT CHALLENGE IN INDIAN COUNTRY TODAY

Stephen Cornell and Joseph P. Kalt*

The Indian nations of the United States face a rare opportunity. This is not the occasional business opportunity of reservation legend, when some eager investor would arrive at tribal offices with a proposal "guaranteed" to produce millions of dollars for the tribe — although such investors still appear, promises in hand. Nor is it the niche economic opportunity of gaming, although that has transformed some tribes' situations in important ways. This opportunity is a political and organizational one. It is a chance to rethink, restructure, reorganize — a chance not to start a business or exploit an economic niche but to substantially reshape the future. It is the opportunity for nation-building.

This opportunity has been unfolding over the last two decades. It is a product of changed relations between Indian nations and the federal government, relations with roots in the Indian politics of the 1960s and in the failure of a century of United States Indian policies that established the federal government as the primary decision maker in Indian Country. Since the mid-1970s, partly in response to the demands of Indians themselves, federal policy has shifted toward something called "self-determination": a belief, often more stated than acted upon, that Indian nations should determine their own futures. This shift toward self-determination has allowed those nations that have been willing to do so to engage in genuine self-governance, to turn sovereignty as a legal matter into "de facto" sovereignty: sovereignty in fact and practice. They still face many constraints, not least the power of the courts and of the United States Congress, but since 1975 a significant

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number of Indian tribes have become the effective decision-makers in their own affairs, often with strikingly positive results.

This new degree of control, unprecedented in the twentieth century history of these nations, constitutes an opportunity of major proportions. It is the opportunity for Native American peoples to reenvision their futures and rebuild their governments and their economic strategies so as to realize those futures.

It also may be a short-lived opportunity. In the late 1990s, we have seen a mounting assault on tribal sovereignty. Recent decisions in the United States Supreme Court have chipped away at the sovereignty that Indian peoples have struggled for a century to reestablish. Disputes over gaming and other issues have led to significant interference in the affairs of Indian nations on the part of states such as California, Arizona, and New Mexico. At century's end, a flurry of Congressional proposals threaten tribal sovereignty and powers. But for the time being at least, the opportunity is there. It is still federal policy that Indian nations should determine their own futures, and determined Indian nations can still do so. But shaping those futures will require not simply the assertion of sovereignty, a claim to rights and powers. It will require the effective exercise of that sovereignty. The task tribes face today is to use the power they have to build viable nations before the opportunity slips away. This is the major challenge facing Indian Country today.[1]

It also is the key to solving the seemingly intractable problem of reservation poverty. Sovereignty, nation-building, and economic development go hand in hand.

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[1] We use the term "Indian Country" loosely here to refer not only to the Indian reservations of the lower forty-eight states but to predominantly Native communities in Alaska. Although the U.S. Supreme Court ruled in February of 1998 in Alaska v. Native Village of Venetie Tribal Government that lands held by Native entities under the terms of the Alaska Native Claims Settlement Act (ANCSA) — in other words, most Native lands in Alaska — are not technically Indian Country, Alaska's Native peoples face many of the same challenges as reservations. The legal and political conditions under which they have to operate differ significantly from reservation conditions in the lower forty-eight states, partly as a consequence of the court's decision. Nonetheless, the fundamental tasks of self-governance and nation-building remain much the same. Despite our use of the term "Indian Country, the argument of this paper applies not only to the Indian reservations of the lower forty-eight but to Alaska's Native communities as well.

Without sovereignty and nation-building, economic development is likely to remain a frustratingly elusive dream.

The Puzzling Pattern of Reservation Development

The economic development situation in Indian Country presents a puzzle. Most people think of Indian reservations as poor, and many of them are. The facts are sobering. Across Indian Country, we find astonishingly high unemployment rates, average household incomes well below the poverty level, extensive dependency on welfare and other transfer payments, and high indices of ill health and other indicators of poverty.

As striking as the degree of poverty, however, are the exceptions to this pattern. Some are well known: In particular, a relative handful of tribes have generated enormous revenues in the niche gaming market and have attracted commensurate media attention as a result. Less well known, but much more intriguing, are those tribes that have broken from the prevailing pattern without depending on gaming as their primary revenue stream or source of employment. Consider the following examples:

- The Mississippi Choctaws are one of the largest employers in the state of Mississippi. Several thousand non-Indians migrate onto the reservation every day to work in the Choctaws' manufacturing, service, and public sector enterprises. The Choctaws are importing labor because there aren't enough Choctaws to fill all the jobs they've created. Choctaw unemployment has fallen dramatically.
- The White Mountain Apaches' forest products, skiing, recreation, and other enterprises have made it the economic anchor of the economy of east central Arizona. Towns there look to the Apaches as the motor force that pulls them through the winter, and as a major player in the regional economy. Their timber operation is one

of the most productive in the western United States, regularly outperforming private operators like Weyerhaeuser.

- In Montana, the Salish and Kootenai Tribes of the Flathead Reservation have built a successful private sector economy based on tourism, agriculture, and retail services. Unemployment on the Flathead Reservation is often lower than in the rest of rural Montana. The tribal college now gets non-Indian applicants who want the quality of education the Flatheads provide.
- At Cochiti Pueblo in New Mexico, effective unemployment is close to single digits — one of the lowest rates among western reservations — thanks to the Tribe's ability to employ in tribally-owned enterprises most of their own people who want on-reservation jobs.

What is odd or puzzling is that these stories — and others like them — do not conform to a lot of common, top-of-the-head ideas about economic development. For example, simply having resources — natural, human, or financial — does not account for what the relatively successful tribes have been able to achieve. It is not the case that relatively successful tribes are those that have good natural resources or high rates of educational attainment, or the ones who have been able to get their hands on the most financial capital.

Obviously, having more resources to work with is better than having less. The Apaches, for example, are blessed with a major Ponderosa pine forest, superb elk habitat, and wonderful ski country. But just having resources is not the key — nor even necessarily a key — to getting a reservation economy off the ground. The Crow Tribe of Montana has as rich a natural resource endowment as any tribe, possessing some of the largest coal reserves in the world, extensive timber, rich wheat-growing land, and arguably the best grazing land in the West. The Crows also have experienced significant infusions of capital through federal programs and a number of large monetary claims

settlements. High school graduation rates at Crow are well above the national reservatior average. Yet official unemployment is almost 60% and real unemployment much higher. The return on Crow wealth — what the tribe and its people earn from that enormous resource endowment — is minuscule. All those resources have not produced wealth, nor have they produced a viable, working economy.

In contrast, the home of the Mississippi Choctaws, centered in the town of Philadelphia, Mississippi, is by no means rich in natural resources, and Choctaw development got going before the recent improvements the Tribe has made in its educational system. Neither natural resources nor education was the key to the Choctaws' success.

If natural, human, and financial resources aren't the key to economic development — if they cannot explain the development pattern in Indian Country — then what can?

