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HANDBOOK  
STATE-TRIBAL RELATIONS

PREPARED BY  
THE  
COMMISSION ON STATE-TRIBAL RELATIONS

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## FORWARD

The Commission on State-Tribal Relations was chartered in 1977 by the National Conference of State Legislatures (NCSL), the National Congress of American Indians (NCAI) and the National Tribal Chairmen's Association (NTCA). It is composed of tribal chairmen or presidents and state governors, attorneys general and legislators.

The National Conference of State Legislatures is a non-partisan organization serving the nation's state legislators and their staffs. It is funded by the states and has three basic objectives: 1) to improve the quality and effectiveness of state legislatures; 2) to assure states a strong, cohesive voice in the federal decision-making process; and 3) to foster interstate communication and cooperation. Its headquarters are in Denver, Colorado, with an office of state-federal relations in Washington, D.C.

The NCSL created a special task force of 20 legislators in March 1977, to study and to improve the relationships between states and tribes. After considering several congressional proposals on state-tribal relations, the Task Force adopted a policy resolution urging states and tribes to reach cooperative agreements. The 43-member Executive Committee of NCSL then approved a project that would help states and tribes develop such agreements.

The National Congress of American Indians is the oldest national Indian organization in the United States. Founded by Indian leaders in 1944, the organization represents over 140 Indian tribes throughout the country. In addition, NCAI has more than 2,000 Indian members who join on an individual basis. Although the primary participating members are

tribal governments, NCAI advocates for small groups and communities not recognized or served by the federal government, including disenfranchised Indian people in urban areas. All officials of the organization are Indian people elected by Indian people.

The National Tribal Chairmen's Association is an organization representing leaders of federally recognized tribal governments. NTCA is committed to the progress of Indian tribal society and to the protection of Indian-owned natural resources. It was established in 1971 to serve as a national voice for its member chairmen in improving the social, educational, economic and government programs among Indian people.

The American Indian Law Center, Inc., is the oldest national Indian legal and governmental advocacy group. It is an Indian-controlled, non-profit corporation organized for research, training and service to Indian tribal governments and communities in all areas of law, policy and governmental affairs. The law center was formed in 1967 as an institute of the University of New Mexico School of Law and achieved fully independent status in 1978 as an Indian-controlled corporation which maintains a close association with the law school. The law center played an important role in the conception and formation of the Commission on State-Tribal Relations and was asked to provide staff for the Indian tribal participants on the commission because of its unique background of assistance to tribal governments in policy analysis and institutional development.

The Commission on State-Tribal Relations was formed at a time of heightened public interest in Indian affairs. In the early 1970's, world attention was drawn to Indian problems by the Trail of Broken

Treaties and the incident at Wounded Knee. National interest later focused on the struggle of the Passamaquoddy and Penobscot Tribes to establish their land claims in the State of Maine, a state long thought to have resolved its "Indian problems." The American Indian Policy Review Commission Report to Congress called for federal recognition of broad tribal governmental powers on reservations, raising concerns among some state governments and non-Indian residents of reservations. Bills were then introduced in Congress which would have abrogated Indian treaties, severely restricted tribal governmental authority, and deprived the tribes of water rights essential for survival and development. So-called "white backlash" groups formed throughout the West to oppose tribal rights. And an energy development boom was approaching which, while creating opportunities, would also place great demands on both state and Indian governments in the West.

The growing conflict and antagonism between states and tribes created an obvious need for a more mature approach to the tribal-state relationship. Despite the adversary character of much of the rhetoric, the tribal-state relationship has historically included many areas of cooperation and holds the potential for increased cooperation and coordination. The role of the commission is to identify these productive relationships and to provide a framework for developing new ones. The commission functions independently of the chartering organizations whose obligations to advocate for their constituent interests are often in conflict.

No single handbook could deal adequately with all possible issues which might arise between tribal and state governments. Their relationships are as diverse as the responsibilities and activities of these

governments themselves. But a handbook can serve useful limited purposes.

First, it can contribute to the understanding by both governments of the tribal-state relationship by setting it in proper historical, legal and policy contexts.

Second, a handbook can analyze the purpose and function of certain critical governmental activities--not as a civics lesson, certainly, but as an effort to identify common interests better served by cooperation and coordination than by competition and confrontation. The latter dominate the literature available on the subject of state-tribal relations. No balanced and realistic examination of these relationships has been available to those in state and tribal governments whose attitudes and activities shape public policy.

Third, a handbook can identify the pressures on state and tribal governments and institutions that contribute to either positive or negative relationships between them. It can identify processes and programs which have succeeded or failed and identify the reasons.

Fourth, a handbook can offer those interested in beginning the process within or between tribal and state governments a guide--not in the form of a blueprint, but in the form of an analytical tool--for defining the areas best suited to cooperative relationships, the range of process choices available, the elements critical to each and the pitfalls which must be avoided.

This handbook attempts to do all these things. It is based on the collective experience and insight of the commission and its staff. This is not a book of advocacy. The commission is well aware of the adversarial aspects of the tribal-state relationship, but believes that areas

of conflict must be seen in the context of the total tribal-state relationship, in which there is also much common ground.

All of the members of the commission should be recognized for their interest in and dedication to its work, but special recognition must be given to the leadership of former Speaker Edward Manning of the Rhode Island House of Representatives, Chairman Joe DeLaCruz of the Quinault Indian Nation, and Senator Sue Gould of Washington State, former and present co-chairmen of the Commission. Among the many dedicated members, Chairman Allen Rowland of the Northern Cheyenne Tribe and Senator Carroll Graham of Montana have shown a particular interest in the commission's work. At the staff level, Tassie Hanna of the National Conference of State Legislatures, Nancy M. Tuthill, Parker Sando, Darrell Knuffke and Sam Deloria of the American Indian Law Center deserve special mention for their work over the years.

Funding for the commission has been provided by the Ford Foundation, the William H. Donner Foundation, the AKBAR Fund, the Aetna Foundation, the Bureau of Indian Affairs, the Administration for Native Americans and the Community Services Administration. Their interest and support have been invaluable.

This handbook is among the first words on the subject; if it has value and utility, if state and tribal relations evolve and mature in part because of it, the final words may never be written.

The commission invites comments and contributions from the many people in the country whose experience with governments at every level can improve this handbook.



## INTRODUCTION

The roots of the peculiar tribal-state relationship are deep in American history. From the earliest days of the European discovery of the continent, the rights of Indian societies to self-government and to land and natural resources have been recognized. All of the European colonial powers, most of the colonies and several states made treaties with Indian tribes or nations in the hemisphere. The United States recognized Indian tribes as political entities and made treaties with them, both during the period of the Articles of Confederation and under the Constitution. The political existence of Indian tribes today is in no sense an historical anomaly.

### Early Federal Policy

Under the Articles of Confederation, Indian affairs were left to individual states. The framers of the Constitution judged this to be unworkable and the Constitution changed this responsibility by providing that "Congress shall regulate commerce...with the Indian tribes." (Article I, Section 8, Clause 3).

The federal government also could rely on other enumerated powers in its relationship with Indian tribes: The Treaty Power; the War Power; and the power to create new territories and to admit new states to the Union. Taken all together, as the Supreme Court has observed on a number of occasions, these Constitutional provisions grant the federal Congress plenary legislative power on the subject of Indian affairs, a power which preempts that of the states.

In early cases, the Supreme Court suggested the political status of Indian nations was solely a matter of the relationship between tribal and federal governments. Federal preemption of state power was exclusive in the geographic areas imprecisely defined as "Indian territory" --later to be called "reservations." In those early days, the federal government tried to control contact between the tribes and non-Indians and to limit it to government agents, missionaries and federally-licensed traders. The attempt, as the world knows, was notably unsuccessful. The story of the pressures non-Indian society brought on the federal government for Indian land and the record of the government's response to those pressures are too well-known to require repeating.

Contacts between Indians and non-Indians proved impossible to control. For a time the federal government sought to preserve tribal isolation by removing tribes westward--a policy which had the added advantage to the government of opening original tribal homelands to non-Indian settlement. After the removal policy, reservations were created for the tribes and guaranteed to them as homelands. But neither removal nor the creation of reservations enabled the federal government to control non-Indian contacts with Indians or the non-Indian presence in Indian country.