This is the problem that we have been working on for the better part of the last decade at the Harvard Project on American Indian Economic Development.[2] On the one hand, there is widespread poverty on Indian reservations. On the other hand, a number o: Indian nations have broken away from the legacy of poverty and are building successful economies on their own terms. What do these breakaway tribes share? What distinguishes them from other tribes? What explains the emerging pattern?

Two Approaches to Economic Development

In our research in Indian Country, we encounter two very different ways of approaching economic development. The first we call the "jobs and income" approach. Tribes that work with the "jobs and income" approach begin by saying, in effect, "we've

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2 The Harvard Project on American Indian Economic Development is a research project operated under the auspices of the Kennedy School of Government at Harvard University and the Udall Center for Studies in Public Policy at The University of Arizona. The project is directed by Dr. Manley Begay (Harvard), Professor Stephen Cornell (Arizona), and Professor Joseph P. Kalt (Harvard).

got a problem here. The problem is not enough jobs and not enough income, and the solution is to get some businesses going on the reservation." Often that means calling in the tribal planner and saying, "go get some businesses going." The tribal planner goes off and writes some grant proposals or looks for some investors or comes up with some business ideas, and everyone hopes that somehow the problem will be solved.

There's a persuasive logic to this approach to economic development: there aren't enough jobs on most reservations; there isn't enough income; too many people are poor; too many people are on welfare. So jobs and income are critical.

The problem is that this approach typically doesn't work. It may produce lots of ideas but it seldom produces lasting businesses. The stories are familiar. An enterprise gets started but fails to live up to its advance billing. Or the tribe obtains a grant that provides start-up funding for a project, but when the grant runs out there's no more money and the project starts downhill. Or an investor shows up but gets entangled in tribal politics, loses heart, and eventually disappears. Or a new business gets underway with lots of hoopla and has a good first year, but then the tribal government starts siphoning off the profits to meet its payroll or some other need, as a result there's no money to fix the leaky roof or upgrade the accounting system, and soon the business is in trouble. Or the enterprise becomes primarily an employment service as people demand that it provide lots of jobs, costs rise, it finds itself unable to compete with non-reservation businesses whose labor costs are less, it becomes another drain on the tribal treasury, two years later it folds and the jobs it provided disappear. Or the new tribal chair decides the business is a source of patronage, personnel are hired based on their votes in tribal elections instead of their business skills, with each election the business gets a new manager and a new set of operating guidelines, customers get cynical, quality declines, and the business collapses. One way or another, the tribe ends up back at square one, once again asking the planner to "get something going," and the cycle starts

over. Eventually, both planners and council feel as if they're banging their heads against the wall.

This pattern, familiar on many reservations, makes one wonder if the economic development problem can be reduced to "jobs and income," and if the solution can be reduced to "getting some businesses going" or winning grants or talking an investor into a joint venture. Maybe it's time for a new approach.

This is where the second approach to economic development comes in. It is a "nation-building" approach. This approach begins with the same perception — we've got a problem — and it recognizes that a big part of the problem is the lack of jobs and income. But it argues that solving the problem will require a solution both more ambitious and more comprehensive than trying to start businesses or other projects. The solution is to build a nation in which both businesses and human beings can flourish. The "nation-building" approach says the solution is to put in place an environment in which people want to invest. They want to invest because they believe their investment has a good chance of paying off. It may produce monetary profits. It may produce satisfaction in a job well done. It may raise the quality of life in the community. It may reduce dependence on the federal government or bolster tribal sovereignty. The point is that most investors have choices. If they don't see a decent possibility of a payoff here, there is little to stop them from going somewhere else or doing something different.

This problem involves more than money. Our definition of "investors" is broad. An investor may be a cash-rich joint venture partner, but it also could be a tribal member considering a job with tribal government or with a tribal enterprise, or someone with a new solution to a reservation problem, or a tribal member hoping to start up a feed store or a beauty salon or some other reservation business and employ a couple of family members, or a newly-trained school teacher hoping to return to the reservation. Investment is not just a financial matter. An investor is anybody with time or energy or ideas or skills or good will <u>or</u> dollars who's willing to bet those assets on the tribal future.

Attracting investment is a matter of attracting those people, of persuading them to make that bet. A development plan that ignores the problem of persuading investors — of all kinds — to invest is a development plan in trouble. Nation-building is a solution to that problem.

A "nation-building" approach to development doesn't say "let's start a business." Instead, it says "let's build an environment that encourages investors to invest, that helps businesses last, and that allows investments to flourish and pay off." A "nation-building" approach requires new ways of thinking about and pursuing economic development. Telling the planning office to go get some businesses going doesn't begin to crack the problem. The solutions lie elsewhere: in the design and construction of nations that work.

Table 1 compares the two approaches to reservation development. The "jobs and income" approach sees development as first and foremost an economic problem and consequently focuses attention on getting grants, finding a joint venture partner, or any other strategy that might produce usable capital. The "nation-building" approach, on the other hand, sees development as first and foremost a political problem. It focuses attention on laying a sound institutional foundation, on strategic thinking, and on informed action.

Most important, the "nation-building" approach produces different outcomes. Our research consistently finds that the "jobs and income" approach can occasionally lead to some quick business start-ups and perhaps some short-term successes, but it does not produce a sustainable future for the nation. A nation-building approach is no guarantee of economic success, but it vastly improves the chances that economic development will take root and be sustainable. It is far more likely to produce prosperity for the nation and its people. Along with sovereignty, it is the key to economic development.

Table 1. Two Conceptions of Economic Development

"Jobs and Income"	"Nation-Building"
Reactive	Proactive
Responds to anyone's agenda (from the feds or off the street)	Responds to your agenda (from strategic planning for the long-term future)
Emphasizes short-term payoffs (especially jobs and income *now*)	Emphasizes long-term payoffs (sustained community well-being)
Emphasizes starting businesses	Emphasizes creating an environment in which businesses can last
Success is measured by economic impact	Success is measured by social, cultural, political, *and* economic impacts
Development is mostly the tribal planner's job (planner proposes; council decides)	Development is the job of tribal and community leadership (they set vision, guidelines, policy; others implement)
Treats development as first and foremost an economic problem	Treats development as first and foremost a *political* problem
The solution is money	The solution is a sound institutional foundation, strategic direction, informed action

The Components of Nation-Building

If we look back at the activist Indian politics of the 1960s and 1970s, it is apparent that sovereignty was the core issue at stake. Who would call the shots in Indian Country? Would the federal government continue to make decisions for tribes, to promote its own version of the tribal future, to control the use of tribal resources, and to wield veto power over tribal actions, or would Indian nations be allowed to govern themselves? The self-determination policy launched formally in 1975 and attendant court decisions and legislative actions answered that question, at least in the abstract. The sovereignty of Indian nations was affirmed.