In the latter part of the 19th Century, the Supreme Court delivered two opinions with far-reaching effect on the governance of Indian reservations. Dramatically narrowing its application of the Preemption Doctrine with respect to territorial jurisdiction over Indian reservations, the Court held in *United States v. McBratney*, 104 U.S. 621 (1881), and *Draper v. United States*, 164 U.S. 240 (1896), that Indian reservations are part of the states in which they are located and that

states have criminal jurisdiction over crimes committed on Indian reservations by non-Indians against the persons or property of other non-Indians. The court did not require express congressional consent for this exercise of power within Indian territory.

#### The End of Isolation

Interaction of Indians and non-Indians might have been relatively rare had the federal government adhered to an isolation policy and maintained reservations for the exclusive use and occupancy of the Indians as promised. But during the latter half of the 19th Century federal policy changed and the United States embarked on an effort to destroy the fabric of tribal cultures, to assimilate Indians into non-Indian society and to open remaining Indian lands for non-Indian settlement. A few individual treaties and special statutes had provided for the allotment of the tribal land estate among individual tribal members, but the policy culminated in the General Allotment Act of 1887. As a result of the Allotment Policy, much of the tribal land was allotted in severalty to individual members. The land not allotted to individual Indians was declared "surplus" to tribal needs and opened for homesteading by non-Indians. As a result of this and later sales of allotments by the Indian owners, many reservations developed checkerboard land ownership patterns and non-Indian settlers flowed in.

The Federal government stopped making treaties with the Indian tribes in 1871. Between then and the revitalization of tribal self-government under the 1934 Indian Reorganization Act, a number of western states were added to the union and many reservations were opened to

settlement by non-Indians, who brought with them state governmental power under the principles of McBratney and Draper. During this same period, the federal government tried to consolidate its own power over the tribes with a dominant federal presence on the reservation--a presence aimed at speeding assimilation by limiting the power and effectiveness of tribal self-government.

The Indian Reorganization Act (IRA) of 1934 revived tribal powers of self-government while other federal laws of the period authorized the continuing intrusion of state governmental authority in Indian country. Federal Indian policy had mixed goals. For example, the Johnson-O'Malley Act provided for federally-funded contracts with state governments to provide various services on reservations, principally education. Moreover, full implementation of the IRA and the revitalization of tribal government were cut short by the nation's preoccupation with World War II.

#### The Termination Policy

The limited gains under the IRA were further eroded after the war. The Indian self-government policies of the 1930's were swept away in the drive to terminate the federal recognition of and relationships with Indian tribes, supposedly to leave them and their problems solely in the hands of the states in which they were located. The Termination Era ran to 1960. Like the earlier assimilationist era of the Allotment Policy, it was the product of mixed federal motives and intentions. History has judged both eras to have been fundamentally anti-Indian in character. Both were surely marked by hostility to Indian culture and identity.

Both showed little concern for the social and economic problems of Indian people or for the states to whom the unsolved problems were so unceremoniously handed. But in both eras the political rhetoric was filled with expressed intentions--often sincere--to "free the Indians from the yoke of federal paternalism" and to "lift them from their status as second-class citizens."

It soon became clear, though, that regardless of what the proponents intended for termination, the policy would not solve Indian problems by the simple expedient of shifting responsibility for them to the states. The conditions of the larger terminated tribes continued to be matters of federal interest and concern because of their very size and visibility. The economic, social and cultural problems of the smaller tribes also remained largely unsolved by the states.

The termination of the federal tribal relationship did not even succeed in dissolving tribal governmental powers. In *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the Supreme Court held that a terminated tribe retained its hunting rights and also its residual sovereign power to regulate its own members' hunting, leaving it exempt from the regulatory authority of the state in which it was located. But as a general rule, termination did greatly diminish a tribe's capacity to participate in or to assume responsibility for the solution to its own problems, and it also cut off special federal financial assistance to either the tribe or the state.

While the Termination Policy's major impact probably was psychological--except, of course, for the tribes which were actually terminated--and has been repudiated explicitly and implicitly by both the federal legislative and executive branches, its unpleasant legacy lingers. But

the experience of the era may have taught that the mere act of shifting governmental responsibility for a problem will neither ease nor expedite its solution.

#### Tribal Self-determination

The modern era of tribal self-determination began around 1960 with the election of a new administration untainted by the Termination Policy. Throughout the 1960's and 70's the federal government greatly increased the participation of tribal governments in efforts to solve reservation problems and increasingly used them as the local delivery system for federally-supported services. With this impetus, the geographic, social, economic and political isolation of American Indian tribes began to erode rapidly.

By the early 1970's, more and more tribes were discussing and exploring ways to exercise their governmental powers of taxation and regulation. This trend grew logically from increased tribal program activity, but it also stemmed from increasing interaction with non-Indian society and the realization that there were vacuums in taxation and regulation which must be filled by tribal government. Still, tribes' aggressiveness in expanding the scope of their governmental activities was rarely proportionate to the intensity of the debate. Some expansion of tribal governmental activities may actually have been undertaken primarily as a competitive tactic to block further state encroachment on the reservations but, by and large, such expansion was a response to real needs.

The issue of criminal jurisdiction illustrates the pattern. In the early 1970's, there was much discussion throughout Indian country of the possibility of tribes' assuming long-dormant criminal jurisdiction over non-Indians by passing ordinances declaring that non-Indians entering the reservation had impliedly consented to tribal jurisdiction. Yet by 1978, when the Supreme Court held that tribes lacked inherent criminal jurisdiction over non-Indians, only a handful of the nearly 300 tribes had actually moved to assert such jurisdiction through "implied consent" ordinances. And in most of these cases, the ordinances were a response to serious problems caused by inadequate state and federal law enforcement.

The most recent court pronouncements allocating power between state and tribal governments are too new to judge definitively, but future competition is assured. In the broad functional area of regulation--both criminal and civil--the issues are unlikely to be put to rest any time soon. Law enforcement will doubtless continue to be a matter of concern. The development of natural resources on and near reservations and the increasing participation of tribes and Indian individuals in the private economy will demand civil regulation on reservations which was never needed before. Economic activity increasingly will involve complex combinations of Indian and non-Indian interests, and as tribal governments attempt to respond to these challenges the boundary line between state and tribal power will be tested ever more frequently. J The same economic complexity will complicate the tribal-state tax relationship, with the tribes facing the unpleasant possibility that the exercise of their taxing power may come at the cost of a double state-tribal taxation which will cripple reservation economic development. And to

the extent that tribal revenue sources are limited and federal funds are channeled through the states, the advantages of the tribal service delivery systems which have been developed in the past 15 years may be lost.

But regardless of the details of future tribal-state competition a message lies beneath the federal court decisions over the years and the changes in federal Indian policy: the resolution of particular unanswered questions concerning territorial, personal and subject matter jurisdiction has not resolved the tribal-state relationship into a static one in which all future questions are easily answered. So long as both governments exist there will be a relationship between the two which extends beyond easily applied formulas.

The Commission on State-Tribal Relations is content to leave to others appeals to good fellowship or esoteric considerations of ultimate--and ultimately unanswerable--questions about tribal and state power. Its focus is solely on the practical issues that are more important to the daily functioning of this complex, permanent and unavoidable intergovernmental relationship: What are the dynamics and mechanics of the relationship? How do they foster or frustrate cooperation? What works and what does not? Why?



CHAPTER ONE

THE STATE-TRIBAL RELATIONSHIP IN GENERAL

One common view of an Indian reservation holds it to be an arena in which tribal and state governments compete to establish their power in some respects and to avoid responsibilities in others. The federal government--the ultimate arbiter--is accused of failing to resolve this power struggle, either because it lacks leadership or because it is politically constrained from throwing its considerable weight to one side or the other. This characterization suffers not so much from untruth as from incompleteness. By using only the conflicts and the problems to represent the totality of tribal-state relations, this view presents a narrow and biased picture, one which makes intergovernmental cooperation and coordination seem--at least by inference--to threaten tribal or state interests.

It is more productive to avoid prejudgement and to examine the total governmental system serving an Indian reservation area--a system including tribal, federal, state and municipal governments in a complex mixture. There are problems in this system, to be sure, and some of them can only be resolved by a definitive outcome in favor of one government or another. But the analytical tools which shape both governments policies today are unduly combative and insufficiently constructive.

In many respects the relationship between state and Indian tribal governments is like that between any two governments, but it is also unique within the American system. It is not the only intergovernmental relationship with overlapping territorial jurisdictions. It is not the

only one with jurisdictional conflict, ambiguities or competition. Nor ~~is~~ is it the only one whose jurisdictional differences provide potential advantages for certain special political or economic interests. Its uniqueness lies in the fact that, while both governments deal with many of the same subjects, their relationship to each other is also a facet of the relationship between two cultures or societies. And one of these is perceived to be in a struggle for survival against the pressures of the other.