This left tribes with two major tasks. First, they have had to assert the sovereignty promised by policy. Against the entrenched interests of federal bureaucracies, the resistance of state governments, and the efforts of numerous other interests making claims to tribal resources, tribes have had to struggle to make their sovereign status a practical reality, to turn the abstract promise of sovereignty embedded in the self-determination policy into genuine decision-making power. This has not been easy. It has involved court battles, lobbying in Congress, and in some cases a good deal of chutzpah as tribes have seized control of their affairs, displacing federal and other decision makers.

Second, tribes have had to back up their assertions of self-governance with the ability to govern effectively. It is one thing to have the power to govern; it is another to deliver effective governance. The shift in governance from outsiders to tribes — a shift that many tribes have not yet been able to make — puts the spotlight directly on tribal capability. This is a fact the opponents of tribal sovereignty have been quick to point out, pouncing on every indication of tribal incapacity or incompetence in tribal government.

Real self-governance is a bit of a two-edged sword for tribes and tribal leaders. Once tribes are in the driver's seat in reservation affairs, they begin to bear more responsibility for what happens in those affairs. When things go well, they are entitled to credit; when things go badly, they bear a larger share of the blame. As tribes exercise more and more real power, the argument that the federal government or some other set of outsiders alone is responsible for what's wrong becomes less convincing. This doesn't mean that responsibility rests solely with tribes. The long history of warfare, imported disease, land loss, cultural suppression, racism, and paternalistic federal control of reservations has had a lasting impact on Indian nations that continues to handicap them today. But the decisions tribes make now and the capabilities they bring to the tasks of self-governance are crucial determinants of tribal futures.

Assertions of sovereignty will have little impact on tribal socioeconomic conditions in the absence of effective governing capability. But what does effective governing capability involve? If successful development requires effective self-governance, what does effective self-governance look like?

The key is the institutions through which tribes govern, the ways they organize themselves to accomplish collective tasks. One of the unfortunate consequences of a century of federal control of Indian nations is a legacy of institutional dependency, a situation in which tribes have had to rely on someone else's institutions, someone else's rules, someone else's models, to get things done. On many reservations, tribal government has become little more than a grants-and-programs funnel attached to the federal apparatus. On others, tribes simply have adopted the institutions of the larger society without considering whether those institutions, in fact, are appropriate to their situations and traditions. Such dependency and blind imitation are the antithesis of self-determination.

For sovereignty to have practical effects in Indian Country, tribes have to develop effective governing institutions of their own. Harvard Project research indicates such institutions will have to provide the following:[3]

- Stable institutions and policies.
- Fair and effective dispute resolution.
- Separation of politics from business management.
- A competent bureaucracy.
- Cultural "match".

Stable institutions and policies: The institutions of governance are the formal mechanisms by which societies organize themselves to achieve their goals. Through formal constitutions, charters, laws, codes, and procedures, and through informal but established practices and norms, a society establishes relationships among its members and between the society and outsiders, distributes rights and powers, and sets the rules by which programs, businesses, and even individuals operate. Those who deal with that society, whether members or not, look to those institutions to understand the rules of the game. They look to those institutions to tell them what their rights are, to tell them which decisions are likely to be politicized and which ones aren't, to tell them how to act in order to achieve their own goals, to tell them what to expect in their dealings with that society, and so forth.

As many developing countries around the world can attest, if governing institutions are subject to abrupt and frequent changes, then the rules of the game become

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[3] Harvard Project results have been published in a number of places, but see especially the following papers by Stephen Cornell and Joseph P. Kalt: "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations," in What Can Tribes Do? Strategies and Institutions in American Indian Economic Development, edited by Stephen Cornell and Joseph P. Kalt (Los Angeles: American Indian Studies Center, UCLA, 1992), pp. 1-60; and "Where Does Economic Development Really Come From? Constitutional Rule among the Contemporary Sioux and Apache," Economic Inquiry 33 (July 1995): 402-26. See also the various papers published in the Harvard Project Report Series, available from the Harvard Project on American Indian Economic Development at the John F. Kennedy School of Government, Harvard University.

uncertain. Faced with uncertain rules, investors are less likely to invest. Tribal members are less likely to put their energy and skills into the tribal future if they're uncertain what role politics will play in their jobs. Small business owners are less likely to start or expand their businesses if they think the rules of the game might change at any moment. A joint venture partner is less likely to commit if tribal policies and practices are inconsistent. In other words, instability in governing institutions discourages investment.

Instability comes not from changes in personnel, but from the changes personnel and politics make in institutions. Measured by unemployment and by sustained enterprise success, Cochiti Pueblo is one of the most successful tribes in Indian Country. But the senior tribal administration changes on a yearly basis. One of the characteristics of Cochiti governance is that the tribal executives you are dealing with this year probably will not be the ones you are dealing with next year. But while the senior personnel frequently change, the institutions of Cochiti governance — the rules of the game — seldom do. Rooted in Pueblo traditions and indigenous governing structures, they have enormous stability. This encourages both tribal members and non-members to invest energy and time and skill in the tribal future.

Governing institutions at some other reservations lack this stability. Sometimes the rules are unclear to begin with or are set on an ad hoc basis, making it impossible for anyone to know what to expect in dealings with tribal government. Sometimes newly elected officials change the rules to serve their own interests or those of their supporters. Sometimes the rules are simply ignored, having only a paper reality. In such cases, stability disappears. All too often, investment goes with it.

Fair and effective dispute resolution. Governing institutions have to be able to provide consistently non-politicized, fair dispute resolution. They have to be able to assure people that their claims and disputes — including disputes with the tribe itself —

will be fairly adjudicated. The key to doing this for most tribes is a strong and independent judicial system.

On many reservations, the tribal court is controlled by the tribal council. Either the judges can be fired by the council or president and serve at their pleasure, or the decisions of the court can be appealed to the council. Either way, the council or the president has the last word in disputes.

This is not a promising environment for a potential investor. Consider a tribal member trying to start a small business on the reservation who has a complaint against the tribal council. Perhaps this person thinks the council unfairly canceled a lease on tribal land or is pressuring the new business to hire certain people, and the member goes to tribal court to complain. On some reservations, the tribal council is going to have the last word, either via appeal to the council or through political pressure brought to bear on tribal judges. In other words, the decision finally will rest with the very people who are the target of the complaint. Under those circumstances, the chances that the tribal member is going to get a fair shake are slim. Given the prospects, such investors are likely to take their money or ideas or time or energy — and the jobs they might have produced — somewhere else.

At the Harvard Project we have examined 67 tribes for which comparable information is available, and have found that those tribes that have strong, genuinely independent judicial systems outperform — economically — those that don't. The measure we used was employment. If you control for the effects of other factors on employment, you find that simply having an independent judicial system reduces unemployment, on average, by five percent.[4] Thus, if a tribal council is looking for ways to reduce long-term unemployment on the reservation, one of the best things it can do is

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[4] See Stephen Cornell and Joseph P. Kalt, "Successful Economic Development and Heterogeneity of Government Form on American Indian Reservations," in Getting Good Government: Capacity Building in the Public Sectors of Developing Countries, edited by Merilee S. Grindle (Cambridge: Harvard Institute for International Development, Harvard University, 1997), pp. 272.

establish a strong, genuinely independent judiciary that can fairly settle disputes and adjudicate claims.