Jurisdiction: Questions and Issues

Jurisdiction--a term often used carelessly in the tribal-state discussion--means only the power or authority of a government to govern. Its scope may be defined in terms of territory, persons, subject matter or a combination of these elements. There are categories in which the respective powers of states and tribes appear to be clearly established and exclusive. For example, states have exclusive jurisdiction over crimes committed by one non-Indian against another on the reservation; tribes have exclusive jurisdiction over tribal members on the reservation. There are also areas of ambiguity in which exclusive jurisdiction in one or another government has not been established. In the past, tribal-state conflict has resulted largely from the attempts of the governments to establish their exclusive power in these ambiguous areas or to avoid responsibility. Aggressive governmental policies have sometimes led to attempts to extend a government's powers into an area previously thought to have been the exclusive province of the other by seeking and finding an "ambiguity" in what was thought to be settled

law.

The lives of tribal and state policymakers would be greatly simplified if the jurisdiction of tribes and states were always allocated discretely within the three general categories of geography, persons or subject matter. But while all have a bearing on the issue, none is an invariable determinant.

Territorial boundaries do exist and serve political and legal functions, but neither tribal nor state jurisdiction is determined wholly on a territorial basis. Despite federal preemption of state power on the reservation in favor of federal and tribal power, a reservation is considered to be a part of the state in which it is located. States have some subject matter and personal jurisdiction over non-Indians, even on the reservation, and tribal jurisdiction over non-Indians on the reservation is limited. Occasionally tribes have jurisdiction over Indians off the reservation. In most intergovernmental relationships, even if the territorial boundaries of each government overlap, they are clearly defined. But reservation boundaries and the jurisdictional status of areas within original reservation borders are often in dispute.

Neither state nor tribal jurisdiction is determined solely on a personal basis. The federal government has assumed certain kinds of jurisdiction over both Indians and non-Indians which it would not exercise in an off-reservation community. While states generally have jurisdiction over non-Indians on the reservation and tribes have jurisdiction over Indians, there are exceptions in both cases.

Neither state nor tribal jurisdiction is determined on a subject matter basis. Some categories are exclusively federal; others are

arguably concurrent between federal and state or federal and tribal. In still other categories, states and tribes have the same subject matter jurisdiction, but the persons and territory over which it may be exercised is disputed or ambiguous. States are prohibited from interfering in the exercise of tribal self-government, and it is clear that this tribal power of self-government extends beyond the tribal membership for some purposes. Because tribes are considered to have inherent sovereignty, a particular state action may even be found to interfere with a hitherto unexercised tribal power.

The Supremacy Clause of the Constitution of the United States resolves federal-state jurisdictional disputes. The state-municipal relationship is created and controlled by state law. Interstate conflicts are resolved according to constitutional provisions and a large body of "conflicts" and "choice of law" principles. The plenary power of Congress to legislate on the subject of Indians has been recognized by the federal courts and has been held to empower Congress to override inherent tribal powers. But the tribal-state relationship is riddled with inconsistencies and major questions that are still unresolved. Federal Indian laws and federal recognition of tribal government have preempted state power on reservations, but the scope of this preemption has not been easy to determine over the years. Both federal laws and federal policy are broadly stated and seem to expand and contract cyclically, providing little opportunity for either tribes or states to anticipate future demands on their governmental systems. Two of the major tests developed by the courts are that tribes lack powers "inconsistent with their status" and that states lack powers which would "interfere with tribal self-government". Both tests invite subjective

interpretation. Neither helps unravel the economic and social complexities of modern reservation life.

The popular view of the reservation as an arena for intergovernmental conflict necessarily presumes that states and tribes are incapable of coordination and cooperation and must therefore definitively resolve all ambiguities and establish areas of exclusive jurisdiction within which to pursue completely separate courses of action. That view is as understandable as it is wrong. For public attention has been riveted-- and public opinion shaped--by dramatic state-tribal confrontations over land claims, water rights and hunting and fishing rights.

But such episodic controversies, however dramatic and compelling they may be, are rare. They can scarcely be said to characterize the day-to-day relationship between nearly 300 Indian tribes and 25 state governments and thus serve us poorly as guides or models for understanding and improving that relationship. The preferred model, the one on which this handbook is based, is one in which tribal and state governments attempt to coordinate their policies and practices in areas of exclusive jurisdiction and to cooperate to assure adequate governmental service where jurisdiction is undefined.

#### Analyzing the State-Tribal Relationship

The Commission on State-Tribal Relations has chosen to begin its analysis with the daily intergovernmental relationship, which involves the routine task of governing Indian reservation areas. If structure, rationality and discipline can be brought to this vast area of the relationship, the episodic controversies can be placed in the broader

context and the attention of tribal, state and federal governments can be drawn to the intergovernmental relationship as a whole.

--Accept existing legal frameworks.

The first ground rule to be adopted is that the intergovernmental relationship should be analyzed in the context of federal, state and tribal law as it stands today. Clearly, major changes in the law will change the relationship. But that relationship has suffered for too long from the tendency of all three governments to postpone dealing with coordination problems in the faint hope that some defect or ambiguity in existing law, which makes coordination impractical, impossible or simply difficult, might be changed in the future.

--Separate common from divergent interests.

Second, the analysis should begin from the point of view of the common interests of both governments and move from there to isolate the divergent interests. Even between governments where there is little rivalry and competition--between states, for example--there is a need for coordination and therefore a need to distinguish common from divergent interests. To assume, as many do, that tribal-state problems will disappear as ambiguities are resolved in favor of one or the other is to overlook the continuing need for coordination. It also assumes that tribes and states, free to pursue different policies within their exclusive jurisdiction, will pursue irreconcilable paths. In light of the geographic overlap and the similarity of their problems, there is no greater reason to assume that they will respond differently than to assume that they will respond in similar ways that can be coordinated. In

the end, states and tribes will decide whether to adopt conflicting or compatible policies on the basis of the merits of the problem before them.

--Avoid jurisdictional questions when possible

Third, once common and divergent interests of state and tribal governments have been identified, the question is this: to what extent can cooperative or coordinated intergovernmental policy and practice assure appropriate coverage of the ambiguous areas without the immediate need to resolve ambiguities in favor of one government or another? The heart of the question is whether jurisdictional uncertainty is a legitimate reason for inaction and whether certainty will add significantly to the governments' abilities to meet their citizens' needs. Ways should be found to postpone or to avoid the ultimate question of jurisdiction. Failing that, the relationship should be so structured that the resolution of jurisdictional questions occurs in the most convenient and appropriate forum.

A tax collection agreement setting out a uniform system in which one government collects taxes at an agreed rate and rebates a portion to the other government avoids the issue of tax jurisdiction with respect to particular combinations of wholesalers, vendors, consumers and the location of the transaction. So long as each government is satisfied with the system, there is no need to litigate taxing jurisdiction in the myriad combinations that exist in a complex economy.

Cross-deputization of law enforcement officials does not avoid the ultimate question of jurisdiction. When formal criminal

charges are brought against an accused the question of jurisdiction must be faced. But cross-deputization does bring the jurisdictional debate to the courtroom where it belongs, removing it from issue at the time of arrest when neither the conditions nor the parties are appropriate for complicated legal arguments.

It is impossible to write a single, simple definition of the legal relationship between state governments and tribal governments. It is also unnecessary. Tribal and state governments needn't focus exclusively on the resolution of all ambiguities so that authority rests exclusively with one government or the other. States and tribes can identify many areas of government in which cooperative arrangements can be made that will result in substantial savings and better service to their citizens. This can be done without sacrificing the legitimate interests of either government or the cultural diversity which the present situation allows.

#### Attitudes and Expectations

The greatest barrier to improved tribal-state relationships is the set of attitudes and expectations held by some members of both governments, the public, the press and the legal profession. These attitudes, as noted, are frequently--and perhaps exclusively--shaped by the narrow and inaccurate emphasis on conflict in tribal-state relations. In the absence of any balanced view, people are likely to be persuaded to the notion that the only interaction between their governments is unavoidable combat. It can be no surprise, then, that a citizen so persuaded sees the imperative to elect to his government gladiators rather than



conciliators or negotiators. People in government tend to do and say what they are expected to do and say, actions and utterances which set up continued expectations among people and institutions outside of government. Because of such expectations, there remains political profit in classic demagoguery, racism and base appeals--in both state and tribal governments. But the existence of those elements--and they do, of course, exist--does not support a thoroughly negative intergovernmental relations policy between tribes and states.