This illustrates the difference between a "jobs and income" strategy and a "nation-building" strategy. The "jobs and income" strategy says go find an investor or start a business. The "nation-building" strategy says build a judicial system that reassures investors, levels the playing field, and gives both tribal and non-tribal businesses an opportunity to flourish. In fact, the lesson from Indian Country is the same one that is being learned in the former Soviet Union, where investment in legal systems is the necessary foundation on which economic development is being built.

Separation of politics from business management. Tribal governments have to be able to separate politics from day-to-day business decisions. On many reservations the tribal government — typically the tribal council or the tribal president — controls tribal businesses. Business decisions are made by the council; administrative and personnel disputes are referred to the council; and the council or president often assumes responsibility for much of the day-to-day running of the enterprise.

At first glance, this may make sense to some people. After all, tribal enterprises belong to the tribe and the government represents the tribe; therefore, the government should run the enterprises. But most societies don't choose leaders on the basis of their ability to read market conditions or manage a labor force or negotiate purchasing agreements with suppliers. Societies ideally choose leaders on the basis of vision, integrity, ability to make wise long-term decisions, leadership attributes, and so forth. When it comes to running businesses, what societies typically need is to find the best business people available, people who know how to make businesses succeed and become lasting sources of income, jobs, and productive livelihood.

To sustain businesses as businesses, rather than temporary welfare programs, requires a clear division of responsibility. The elected tribal leadership is responsible for

the long-term future of the nation. Among other things, they properly consider strategic issues: What kind of society are we trying to build? What uses should we make of our resources? What relationships with outsiders are appropriate? What do we need to protect and what are we willing to give up? These are proper matters for political debate and they are the sorts of questions elected leaders appropriately deal with. But when it comes to things like hiring the new foreman at the plant; working out the payroll at the casino; dealing with personnel issues, purchasing, or operating hours; putting together the business plan for next year; or deciding how much the middle managers should be paid — these are not appropriately political matters. They are business matters, and they should be decided by skilled business people working within the strategic directions set by the tribe but free of the interference of tribal leadership. When politics gets involved in business operations, businesses typically either fail or become a drain on tribal resources, preventing those resources from being used to the full advantage of the tribe. Businesses cannot compete successfully when the decisions are being made according to political instead of business criteria.

The Harvard Project has been carrying out a running survey of tribally-owned businesses on reservations. To date, we have surveyed approximately 125 such businesses on more than thirty reservations. The results are compelling. Those tribally-owned businesses that are formally insulated from political interference — typically by a managing board of directors and a corporate charter beyond the direct control of council members or the tribal president — are four times as likely to be profitable as those businesses that are directly controlled by the council or the president. To be sure, there are some council-controlled businesses out there that are successful. But the evidence from Indian Country shows that the chances of being profitable rise <u>four hundred percent</u> where businesses are insulated from political interference in day-to-day operations.[5]

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[5] Some of this evidence is presented in Cornell and Kalt, "Reloading the Dice...," p. 32.

Of course a tribe might decide that it is not interested in profits; it is interested in jobs. The enterprise, in this view, should employ as many people as possible; if it also makes money for the tribe, that's gravy. But our experience has been that, in a competitive environment, enterprises run as employment services invariably run into difficulties which typically threaten to bring the whole business down. Tribal enterprises in such situations have cost levels higher than is efficient. Their products therefore are expensive; sales tend to fall; and eventually the tribe — which typically doesn't have much money — has to subsidize the business, which often fails as political support evaporates.

If an enterprise in a competitive market is not itself competitive, the jobs it creates won't last very long. On the other hand, a strategy that reinvests profits to maintain and expand the business, eventually employing more people, or that invests profits in new businesses, accomplishing the same thing, may produce fewer jobs today but far more jobs tomorrow.

A competent bureaucracy. The White Mountain Apache Tribe in Arizona recently reached an agreement with the U.S. Fish and Wildlife Service under which the Tribe is able to manage its forest and recreational resources in conformance with the Endangered Species Act. This agreement was a product of negotiations between the two entities over the Service's concerns about endangered species on the Apache reservation. The agreement avoided potentially costly litigation that would have pitted the Service's concerns against the Apaches' right to manage their own resources. Under the agreement, the Service recognizes Apache sovereignty while the Apaches put in place a conservation plan that recognizes the endangered species concerns of the Service.

One of the key elements in the success of these negotiations was the Apaches' resource management capabilities. Over the years, the White Mountain Apache Tribe has developed sophisticated forestry, wildlife, and recreational management capabilities.

Among other things, they boast one of the most productive sustained-yield timber operations in the west and the country's premier commercial elk hunting operation. In other words, they have a competent, sophisticated resource management bureaucracy. It gets things done and does them well. This capable bureaucracy has enabled them to assume the driver's seat as far as their natural resources are concerned. Without this capability, their claim to control over endangered species management would not have been credible. The Apache case illustrates how important it is to negotiate from strength — in this case the organizational and managerial strength of tribal government.

As Indian nations increasingly take over the management of social programs and natural resources on reservations, as they undertake ambitious development programs, as their governing tasks become more financially and administratively complex, their bureaucratic capabilities become even more essential to their overall success. Attracting, developing, and retaining skilled personnel, establishing effective civil service systems that protect employees from politics, putting in place robust personnel grievance systems, establishing regularized bureaucratic practices so that decisions are implemented and recorded effectively and reliably — all of these are crucial to a tribe's ability to govern effectively and thereby to initiate and sustain a successful program of economic development.

Cultural "match". The task of governing institutions is to back up sovereignty with the ability to exercise that sovereignty effectively. That's where sovereignty pays off — in its effective exercise. But where do those institutions come from? Should they simply be imported from somewhere else?

Cultural "match" refers to the match between governing institutions and the prevailing ideas in the community about how authority should be organized and exercised. Such prevailing notions are part of the culture of a tribe or of any cohesive society. Governing institutions "match" a society's culture when governing authority is

exercised when, where, and by whom the society's norms — often unspoken and informal — regard as legitimate. Where cultural match is high, the institutions of governance tend to have a high degree of support in the community; they command allegiance and respect. Where cultural match is low, legitimacy is low, and governing institutions are more likely to be toothless, ignored, disrespected, and/or turned into vehicles for personal enrichment.

Two of the tribes that the Harvard Project on American Indian Economic Development has worked with extensively are the White Mountain Apache Tribe of the Fort Apache Reservation in Arizona and the Oglala Sioux Tribe of the Pine Ridge Reservation in South Dakota. Both have tribal governments organized under the provisions of the Indian Reorganization Act (IRA) of 1934. Both governments are classic IRA systems: Power is centralized in the tribal government, chief executive officers exercise extensive power, there is no independent judiciary, and there is executive oversight of business operations. In short, the tribal constitutions at Fort Apache and Pine Ridge are near replicas of each other, and the institutions of governance are largely the same on both reservations.