It makes no more sense to avoid cooperation until generosity of spirit pervades tribal-state relations than it does to forego cooperation until a coherent and comprehensive body of jurisdictional law supplants the present one.

Governments, like most social institutions, have goals and principles so broadly stated as to be impossible to disagree with. And, like most institutions, they fall far short of the loftiest of these. It is unrealistic to judge a society or a government--one's own or another--solely by its stated goals. Its actual behavior may be quite different because of the influence of various interests, the practicality or impracticality of its goals, the character of those running the government, the degree of accountability its electorate demands. It is equally unrealistic--and unduly cynical--to characterize a society or a government as simply the product of the selfish struggle between special interests. While there can be no guarantee that the political process will rise above its baser urges, undue cynicism may very well guarantee that it does not.

The gap between the ideal and the real, between goals and achievement, is found throughout human society. One of the historic communication

tions barriers between tribal and state governments has been that, when considering their intergovernmental relationship, each has tended to idealize itself and to be harshly realistic, if not cynical, about the other. When the goals of each are compared, they are often found to be complementary or compatible except on the subject of each other. Their performances often seem to fall short in the same ways and for the same reasons. There may be differences of degree but there are few differences in kind.

Cultural pluralism is a fact of human life throughout the world, and America takes great pride in its attempt--not always successful--to accommodate cultural diversity in its social and political systems. But cultural diversity is also a potentially divisive and destructive force in history, and both state and tribal governments must define their roles with respect to the cultural realities of their jurisdictions. Governments are not the same as societies, and governments must be aware of the right of people to cultural self-determination. At the same time, cultural differences, ethnic loyalties and even racism should not be magnified or encouraged in order to mask the inability or unwillingness of governments to cooperate and to deliver effective government services to the people of the reservation.

Although often encouraged to think in terms of separate state, tribal and federal systems, the people living on reservations can also see that they are served by a total governmental system having three parts: tribal, state and federal. As they evaluate this total system they may be convinced for a time that the system's problems can be blamed on the "other" government, the one with which they do not personally identify. On the other hand, they may also eventually conclude

that they have the right to expect that the three components of government which have power over them will work together to meet their needs and provide them with a quality of government that compares favorably with any in the nation.

#### A Realistic Look at Goals and Performance

A necessary precondition to bringing about an improved state-tribal relationship is that each government have a sound and realistic understanding of its own goals--both stated and unstated--and its own performance, including its shortcomings. This does not mean that a public confession of inadequacy is the required first step. It does mean, however, that neither government should view itself--as has been the tendency in the past--as a group of philosopher-kings trying to cope with a group of incompetent and dishonest political hacks on the other side. The process does require that each government enter into it with skepticism toward its own as well as the other government's propaganda and rhetoric.

An example from the commission's fact-finding meetings illustrates the point. A small conference to discuss state-tribal coordination in hunting and fishing regulation was attended by a representative cross-section of state and tribal officials. Although attitudes varied widely among the participants, some tendencies were evident. State officials generally viewed themselves as scientific professionals seeking to manage and conserve a resource; tribal officials saw themselves as dealing primarily with the traditional relationship between Indian people and nature, involving both subsistence and religious uses and ideas.

State officials tended to view tribal management policies and practices as amounting to no regulation at all; tribal officials tended to view the states as managing the resource to serve sports or commercial interests and to deny Indians access for religious and subsistence purposes.

In the course of discussion, several interesting changes in attitudes occurred. After a period during which both sides relaxed their initial hostility (possibly encouraged by the fact that they were able to talk in the abstract and not in a specific, local political context), they began to view each other as fellow bureaucrats with many common problems. State officials eventually conceded that some of their scientific management principles had only recently begun to replace a more traditional system of setting bag limits--one known to them as SALY (same as last year). They conceded that "scientific game management" is administered in light of the reality of the politics of state game commissions and the economic expectations of motel, bar, liquor store and gas station owners throughout a particular game habitat. They conceded, too, that their coordination problems with the fish and game departments of neighboring states are often worse than those with tribal departments and less susceptible to solution.

On their part, tribal officials eventually conceded that while subsistence and religious considerations continue to play an important part in tribal game management, it overstates the case to say that these are the sole factors influencing reservation management. Wasteful hunting and fishing, even in small degrees, cannot be allowed to hide behind legitimate Indian cultural practices.

Both sides, it seemed, had entered the meeting viewing themselves

ideally as purists and viewing the others with suspicion and cynicism. Both sides conceded in the course of the meeting that their own idealism was overstated. Most importantly, both sides left the meeting with a greater understanding of their counterparts as professionals dealing with many of the same problems. And, although the problems may have been different in detail, they represented real-world considerations that required compromise from idealized positions. Both sides seemed to realize that their initially overstated attitudes toward themselves and the other government represented the roles they were expected to play in the tribal-state relationship.

Neither government should stop with a realistic assessment of its own goals and performance. It should also undertake the same kind of analysis with respect to the other government, keeping in mind that it is not compiling an adversary's brief to persuade a court or to sway public opinion but rather it is attempting to function rationally in an intergovernmental relationship by arriving at an accurate view of the behavior of the other government. Whether or not a self-serving characterization of the tribal-state relationship is considered necessary for public consumption, it is misleading as a basis for a government's own view of the relationship. There, accuracy, insight and understanding are essential.

Some fundamental questions are these:

- What does the other government say its goals are?
- What do its goals really seem to be as judged by its performance?
- What moves it to act?
- What does it fear?

--And, especially, what does it seem to fear from our government?

It is also helpful to identify and examine the negative impressions one has of the other government:

--Why do we have this impression?

--Is it based solely on fact or is it partly an impression or attitude which helps to justify a lack of communication or coordination?

--Does the negative behavior, performance or attitude of the other government really set it apart or do we have similar problems with other governments with which we deal?

--Do we ourselves have the same problem which we tend to overlook?

What is the significance of the final total after taking account of all that is good about one's own government and all that is bad about the other? Can all the negatives justify a refusal to deal with the other government, or do they simply give us clues as to how to work effectively in an unavoidable relationship? What is the cost to one's own government and its constituents of refusing to work with the other government?

It will not always be possible to achieve coordination of tribal, state and federal policy and practice affecting Indian reservation areas. But the focus must shift from where it is today--laying all problems at the door of "jurisdiction"--to where it ought to be--making intergovernmental coordination and cooperation one of the standards to which governmental performance is held to account. This does not mean

that intergovernmental cooperation must bury legitimate social and governmental interests at all costs. Rather, it means that tribal, state and federal governments should be required to articulate the reasons for the failure of coordination efforts and to replace hostility, suspicion and fear with rationality. The needs of reservation areas are too great in the modern world for state and tribal governments to fail to coordinate their efforts. Where their jurisdiction or their responsibilities as governments are unclear, both tribes and states have naturally shown a greater interest in activities which produce revenue or which affect significant political or economic interests than they have in more routine or costly functions of government. As a result, the negative aspects of the tribal-state relationship have appeared not only in the debilitating competition to assert power; they have also been found in gaps where no government authority or service is effectively present. That situation works to the detriment of all of the residents of the reservation.

CHAPTER TWO

SPECIAL CIRCUMSTANCES OF TRIBAL GOVERNMENTS

Intergovernmental relations in general have been thoroughly documented. There is an extensive literature on the operations of federal, state and municipal government in the United States. Organizations such as the Advisory Commission on Intergovernmental Relations and professional groups such as the American Society of Public Administration continue to focus attention on the subject. Modern tribal government is much less well-documented. And it is rarely described in a form that will permit helpful comparisons with state and municipal government.

To determine the potential for improved tribal-state relations, it is important to understand first the special circumstances of tribal governments and their reservations. There is a tendency for state governments, realizing that they are dealing with unusual circumstances in tribal governments, to assume that tribal governments are so exotic as to defy understanding. State and tribal officials alike may better understand the special problems of their intergovernmental relationship if they give particular thought to the unique circumstances of tribal governments.

Indian governments are uniquely American, but even within that framework they are governments with unique characteristics and limitations. Their ability and willingness to enter into structured and stable relationships with state and municipal governments are affected by these special circumstances.