But the performances of these two Indian nations are radically different. Economically, as we already have noted, the White Mountain Apaches are one of the most successful tribes in the country, having built a number of successful tribal enterprises in timber, manufacturing, and recreational tourism. Pine Ridge, on the other hand, is statistically the poorest Indian reservation in the country. The record of failed tribal enterprises at Pine Ridge is long and depressing. It has some of the highest rates of unemployment and related social problems in Indian Country.

What's the difference? Resources certainly are part of it. The Fort Apache Reservation is blessed with a rich natural resource endowment, while Pine Ridge has comparatively less to work with. But resource differences cannot explain the very

different record in the performance of tribal enterprises. Tribal businesses at Fort Apache tend to be productive and to last. Tribal businesses at Pine Ridge, typically, do poorly.

Our research strongly suggests that a central part of the difference has to do with the institutions of governance. Those institutions are essentially the same in structure. But in the Apache case, there is a much closer match with Apache traditions. In the Sioux case there is no match at all. A comparison of Apache and Sioux systems of governance prior to the mid-nineteenth century, before either tribe had come under the effective control of the United States, shows substantial differences between them. This comparison is summarized in Table 2.[6]

[6] For a more detailed version of this comparison and for the sources on which it draws, see Stephen Cornell and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule among the Contemporary Sioux and Apache," Economic Inquiry 33 (July 1995): 402-26.

Table 2. IRA, Western Apache, and Lakota Governing Structures

Typical IRA Governments (1930s...)	Western Apache Government, c. 1850	Lakota Government, c. 1850
Centralized (single units, power concentrated in chairs or presidents)	Mixed (local band autonomy, power concentrated in single chiefs)	Decentralized (local band autonomy, power dispersed among individuals and institutions)
Modest separation of powers (strong executive, weak legislature)	Minimal separation of powers (strong executive, weak legislature)	Separation of powers (executive, legislative, judicial)
Directly elected executive oversees representative council	Directly elected executive selects council	Parliamentary design (council selects executives)
No independent judiciary (council or chair is court of appeal)	Judicial functions in hands of executive	Independent judicial and law enforcement functions (*Akicita* societies)
Executive or legislative oversight of business operations	Executive oversight of business operations	Separation of strategic affairs from day-to-day business operations

Traditional Apache government was centralized. It put enormous power in the hands of a single, charismatic leader. That leader selected the legislature or council, which were looked to for advice, but over which the executive had the last word. There was no independent judiciary; the chief executive resolved major disputes as chief judge and jury. He made the major economic decisions as well.

This traditional Apache system looks very much like the contemporary IRA government. By chance, when they adopted their IRA constitution, which was written by the federal government, the Apaches got a governing system that in many ways resembled the system they had developed over centuries on their own. As a result, the people tended to believe in that government, and still do so. The institutions of governance at Fort Apache have community support because they fit Apache conceptions of the appropriate organization and exercise of political authority.[7] They have cultural match.

The situation is very different at Pine Ridge. Traditional Lakota government looked radically different from the contemporary IRA version. It placed little power in the hands of single individuals. A legislative council exercised the largest degree of power. In parliamentary fashion, that council chose four executives, called Shirt Wearers, who served at the pleasure of the council. The council also oversaw selection of a police force from among the warrior societies, called the *akicita,* and assigned them responsibility for enforcing the law and settling disputes. Once appointed, the *akicita* and their judicial powers were remarkably independent. There are cases in the historical record, for example, of the *akicita* physically beating members of the legislature and Shirt Wearers — chief executives — for failing to observe the law. Being able, by general

[7] This is not to say that those institutions are conflict-free or that the individuals who serve in those institutions necessarily enjoy the same degree of support but only that the institutions themselves appear to be viewed by most tribal members as legitimate.

cultural assent, to punish chief executives and legislators is a persuasive sign of culturally legitimate judicial independence.

Historic Lakota government also provided for a clear separation between strategic decisions and day-to-day business management. The council might decide where the camp should move next, or when to gather for the buffalo hunt, or whether to engage in raiding against another nation. When it came to the business of actually moving or hunting or going to war, the council chose individuals known to be superbly skilled in those managerial functions, and put responsibility in their hands. Once the hunt began, it was not the leaders of the nation, but the most skilled and knowledgeable hunters who held decisionmaking power. Indeed, traditional Lakota government was a highly sophisticated system, complete with its own separation of powers, checks and balances, and clear division of authority. What's more, it worked.

The IRA government at Pine Ridge looks very different today. It places enormous power in the hands of single leaders, has no effective separation of powers, muddies lines of authority, fails to place checks on the behavior of leaders, and offers no independent, impartial means for settling disputes. At almost every point, it departs from the political ways of the past. As a result, it has little legitimacy among the people. Few of them are willing to invest in those activities where the government exercises significant power. Those who do invest take significant risks. Some get burned, resources are squandered, and the chances of long-term prosperity disappear.

What is at issue here is cultural match and the legitimacy of governmental institutions that it produces. The institutions of governance at Fort Apache match the culture of the people — their ideas about how authority should be organized and exercised — and therefore have legitimacy. The virtually identical institutions of governance at Pine Ridge have little match with Lakota culture and therefore have little legitimacy with the Lakota people.

In short, the institutions of governance have to have legitimacy with the people if they are going to work. This is not necessarily a signal to revive traditional governing systems. Those systems were designed to meet the problems of their time. Tribal governments operate in a very different environment today and often have to solve very different kinds of problems. Furthermore, not only have the demands on tribal governments changed, but in many cases the ideas carried in the community — tribal cultures — have changed as well. The trick is to invent governments that are capable of operating effectively in the contemporary world, but that also match people's ideas — traditional or not — about what is appropriate and fair.

The Building Blocks of Development

Putting in place effective institutions of self-governance is a critical piece of the development puzzle, but it is not the only one. Institutions alone will not produce development success. Sound institutions have to be able to move into action. In our research and in our work with Indian nations, we think about development as having four central pieces or building blocks: sovereignty, effective institutions, strategic direction, and decisions/action.

Sovereignty is the starting point; without it, successful development is unlikely to happen in Indian Country. But, as we have argued above, sovereignty has to be backed up with effective governing institutions. These provide the foundation on which development rests. Development itself, however, still needs focus. For most Indian nations, not just any kind of development will do. Most nations have priorities: aspects of their society or situation that they wish to change, features that they wish to preserve or protect, directions they see as compatible with their views of the world, directions they wish to avoid. The crucial issues for societies to decide as they put together a development agenda are these:

- What kind of society are we trying to build?
- What do we hope to change in our society?
- What do we hope to preserve or protect? What are we willing to give up?
- What are our development priorities (e.g., sovereignty, health, employment, income, skill development, etc.)?
- What are our development concerns (e.g., cultural impacts, environmental impacts, changing demographics, out-migration, etc.)?
- What assets do we have to work with?
- What constraints do we face?

The answers to these questions form the basis of a development strategy. They provide criteria against which development options can be evaluated and development decisions can be made. They do not tell a tribe what to do in every case, but they orient decision-making to long-term goals and to the realities of the tribe's situation. Without a sense of strategic direction, there is a danger that the tribe will move into a reactive mode, responding to the agendas of funding agencies or outside investors instead of proactively pursuing its own goals and seeking ways to achieve them.

Finally, there are practical development decisions to be made and implemented: this is the action piece of the puzzle. In our experience, many tribes focus the bulk of their development attention on decisions/action, at the expense of institution-building and strategic direction. Faced with urgent problems and often transitory opportunities, tribal councils deal with development on a short-term basis, as a set of decisions that have to be made. A funding agency is willing to provide start-up funds for tourism; let's do that. An outside investor has offered an opportunity to start up a company but needs a decision now; what shall we do? The new tribal planner has put three business proposals before us; which ones should we pursue? Timber prices are up; shall we increase the cut?

All of these are real issues that need attention. But without appropriate and effective institutions, the council probably is trying to answer these questions with only

limited information. And some may not be council business at all. Moreover, without some sense of strategic direction, it is not clear which options make sense. Under these conditions, development becomes a haphazard affair. In contrast, a tribe that has effective institutions in place and has developed a clear strategic direction not only is in a better position to make development decisions, but is more likely to see those decision pay off.

Thus institutions and strategic direction are not only pieces of the development puzzle; they are building blocks: successful development rests in part on them. These building blocks are shown in Figure 1. The arrow indicates the appropriate sequence of steps.

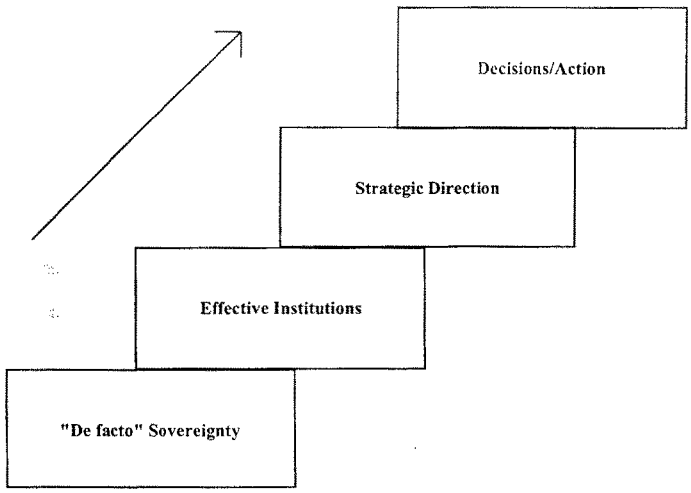

Figure 1. The Building Blocks of Economic Development

The Argument for Sovereignty

Of the building blocks of development shown in Figure 1, three are substantially under tribal control. It is up to tribes to put in place institutions that work, to determine their own strategic directions, and to make informed decisions and act on them. Sovereignty is different. Sovereignty is fundamentally a matter of the relationship between political entities, of the rights and powers they recognize each other as possessing. For example, the treaties signed between Indian nations and the United States typically included, among other things, explicit recognitions and specifications of relevant sovereign powers belonging to each party.

Figure 1, however, refers not simply to sovereignty. It refers to "de facto" sovereignty. By "de facto" sovereignty we mean acting as the effective decision maker in tribal affairs. Who is really deciding the economic strategy? Who is really deciding how many trees will be cut? Who is really deciding whether the joint venture agreement with an outside investor will go forward? Who is really deciding how the housing money will be spent? When the answer to these questions is "the tribe," we have "de facto" sovereignty — sovereignty in fact and in practice.

We have argued that a distinctive feature of the last twenty-five years in Indian-White relations — and a critical foundation of tribal economic success — has been federal acknowledgment of tribal sovereignty as not only a legal but a practical matter. For those tribes that have been willing and able to assert it, these have been decades of "de facto" sovereignty, of practical self-governance.

The attack on tribal self-governance — on sovereignty — which began in the mid-1990s is not new; tribal sovereignty has been under attack many times before. But the attack now comes at a time when many tribes, through the assertion of their sovereign powers and the development of institutions that can exercise those powers, have begun to

put their sovereignty to effective use. At century's end, the attack continues in the Congress, the courts, state legislatures, and to some degree in public and media debate.

This attack is both misguided and dangerous. There are legal and historical arguments for tribal sovereignty that we need not rehearse here. Another important argument, however, gets too little attention. Among the most powerful arguments for tribal sovereignty is the simple fact that it works. Nothing else has provided as promising a set of political conditions for reservation economic development. Nothing else has produced the success stories and broken the cycles of dependence on the federal system in the way that sovereignty backed by capable tribal institutions has done.

The history of Indian policy is amply clear on this point. The United States has been concerned to overcome the dismal economic situation on Indian reservations at least since 1928, when the so-called Meriam Report marshaled massive evidence of reservation poverty and hopelessness.[8] In its attempts to deal with those conditions, subsequent federal Indian policy has ranged across the map, from assimilationism to the termination of federal responsibility for tribes to multiplying social programs and explicit support for tribal governments. To date, however, only one federal policy orientation has been associated with sustained economic development on at least those Indian reservations that have exercised de facto sovereignty through their own institutions: the self-determination policy that emerged in the 1970s. In other words, not only does tribal sovereignty work, but the evidence indicates that a federal policy of supporting the freedom of Indian nations to govern their own affairs, control their own resources, and determine their own futures is the <u>only</u> policy orientation that works. Everything else has failed.

In our work, we cannot find a single case of successful economic development and declining dependence where federal decision makers have exercised de facto control

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8 Lewis Meriam and Associates, <u>The Problem of Indian Administration</u> (Baltimore: Johns Hopkins Press, 1928).

over the key development decisions. In every case we can find of sustained economic development on Indian reservations, from the Salish and Kootenai at Flathead in Montana to the Mescalero Apaches in New Mexico to the Muckleshoots in Washington to the Choctaws in Mississippi, the primary economic decisions are being made by the tribe, not by outsiders. In every case, the tribe is in the driver's seat. In every case, the role of the BIA and other outside agencies has shifted from decision maker to merely a source of helpful resources, from the controlling influence in decisions to advisor or provider of technical assistance.

We realize that in finding that sovereignty is the precondition of economic development on reservations we have reached a very pro-Indian conclusion, but it is based on the evidence. In fact, it is not surprising. The same lessons enumerated here have been taught to the world by former Soviet attempts to exercise the de facto decision making role in Eastern Europe. Such a strategy did not produce successful economies there. It should come as no surprise that it does not work in Indian Country.