Tribes as Land Owners

First of all, Indian tribes are usually major landowners within their own jurisdictions. In many ways their relationship to land and natural resources differs from that of any government in the American system and calls for a special responsibility to the Indian societies which tribal governments serve. The implications of this landowner status are many. An Indian tribe must relate to the reservation economy both as a government and as a participant, because it is also landowner and entrepreneur. This dual role, when analyzed from a standard American governmental perspective, greatly complicates the tribe's performance of its governmental functions of regulating, taxing and delivering services.

Lacking a healthy reservation economy to provide a revenue base, tribal governments for many years were forced to rely exclusively on their proprietary interests to fund their activities. Landowner's and entrepreneurial devices were most often used as the vehicles for tribal participation in economic development--leases, tribally-owned enterprises and joint ventures. Tribal regulatory and taxing powers were frequently not exercised in conjunction with the business arrangement. This led lessees and others doing business with tribes to conclude that revenue issues and the conditions for doing business were dealt with exclusively in lease and other business provisions, and to forget that tribes--like states and other governments throughout the world--retained the power to tax and regulate as well as to offer business concessions. Even in the best of circumstances it would be difficult to combine the functions of government and landowner/entrepreneur. But tribes have

attempted to do so in a situation further complicated by:

--a political constituency which is predominantly poor and which expects tribal enterprises to favor job creation over profit, an expectation which complicates the tribe's participation in business;

--a constant anxiety that economic achievement will be used as an excuse to terminate the federal-Indian relationship and therefore the recognition of tribal governmental powers and nature;

--a concern that increasing involvement in the complex non-Indian economy will destroy Indian culture and create a rationale for additional political incursions by state and municipal governments;

--a federal policy which stresses economic development, but whose funding pattern is preoccupied with the social welfare symptoms of poverty rather than the capital investment which was crucial to the development of much of the non-Indian economic growth in the western states.

#### The Tribal Constituency

The second characteristic of Indian tribes is that they have a unique idea of citizenship. Unlike state citizenship, which is virtually coextensive with residency for American citizens, tribal citizenship is governed by the membership provisions which are defined in tribal constitutions or ordinances. Once an individual is admitted to tribal membership, he or she normally does not lose it. Depending on the tribe, it is possible for an individual to become a member and never be on the reservation at all. And it is also possible to live one's entire life on a reservation, be culturally and genetically of the local

tribe, and yet not be eligible for membership in the tribe. These unusual aspects of tribal citizenship are due in part to tribal custom and in part to the pressures of federal law.

Because of the importance of membership and the combined tribal-federal significance attached to it, major policy decisions such as constitutional amendments usually must be submitted to a vote of the entire tribal membership, which often includes a substantial non-resident population. People who move permanently from a state lose their citizenship in that state and with it their standing to participate in the political life of their former home and society; not so with the members of most Indian tribes.

Tribes also have two additional constituent groups to take into account: non-member, non-voting non-Indians, who live in Indian country and over whom tribal jurisdiction is quite limited; and non-voting, non-member Indians whose jurisdictional status is unclear. These non-members can affect public attitudes toward tribal government and tribal rights; they have an effect on the attitudes of appointed and elected officials of state, federal and tribal governments. Like the added dimension of tribal proprietary interests, the complex tribal political constituency vastly complicates the job of public policymaking for tribal governments as compared with the already-complex problems faced by state governments.

State government constituency also has unusual characteristics. State and municipal governments are constitutionally required to extend both services and the franchise to reservation Indian people despite the fact that they lack jurisdiction over them. For years, many state and municipal governments resisted both of these duties, and the resulting

legacies of bitterness and mistrust remain. It is a problem which complicates state and municipal governmental functions, and the time must come when both tribal and state governments accept it as a complication of the tribal-state relationship which can be dealt with in an emotionally neutral way.

#### Poverty

Third, the fact that the majority of the resident constituency of most tribes lives in poverty has a special impact on the policymaking of tribal governments. Most American governments balance their responsibilities to the poor against their responsibilities to other economic groups--a task which carries its own difficulties and which generates a particular kind of public debate over values, priorities, strategies and tactics. Tribes, with their endemic economic imbalance, have a different kind of balancing problem and, because of their lack of economic diversity, also have fewer tools to work with and options to choose among.

#### Federal-Tribal Relations

Fourth, the unique relationship of tribal governments to the federal government, as it has developed historically, has created special problems in defining the role of the tribal government. Municipal governments must adjust to superior state power, but these relationships are well-defined in state law. Municipalities derive their power from the state rather than from an inherent right of self-government.

The states themselves are in a perpetual process of defining their own relationship with the federal government, and there is a constant tension between state sovereignty and federal supremacy. The Supremacy Clause of the U.S. Constitution provides a definitive resolution of conflicts, and there are quite specific judicially-developed rules to determine when federal power has preempted state power. But the federal-tribal relationship is different. It involves a continually shifting balance between federal trusteeship and tribal self-determination--policies that are simultaneously professed by the federal government, that are unevenly applied over time and through changing federal administrations and that are, at bottom, inherently in conflict.

#### Tribal Governments and Indian Culture

And finally, by no means the least important but perhaps the least understood, is the special relationship of Indian tribal governments to Indian culture. Non-Indian American governments are drawn philosophically and structurally from the cultural background of the majority society which these governments serve--that of Euro-American culture. Ironically, because of federal Indian policy, many tribal governments are also constitutional governments patterned along similar lines, alien to the Indian societies they are expected to govern. Some observers have noted that Indian tribal governments are subject to criticism from two perspectives at once: they are too heavily influenced by non-Indian ideas of government and are not "Indian" enough for some critics; at the same time they are inadequately equipped to meet the challenges facing Indian people and societies in the modern world and, by this argument,

are too "Indian"--or insufficiently "non-Indian"--for other critics.

To date, no model Indian government has emerged which is generally considered to embody traditional Indian governmental processes and, at the same time, to be adequate to the complex modern challenges of taxation, regulation and the delivery of services, although there is no reason why it cannot be done. This kind of debate is unique to tribal government and rarely occupies the agendas or complicates the problems of state and local non-Indian governments in the United States.

Non-Indian governments are also partly responsible for the perpetuation of the culture and social values of the majority society in America, from their control of compulsory education to their basic commitment to a republican form of government and some form of free-enterprise economy. But tribal governments are seen by many as protectors of Indian cultures whose existence is perceived to be constantly threatened. Thus, tribal governments tend to sense that every major policy decision and every significant new direction taken could conceivably lead to irreversible damage to a threatened culture. It is a culture whose position is the more precarious because it has no ties resembling those fundamental links between American and European societies--a culture which, in fact, has no ties, no counterparts and no source of renewal anywhere on earth but on the reservation.

This special relationship of tribal government to Indian culture dominates every facet of tribal policymaking and inculcates a caution and a conservatism which are marks of most tribal policy. Tribal governments cannot ignore this overriding concern. It is not only an important tribal value and hence a major expectation tribal members have of their governments, it is also a major expectation of many non-Indians

in the press and the public at large--an additional source of pressure on tribal governments. They can no more pursue public policy by ignoring cultural realities than could any other government.

It can be very difficult to identify the precise cultural dimension of many specific policy problems facing Indian tribal governments. Although in many instances the Indian cultural considerations can be identified and explained, in other instances the exact demands of Indian culture can be misidentified or used to mask other considerations. The existence of special requirements based on cultural considerations may raise problems not encountered by state government. Accommodating them within a cooperative intergovernmental relationship will require a special effort by both governments.

#### Can Cooperation Threaten Tribal Governments?

A number of thoughtful tribal advocates have questioned whether an improved tribal-state relationship would have a debilitating effect on Indian culture or would weaken the tribal-federal relationship and prompt another attempt by Congress to abandon its historic recognition of tribal political existence and its complex responsibilities to Indian tribes. This question is not frivolous. It reflects fears which flow from sad experience and it deserves a serious response. But it is also important because of the insight it offers into how the seemingly precarious status of Indian tribes in the United States sometimes has a paralytic effect on tribal policies.

It is obviously beyond the scope of this handbook and beyond the competence of the Commission on State-Tribal Relations to pass judgement

on the complex questions of culture change among Indian tribal societies. Whether a particular course of action will have a destructive or constructive influence on the natural process of culture change to which Indian cultures--like all cultures--are always subject is a matter for the Indian people themselves to judge. But the dangers any particular course of action by tribal governments might pose to Indian cultural survival should be determined on the merits of that course of action, not solely by whether it happens to involve coordination or cooperation with state or municipal governments. It is easy to imagine a program of tribal-state cooperation which strengthens tribal culture by ensuring tribal control of an area of government which might otherwise be dominated by federal, state or municipal standards and practices. One can just as easily imagine a state-tribal agreement which fails to recognize and protect essential tribal interests. But the difference between the two lies not in the fact of intergovernmental cooperation, but in the nature of the agreement.

The essence of a successful tribal-state agreement is that both governments have found a basis for cooperation that protects their legitimate interests. Even in situations where tribal and state interests are in vigorous conflict and where the historic relationship has been negative, examples of coordination and cooperation can be found. It is apparent, then, that both governments can find a basis for distinguishing competing from common interests and that many already have decided that a wholly negative intergovernmental relations policy is in the interest of neither party.

As with the cultural impact, the likely political impact of an improved tribal-state relationship is a matter of judgement. Federal



Indian policies and programs date from the earliest days of the nation. Because of their age and historical background they have a complex rationale based on several different motivations. In the classic formulation of Chief Justice John Marshall over 150 years ago, Indian societies have, within limits, inherent rights to self-government, to land and natural resources and to a separate culture, none of which is derived from the American Constitution but which to some degree must be protected under the Constitution. In theory, perhaps these rights should stand on their own. But the Supreme Court observed nearly a century ago in *United States v. Kagama*, 188 U.S. 375 (1886), that special federal protective measures are necessary because the Indians' non-Indian neighbors and state governments are most likely to treat them unfairly and take advantage of their unfamiliarity with the majority society.

At the same time, a major strain of federal Indian policy has been to "civilize," or, in the modern euphemisms, to acculturate and assimilate Indians into the "mainstream" society "when they are ready." An equally persistent strain of American policy, related to the former and perhaps more modern in its expression, is that a rationale for Indian status and the complex of federal Indian programs is the economic underdevelopment of reservations and the endemic poverty of Indian people.

Many observers, and many of the Indian people themselves, believe that the Indians' worst enemy is the dominant federal establishment which exercises such great control over their lives and affairs. Why, then, do the Indians seem to cling so tightly to their relationship with the federal government? Indian spokesmen have answered this question often and clearly: the primary Indian goal is survival as distinct

peoples, cultures and societies--preservation of identity. Historically, it has seemed that one of the conditions which makes Indian survival a continuing possibility in America is the relationship of the tribes to the federal government and the maintenance of the complex Indian status in law and government, even with all the disadvantages that status entails. It has never seemed to be a realistic possibility for the tribes to work out a new relationship which would sort out the disadvantages from the advantages of the present arrangement.

The apparent conservatism of tribal policy comes, then, from a conviction, based on experience, that any substantial change in the present Indian status poses a potential threat to the federal-tribal relationship and hence to the conditions apparently necessary for continued Indian survival within American society. As perceived--probably accurately--by the tribes, the Indian right to political existence established in American law by the immortal John Marshall is in reality much more fragile than the sovereign existence of other nations and might not be able to withstand the pressures of the American legal, political and economic systems on its own. As Indians point out, there is little likelihood that the international community would decide that the rationale for the sovereignty of, say, Switzerland, Luxembourg, Lichtenstein or Monaco will vanish if and when it can be established that those countries are:

- 1) insufficiently culturally distinct from neighboring countries;
- 2) insufficiently threatened by the hostility of neighboring countries; or
- 3) insufficiently poor.

The nation, and especially the state governments which deal directly with tribal governments, must recognize the complexity of the dilemma in which the tribes find themselves and the difficulty of making policy in these circumstances. On the one hand, tribal political existence has survived for 200 years of European occupation and is so embedded in federal law, policy and programming that it is likely to survive indefinitely in some form. But it is probably not possible for the nation to make a binding guarantee to the tribes that their existence--socially and politically--will be a matter of right for as long as they choose to maintain it or that they will retain the governmental power they feel they need to function effectively on the reservations.

Lacking such a guarantee and convinced that the survival of Indian societies depends to a large extent on the survival of Indian governments, tribes ironically perceive that they must be in a state of obvious cultural distinctness, obvious hostility from their neighbors, and obvious poverty in order to justify their existence. If tribes seem to lack enthusiasm for a close relationship with even well-intentioned state governments, here is a point to remember: states stand to inherit governmental authority on reservations if tribes lose it; federal Indian policy makes them natural rivals so long as tribal governments are not considered permanent.

There can be no guarantee that Congress will not radically change its historical policy and, in effect, punish tribal governments for developing constructive relationships with state and municipal governments by limiting tribal powers and expanding state powers on reservations. But it should be made clear to Congress, the states and the American people that if poverty and the hostility of their neighbors are

necessary ingredients of continuing tribal existence, Indian societies are paying a heavy price to insure their own survival. The likelihood of reducing the enormous human and financial cost of contemporary reservation problems under these conditions is negligible.

CHAPTER THREE  
FUNDAMENTAL CONSIDERATIONS  
AFFECTING TRIBAL-STATE AGREEMENTS

The tribal-state relationship could take any of a vast range of forms, from the most solemn, formal treaty-like agreement designed to settle a complex water rights issue all the way to a casual verbal understanding between the lowest levels of governments that achieves day-to-day coordination. When considering the tribal-state relationship, there is a tendency to use terms such as "negotiating process" and "agreement" which imply more formality and structure than may be necessary. In this handbook, "negotiation" or "negotiating process" refers to any discussion of common problems between state and tribal governments regardless of the degree of formality or the level of government at which the discussion occurs. The term "agreement" refers to any kind of understanding between the two governments. Where formal negotiations or agreements are intended, we will be specific.

Tribal, state and federal officials often make several assumptions about tribal-state agreements:

- that the exact limits of existing tribal and state jurisdiction must be defined and agreed on first;
- that a specific term is necessary;
- that there must be provisions requiring notice and a waiting period before cancellation by either party;
- that an agreement must be enforceable; and
- that federal approval is required for a tribal-state agreement

These assumptions do reflect relevant considerations, but clearly they are not all necessary to all forms of cooperation and coordination between tribal and state governments. Laying the groundwork for an increasingly rational and cooperative intergovernmental relationship does not consist of reducing the tribal-state relationship to a set of structured, enforceable formal agreements. In fact, insisting on unnecessary formality may prevent informal working understandings across broad areas of government.

To determine the requisite degree of formality, it is necessary to identify in general terms the relevant state and tribal interests at stake, the legal constraints and the desired outcome. Although there may be problems that cannot be approached without directly addressing complex or controversial issues, it is usually better to begin with areas where common interests are clear and agreement can be reached as informally as possible and then to move incrementally toward the complexities as the need arises.

The delivery of services, the management of executive branch resources and the coordination of regulatory and tax policy and practice generally can be approached informally, enabling both governments to avoid ultimate jurisdictional questions. So doing helps avoid unintended gaps in service or jurisdictional vacuums in tax and regulatory enforcement. On the other hand, the governments are less likely to be able to avoid defining jurisdictional limitations where the imposition of sanctions is involved because constitutional and statutory limitations of tribal and state governmental power in favor of individual rights differ. When these rights are asserted the limits of a particular government are tested.

Existing Limits of Jurisdiction

A major cause of tribal-state conflict is jurisdictional uncertainty. As between two governments, jurisdiction can be exclusive or concurrent. When it is exclusive, one government has the power to the exclusion of the other. When it is concurrent, each government independently has the power over the same territory, persons or subject matter. Tribes and states have areas of exclusive jurisdiction and a few areas where their jurisdiction is considered to be concurrent, that is, both have power at the same time. But the troublesome area in the relationship is the area of jurisdictional ambiguity; there, each government commonly seeks to establish its own exclusive jurisdiction to resolve the ambiguity.

Resolving a jurisdictional ambiguity definitively and exclusively in favor of one government or another negates--to that extent--an inter-governmental relationship and replaces it with the discretion of a single government. Concurrent jurisdiction, on the other hand, can be troublesome where government policy and practice are conflicting and uncoordinated. Because of the uniqueness of their relationship, tribes and states have sought definition of the scope of their powers in the absence of other means to manage the problems which might result from the concurrent exercise of government power. Because of the nature of federal Indian law, it is unlikely that either a federal court or the Congress will conclude that tribal and state powers are concurrent, although any decision made will likely leave additional ambiguities. But tribes and states can agree to leave ambiguous jurisdictional areas undefined for the time being and enter into discussions of policy and

practice which will determine whether there is a practical necessity to resolve ambiguities into exclusive state or tribal power. Where government policy and practice are identical or compatible there is no need to resolve ambiguities; moreover, an additional outcome of this process may be to define much more precisely the questions which must be resolved.