The underlying logic to the finding that only sovereignty works in overcoming the long-standing problems of reservation poverty, dependence, social ill-being is clear. As long as the BIA or some other outside organization carries primary responsibility for economic conditions on Indian reservations, development decisions will reflect the goals of those organizations, not the goals of the tribe. Furthermore, when outsiders make bad decisions, they don't pay the price of those decisions. Tribes do. As long as the outside decision maker doesn't pay the price of bad decisions, there's no incentive for that decision maker to make better decisions.

Once the tribe is in the driver's seat, the situation changes. The quality of the decisions improves as the tribe pays the price of bad decisions and reaps the reward of good ones. Making the federal government bear responsibility for improving economic conditions on Indian reservations may be good political rhetoric, but it is bad economic strategy. When tribes take responsibility for what happens economically on reservations

and have the practical power and capacity to act on their own behalf, they start down the road to improving reservation conditions.

In short, "de facto" sovereignty is an essential precondition for reservation economic development. A decade of Harvard Project research has been unable to uncover a single case of sustained development that did not involve the recognition and effective exercise of tribal sovereignty: the practical assertion by tribes of their right and capacity to govern themselves. There is a major policy lesson here. The lesson is that sovereignty is one of the primary development resources any tribe can have. The reinforcement of tribal sovereignty should be the central thrust of public policy. One of the quickest ways to bring reservation development to a halt and prolong the impoverished condition of reservations would be to undermine tribal sovereignty.

Furthermore, tribal sovereignty works not only for Indians; it has benefits for non-Indians as well. Around the country, economically successful Indian nations are becoming major players in local and regional non-Indian economies. The most abundant evidence of this fact comes from gaming tribes. The evidence is rapidly mounting that some Indian gaming operations are making major economic contributions not only in Indian communities, but in non-Indian ones: creating jobs, providing new business to non-Indian vendors of various kinds, attracting increased tourism to certain areas, expanding sales by local retailers, moving people off state welfare rolls, and increasing state income and sales tax receipts.[9] On top of that are the major investments in non-

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[9] See, e.g., Kalt, Joseph P., Testimony before the National Gaming Impact Study Commission, March 16, 1998. See, also, Center for Applied Research, The Benefits and Costs of Indian Gaming in New Mexico (Denver: Center for Applied Research, 1996); Center for Applied Research, Indian Reservation Gaming in New Mexico: An Analysis of Its Impact on the State Economy and Revenue System (Denver: Center for Applied Research, 1995); John M. Clapp, et al., The Economic Impacts of the Foxwoods High Stakes Bingo & Casino on New London County and Surrounding Areas (Arthur W. Wright & Associates, September, 1993); Steven C. Deller, Amy Lake, and Jack Sroka, *The St. Croix Casino: A Comprehensive Study of Its Socioeconomic Impacts* (Madison: University of Wisconsin Extension, 1996); Stephen A. Hoenack and Gary Renz, Effects of the Indian-Owned Casinos on Self-Generating Economic Development in Non-Urban Areas of Minnesota (Plymouth, MN: Stephen A. Hoenack and Associates, 1995); James M. Klas and Matthew S. Robinson, Economic Benefits of Indian Gaming in the State of Minnesota (Minneapolis: Marquette Advisors, 1997); James M. Klas and Matthew S. Robinson, Economic Benefits of Indian Gaming in the State of Oregon (Minneapolis: Marquette Advisors, 1996); Minnesota Indian Gaming Association and KPMG

Indian enterprises that some gaming tribes are making with their profits, becoming significant contributors of investment capital for non-Indian businesses.

Of course gaming is an easy activity to point to. The money involved is often substantial, it makes a big splash, and it captures the attention of the media. But other tribal economic activities also contribute to the economies of Indian and non-Indian communities. Tribes with successful economies — whether gaming is involved or not — typically become net contributors to the larger economies around them. We have already noted the Mississippi Choctaws, who are importing non-Indian labor because there aren't enough Choctaws to fill all the jobs they've created. Some non-Indians now look to the Choctaws for an economic future that is otherwise unavailable to them in that part of Mississippi. As noted above, the White Mountain Apache Tribe has become a keystone of the non-reservation economy in east-central Arizona, bringing both people and dollars into Pinetop and Snowflake and other communities. When the Tribe's natural resource economy was threatened by federal endangered species policies, not only did the Tribe put itself in the position to exercise de facto sovereignty on species issues, the non-Indian communities around them organized in support of the Tribe's assertions of self-rule. In Montana, it was not gaming that turned the Confederated Salish and Kootenai Tribes of the Flathead Reservation into a major economic force in the Flathead Valley, where their economy accounts for a significant part of the growth taking place in the corridor running from Missoula north toward Kalispell and Glacier National Park. Elsewhere, too, tribes that are engaged in successful economic development — with and without gaming — are moving tribal members off welfare, reducing the need for some social programs, helping families survive, taking over functions previously filled by the federal government,

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Peat Marwick, Economic Benefits of Tribal Gaming in Minnesota, 1992 (Minnesota Indian Gaming Association, April, 1992); James M. Murray, Direct and Indirect Impact of Wisconsin Indian Gaming Facilities on Wisconsin's Output, Earnings, and Employment (Madison: University of Wisconsin Extension, 1997; James M. Murray, The Impact of American Indian Gaming on the Government of the State of Wisconsin (Madison: University of Wisconsin Extension, 1993). Dennis J. Nelson, Howard L. Erickson, and Robert J. Langan, Indian Gaming and its Impact on Law Enforcement in Wisconsin (Attorney's Process and Investigation Services, Inc., 1996).

supporting the education of tribal members, and improving the quality of life on reservations. These activities reduce the support burdens on the rest of the society — on taxpayers — and reduce the squandering of human resources that has plagued Indian Country for more than a century.

Such benefits as these also give states such as Arizona, Mississippi, and Montana a major stake in tribal economic prosperity. And what is the foundation of tribal economic prosperity? It all comes back to sovereignty: rights and powers of self-governance and the ability to exercise them effectively. This set of connections — from sovereignty to reservation development to non-reservation payoffs — is largely left out of the thinking and tactics of those who would now squash tribal sovereignty. But what is the alternative? We believe the alternative to sovereignty and real progress on reservation development is a return to a system dominated by federal and state programs that perpetuate institutional and individual dependence and consign tribes to debilitating futures of poverty and despair.

Conclusion

The policy implications of this research can be summarized briefly. Economic development on Indian reservations is first and foremost a political problem. At the heart of it lie sovereignty and the governing institutions through which sovereignty can be effectively exercised.

This directs attention first to the federal and state policy levels, for it is at these levels that sovereignty, as a set of rights and powers, will be either affirmed or reined in. The lesson of the research is clear. It is increasingly evident that the best way to perpetuate reservation poverty is to undermine tribal sovereignty. The best way to overcome reservation poverty is to support tribal sovereignty. Furthermore, the evidence is mounting that successful tribes, whether in gaming or skiing or timber or manufacturing or some other activity, can make important contributions to local, regional, and national economies.