Thus the jurisdiction of tribe and state need not be definitively agreed upon at the beginning of a negotiating process between the two governments. It is helpful to have some agreement as to the scope of the exclusive jurisdiction of each and the scope of the areas of ambiguity, but to attempt to remove all ambiguities at the outset would be to remove from the discussion the largest share of the basis for the intergovernmental relationship. Coordination of government policy and practice with respect to areas of exclusive jurisdiction would facilitate many important government goals, just as it does between states or on a council of governments level in a metropolitan area. But the real usefulness of the process suggested by the commission lies in the attempt to coordinate in areas of ambiguity such that establishing exclusive jurisdiction becomes unnecessary.

It is important to stress that the agreements which result from such a process will not by their own force concede or bring about concurrent jurisdiction. Under present federal law, the jurisdictional relationship between state and tribal governments can be changed only through a formal process prescribed by the 1968 Indian Civil Rights Act involving a tribal referendum or by a new act of Congress. These agreements can neither enlarge nor diminish the existing scope of tribal or state power. And if an agreement cannot be reached or later proves unworkable, both governments are back in the ambiguous situation where



they began. The process examined and recommended here assures that the governments will seek judicial definition of the scope of their jurisdiction--or congressional adjustment of their relative powers--only after they have tried and failed to coordinate the exercise of their powers in such a way as to make the ambiguities benign and of academic interest and only where the need to resolve ambiguities is compelling.

#### Transfer of Government Powers

Some recent attempts to resolve problems cooperatively have involved the purported transfer of government power from one jurisdiction to another, for example, in attempts to find a means for the involuntary civil commitment of reservation Indians to state institutions. One reason these attempts failed was that both governments seemed to be operating on the assumption that the only way to deal with the problem was to give state courts jurisdiction to conduct proceedings to commit reservation Indians to mental institutions or juvenile facilities.

The 1968 Indian Civil Rights Act requires that a transfer of jurisdiction from tribal to state government can be accomplished only with the consent of the tribe as expressed in a popular referendum. But the goal of achieving the involuntary commitment for treatment of the mentally ill or juvenile offenders could have been reached by less drastic means. The states and tribes could have sought a method to enable state institutions to accept reservation Indians on the basis of tribal court commitments. There is ample precedent for this in the common practice of housing patients or prisoners from one state in the institutions of another on the basis of home-state court action. If the

state is concerned about the adequacy of the tribal court procedure, the negotiation process itself and the final agreement provide opportunities for addressing these concerns to the satisfaction of the state while still preserving tribal prerogatives.

#### Written Agreement

For some kinds of tribal-state agreements, a written document is essential to spell out the obligations and benefits for each government. At the same time, most tribal-state agreements are entirely voluntary and self-enforcing coordination arrangements. There may be circumstances, for example, in which an official of one government lacks the power to conclude a written agreement on the part of his government but may be willing to exercise his own discretion along the lines of an agreed-upon course of intergovernmental cooperation. In such a case, a sincere commitment to follow the agreed plan may be sufficient to accomplish the substantive purpose of the agreement. To insist on a written document may defeat the purpose of the negotiation and make minimal cooperation impossible. A written agreement could, for example, create political problems for one or another government.

Given the history of many individual tribal-state relationships, there will be a natural tendency to prefer written agreements to oral promises. But the caution which leads one government to insist upon a written agreement may be matched by a corresponding caution in the other government which prefers to operate on an oral understanding until the relationship has stabilized to the point where a written agreement can be justified. Both governments should remain as flexible as possible,

use the formal structure not for its own sake but where necessary, and remain sensitive to each other's problems.

#### Specific Term

It may be advisable for each agreement to have a specific term or to provide for periodic review and renewal. As most tribal-state agreements deal with voluntary coordination and cooperation, however, either government can probably effectively cancel an agreement at any time. Such provisions would only have a normative effect, then, and usually should not be insisted upon in the face of reluctance or opposition from the other government.

#### Notice Before Cancellation

Like the question of a specific term, a requirement of prior notice before cancellation may have only normative value in a voluntary agreement. Nonetheless, it may be a reasonable requirement for situations in which personnel or equipment must be acquired or redeployed in the event of cancellation. Both governments should be aware that if they adopt a pattern of cancelling agreements without notice and without an orderly transition process the possibility of future agreements suffers.

#### Enforceability

Most of the tribal-state agreements which are now in effect rest on the exercise of discretion by legislative and executive branches of the

respective governments and are largely voluntary and self-enforcing. These are areas of government in which the powers of state and tribal courts to review the actions of their own governments are traditionally quite limited, and there are obvious problems connected with proposing that one government submit itself to the jurisdiction of the other's courts to enforce an agreement.

Some legislative proposals would grant federal courts jurisdiction to enforce tribal-state agreements. But if this jurisdictional grant is drawn too broadly, states and tribes may be discouraged from entering into agreements which are essentially voluntary and discretionary, fearing the surrender of important prerogatives to the judgement of a federal court.

There are not enough data to define the scope of need for additional enforcement mechanisms for tribal-state agreements, although there may be such a need. Many disputes between tribes and states are now settled in federal courts. As agreements become more widespread and the experience is analyzed, and as the governments explore such mechanisms as binding arbitration to settle disputes, the need for mandatory enforcement mechanisms should become clearer.

#### Federal Approval

Contrary to the misconception of many state, tribal and federal officials, not all possible agreements between tribal and state governments require federal approval. The question of whether a particular agreement is subject to federal approval depends on the subject matter of the agreement, its intended effect, and the content of pertinent

federal and tribal law. A tribal-state agreement on the allocation of water rights would require federal approval. An agreement between the Nez Perce Tribe and the State of Idaho designating a "Chief Joseph Day" would not.

CHAPTER FOUR

THE PROCESS

The Context of State-Tribal Cooperation

A tribal-state relationship exists whether the two governments attend to it or not. Even with no specific efforts devoted to it, this relationship will be good in some respects and poor in others depending on a number of factors. In this section we examine some of the considerations which are relevant when governments want to undertake a deliberate effort to improve the intergovernmental relationship.

To yield results, any process aimed at such change must be understood in the proper context. Each government must have a realistic view of its own goals and policies and those of the other government. Each government should begin with the assumption that the problems of intergovernmental coordination stemming from the tribal-state relationship are of the same nature and character as the problems stemming from any intergovernmental relationship; they are not totally different merely because states and tribes happen to be involved. Many states share coordination issues with neighboring states. They are handled routinely through various coordination techniques. But often when states encounter similar coordination problems with an Indian tribe they perceive them as problems of a totally different character requiring very different solutions--or sometimes requiring only the "solution" of attacking the tribe's jurisdiction.

Tribal governments have a different kind of problem. Tribes often ascribe all of their coordination problems with state government to

anti-Indian, anti-tribal-government state policies. They fail to realize that at least some of the problems arise from the inevitable intergovernmental frictions which always occur between neighboring or overlapping jurisdictions. A state may have exactly the same problem with neighboring states or with the federal government, but the tribe often fails to realize this and is therefore unable to suggest ways of managing the conflicts.

Of course, there are some intergovernmental issues unique to the overlapping and unclear jurisdictional distribution between tribal and state government. And, of course, some problems between the governments are based on racism and an obstinant refusal to respect any of the other government's legitimate prerogatives. But it is only common sense to begin with the assumption that tribal-state coordination problems have the same causes--and are amenable to the same solutions--as coordination problems between any two governments with common interests and overlapping jurisdictions, and then to remain sensitive to the possibility that a particular tribal-state problem is unique or is grounded in attitudes on the part of one or the other which have nothing to do with legitimate governmental interests.

The history of this complex intergovernmental relationship teaches that even a process that does not result in a specific written agreement may still be beneficial. Many tribal-state relationships suffer from the lack of communication between the governments and from the fact that each government may be unclear as to its own goals and the reasons for them. In a publicly antagonistic relationship in which the parties rely only on the other government's rhetoric for understanding its position, each government may assume that the issues dividing them are more exten-

sive and intractable than they really are. Or they may impute to the other government motives and problems which do not exist.

A discussion process which does not produce an identifiable formal result may achieve a beneficial purpose by increasing communications between the two governments at all levels, by leading each government to define its own goals more precisely vis a vis the other, and by defining the issues dividing the two governments precisely--all of this, perhaps, for the first time. The movement of the tribal-state relationship from a state of generalized suspicion and antagonism to one where unreconciled issues are defined precisely and where each government's position is held for reasons of deliberate policy is a sign that the relationship is maturing into a manageable intergovernmental relationship not unlike many others in the nation. Separate governments will guard their prerogative to adopt policies independently. In the past, it has often seemed that the inability of tribes and states to cooperate was a policy in itself rather than an incidental by-product of legitimate governmental and social interests.