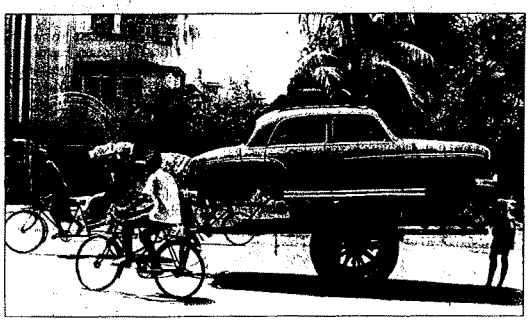
At the tribal level, the lesson is that those tribes that build governing institutions capable of the effective exercise of sovereignty are the ones that are most likely to achieve long-term, self-determined economic prosperity. They are the ones who will most effectively shape their own futures, instead of having those futures shaped by others. For tribes, nation-building is the only game in town.

ROLE of WORLD BANK

FINANCE AND ECONOMICS

Evol. of Development Thinking

Capital Subs → Gr+MKTS → FIX Inst



Time to roll out a new model

WASHINGTON, DC

The World Bank wants to be the best in the development business. Does that business still exist?

JAMES WOLFENSOHN, president of the World Bank, is not shy of grand statements. He famously said that his organisation's success should be judged by "smiles on the faces of children" in poor countries. Now he is proposing a "comprehensive programme of renewal", to make the World Bank the "premier global development institution" of the 21st century.

Apart from its grandiose language, the most striking aspect of this proposal is its cost. Aside from giving up to $150m to workers who will be laid off, Mr Wolfensohn wants to spend a whopping $420m over the next two years to make the World Bank better at what it does. Whether that investment makes sense depends on whether the World Bank is in an expanding industry or a declining one. Knowing the answer means first asking what, if anything, development is really about.

This may seem a strange question. Mr Wolfensohn, for one, would be quick to point out that there are 4.7 billion people living in the developing world, many of them in abject poverty. These are the Bank's "clients", and helping them is its business. A touching sentiment, but a trite one. Justifying the use of public money (which is what the World Bank's money in effect is) to help poor people in a world where private capital flows predominate, where rich countries are painfully tightening their fiscal belts, and where much previous foreign aid has been an abject failure, demands more than heartwarming words.

That has not always been the case. In the 1950s and 1960s, when the development business began, it had an intellectual rationale and a goal. People believed poor countries were truly different from rich ones. Markets and prices, many argued, did not work well in isolated, agrarian societies. Free trade would mean misery, not prosperity, for countries dependent on exports of commodities, such as rubber or coffee. So promoting development meant building up subsidised domestic industries behind protective trade barriers. The World Bank saw its job as lending governments money for particular projects, such as roads or irrigation schemes. The development business was basically about alleviating a capital shortage.

This approach failed miserably. Closeted behind their protective barriers, poor countries built up uncompetitive industries, borrowed money they were increasingly unable to repay, and stifled economic growth with over-regulation, big budget deficits and high inflation. By the 1980s, the bankruptcy (literally) of such state-led development was clear. A new orthodoxy emerged. Development, mark two, was all about putting markets first.

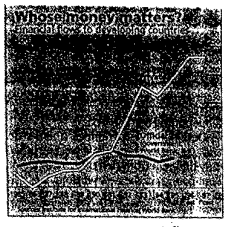
Development economics, 1980s-style, held that poor countries were not inherently different from rich ones. What made them poor, said the new wisdom, was bad economic policy and too much government. Fiscal prudence, freer trade, privatisation and deregulation would turn poor economies around. The World Bank embraced this intellectual change. Its research department helped to define ~~and~~ justify the free-market theorising, and its bankers offered countries loans in return for market-oriented reforms.

At one level, market-based development has been remarkably successful. Many poor countries are today growing far faster than rich ones. Private finance is pouring into emerging markets: around $230 billion in 1996, up tenfold from a decade ago (see chart on next page). Private money now dwarfs official aid, which has not been increasing and now amounts to only about $50 billion a year.

Unfortunately, that is not the whole story. The recipe of the 1980s provides necessary, but not always sufficient, ingredients for prosperity in poor countries. Private capital favours a small number of countries; many economies, particularly in Africa, have failed to attract private money despite significant free-market reforms. Understanding why is perhaps the central development issue of the 1990s.

Superficial answers are easy. Many countries lag because their reforms have barely begun. In others, reform has been piecemeal and ineffective. In yet others it is simply that the pay-off from liberalising reforms seems slow to arrive. Such explanations are clearly not enough. Why is it that some governments seem able to reform and others not? Why is it that reform works in some countries and not in others? These questions do not undermine the case for market-led development. They simply suggest that it involves more than completing a checklist of "sensible" policies. Much development thinking today is about where that checklist may be incomplete, and why it can be difficult to implement.

So development economics, mark three, has rediscovered that institutions matter. The ideological proponents of free markets have tended to forget that, for markets to work well, an economy requires a complex web of effective institutions, from basic property rights and well-run legal systems to effective and uncorrupt bureaucracies. In poor countries such institutions are



often weak or non-existent. A batch of new academic research has shown how this matters for economic growth. Countries where property rights are weakly enforced, where the rule of law cannot be counted on and where governments are corrupt tend to grow more slowly, even if they claim to give

Improving institutions should therefore be a top priority. How to go about it is less clear. At the most basic level, economists emphasise putting in place basic market structures, such as property and contract rights. This means more than simply writing laws and titling lands.

It means building a credible legal system to enforce them, complete with uncorrupt judiciaries. It also means setting up the kinds of institutions that themselves are likely to lead to better policies. Few doubt, for instance, that monetary policy is better handled by an independent central bank than by politicians focused on re-election. Similarly, fiscal policy could be improved through a clear and transparent budget process. The basic ideas behind all this institutional emphasis are that markets need the rule of law to work properly, and corrupt bureaucracies can do less damage if they have less room for manoeuvre.

that economists are paying more attention to the political dynamics of reform. Sustaining and implementing reforms is not simply a matter of ticking off a checklist, but a question of strategy and priorities. Governments not only need to do the right reforms in the right order; they also need to make them stick. This means building a consensus for reform. It sometimes means compensating losers, often government elites themselves. The difficulty is how to create the kinds of incentives that will ensure these elites want to continue reform.

Many of these issues remain unresolved. The new development model is far from complete, though it is clear that it goes beyond the solutions of the 1980s. Does that leave a job for a development institution such as the World Bank? In principle, yes. The Bank could be much stricter about not lending to countries with inadequate institutions, and could focus on helping them to build better ones. Mr Wolfensohn himself acknowledges that the bank needs to move in this direction, but he has not made this the top priority. If it were, it might even warrant some investment.