The situation will dictate the solution

This handbook presumes to offer no single prescription for solving all problems of tribal-state relations for the simple reason that no such prescription exists. The shape of the process must be tailored to the circumstances of each situation. In some instances, the will to cooperate and the facts of the case are such that success can be reached by any of a number of routes. Sometimes, what succeeded in one situation may fail in what appears, superficially at least, to be an analo-



gous situation but which actually differs greatly due the kinds of pressures brought to bear on both governments, the personalities of the people involved, etc. If there are no "never fail" recipes for success in improving tribal-state relations, neither are there impenetrable layers of mystery surrounding the elements of these intergovernmental relationships and ways to improve them. If one understands the dynamics of one's own and the other form of government, the likelihood is greater that an approach will be chosen which will produce success.

There is tendency to assume that the overall improvement of tribal-state relations requires a highly publicized ceremonial process. But it can begin, in fact, anywhere in state or tribal government where there is an interest. Where it begins depends upon the overall strategy of the process and how it is designed to achieve results.

Tribal-state relations are usually handled for the tribe by the tribal chairman and the tribal council. Because of the greater size and complexity of state government, often the first question considered by both states and tribes in seeking to begin a process is whether there should be a single entity in state government whose role it is to address Indian tribal governments. State policy toward the Indian tribes should be uniform, runs the argument, but each agency of state government now tends to make its own policy. Some have good working relationships with the tribes, while others seem to be in continual combat. If the state had a single designated agent to deal with the tribes, state policy would tend to become more uniform and the tribes would not be forced to work with a confusing plethora of state agencies.

This analysis may lead to the creation of a special legislative committee on Indian affairs charged with improving the relationship with

the tribes. In the executive branch it may lead to the creation of an Indian specialist position in the governor's or the attorney general's office, or to the creation of an Indian affairs commission.

The tribal-state relationship is horizontal in nature, cutting across nearly all vertical areas of government such as education, health, law enforcement, roads, economic development, welfare, and taxation. The tribal-state relationship, then, does have a common element of "Indian affairs" but that horizontal common element is always found in the context of a particular vertical area of state government. There is no "Indian affairs" issue without reference to a particular subject of governmental interest--education, taxation, health, etc.

But there are problems with the approach of seeking a uniform state policy on tribal-state relationships. In some of the vertical areas, cooperation and coordination will be easy to achieve and no doubt already exists to some extent. In other areas there may be serious problems which cannot easily be resolved. To impose a "uniform" state policy across state government may be more likely to turn back progress already made in the "easy" areas than to speed progress in the difficult areas. Both the state and the tribe should carefully consider the present state of the relationship before concluding that a uniform state policy toward the tribes is a sensible approach.

There are other reasons why the pursuit of a uniform state policy may be futile. Each vertical area of government functions within a system composed of people, organizations and institutions with legal, political, professional and economic interests in that particular area of government. Among these are the governor, possibly the attorney general, the responsible executive agency, substantive and appropria-

tions legislative committees and subcommittees. Superimposed on these are the various non-governmental constituent groups which have an influence on the functioning of the system--an influence which does not appear on the organizational charts but which in some cases is controlling.

The important decisions regarding these vertical categories of government are made largely within this system--decisions about new legislation, policy, the allocation of resources, the distribution of funds, eligibility for services, standards and guidelines, the location of offices and the creation of new positions. Control of these matters is often jealously guarded by the power centers within the system and one should not underestimate the difficulty of implementing changes within a vertical area of government without the active support of many if not all of the elements of the system.

#### Isolation Is Costly

A process which emphasizes a specialized Indian committee, task force, agency or liaison position is likely to pay a very heavy price in its isolation from the main flow of decision-making in each vertical area of state government, especially as it tries to involve itself in the details of government. Any specific agreement arrived at between a tribe and a state using a specialized "Indian" negotiating vehicle will still have to gain the backing of the various elements controlling the affected vertical category. Frequently, of course, the acceptability of an agreement is directly proportional to the involvement in the negotiating process of those who regularly control the system.

This is one of the reasons for the relative ineffectiveness of state Indian affairs commissions. These commissions are commonly appointed by the state governor and consist of state agency heads or Indian affairs specialists from state agencies and official or unofficial representatives of the various Indian tribes and Indian communities in the state. Tribes are often wary of state Indian commissions, in part because they seem to have little effect on state policy. State agency heads often devote little time and attention to them and are also skeptical of them because they represent a process outside the normal flow of decision-making and thus have the potential of raising policy issues outside the context of that flow.

Relegating all Indian business to a central point in state government may also give rise to another kind of problem. Once such a responsibility is assigned to an agency of government or a legislative committee, all other agencies or committees will tend to relax their own efforts in Indian affairs and rely on the agency or the committee with special Indian responsibilities to "resolve the Indian problems." They also tend to remain on guard to see that their own "turf" is not violated. In the end, critical tribal-state coordination problems go unattended, while the Indian specialists spend their time trying to avoid controversies with either tribes or state agencies. Concentration into a single agency, then, often pays too high a price in professional and political isolation.

But the opposite approach, complete dispersal of the responsibility for Indian affairs to each vertical unit of state government--the "Indian desk" approach--brings its own problems and penalties. If each agency is responsible for its own tribal relationship the needed uni-

formity and coordination in state Indian policy may suffer. There is also then no forum in which to assess the general performance in this area of intergovernmental relations.

These two flawed approaches--concentration in a single agency or dispersal--appear to be the product of the very human, very understandable desire to find an easy solution to a complicated problem. But neither has been equal to the challenge. The quality of the relationship a state agency has with the Indian tribes is simply a function of the normal evaluation and oversight of that agency by the governor, the legislature, the press and the public. It need be no more complicated than that. If the head of the highway department, for example, had continual problems with the federal Department of Transportation and neighboring state highway departments, public and legislative attention would soon focus on him with the attendant questions about his ability to do this important part of his job.

Similarly, those who control each vertical category of state government should be responsible for working out a satisfactory relationship with the Indian tribes. And they should be evaluated on their performance of that responsibility. (All too often, of course, the official who battles constantly with tribal governments has been seen uncritically as the zealous champion of the state's interest.) This approach is not so seductively simple as the concentrated Indian super-agency or the ineffectual Indian desks dispersed throughout state government. But, unfortunately, there is no effective substitute for simple executive accountability.

Open-ended or Single-Issue Discussions?

There are two basic types of processes for improving tribal-state relations. One is a process which begins as an open-ended and relatively unfocused discussion of the intergovernmental relationship which later narrows to a discussion of specific coordination issues. The second focuses from the outset on a single issue or a specific agenda of issues. The type of process chosen should depend upon the nature of the existing relationship between the governments.

The advantage of a focused or single-issue process is that it can be structured more easily and it can be evaluated readily by its outcome. It is analogous to many diplomatic or labor negotiations in that each party presumably has a list of goals to achieve in the process and maintains its participation as long as there remains a possibility of achieving some, if not all, of these goals. An additional advantage of a focused process is that it is more likely to attract the personal attention of the top governmental leadership--the offices of the governor and tribal chairman, the attorney general and tribal attorney, executive agency heads, and legislative committee chairmen.

If a limited agenda focus is preferred, governments should not attempt to force a premature focus to a process. The first step always should be a discussion between state and tribal governments regarding the scope of the process to be undertaken. During this preliminary step, as throughout the process, both sides should remain flexible and keep an open mind. If one government insists upon focusing on issues that the other government does not want to discuss, it gives the impression that there is a hidden agenda on the part of the government taking

the initiative. Forcing one's own priorities onto the agenda may breed so much suspicion that the process never has a chance to succeed.

The advantage of an open-ended process is that it allows maximum flexibility by enabling both governments to avoid negotiating a specific agenda which may, in fact, be impossible early in the process. One might expect this type of process to be most useful where the historic tribal-state relationship has been poor and there appears to be a need for basic communication between state and tribal governments to lay the groundwork for more specific discussions in the future. But the generality of this type of process is also its disadvantage. It may be viewed as a waste of time by the very top leadership whose commitment is vital to the success of any process and it may suffer from their lack of participation. If the open-ended process does eventually produce specific recommendations for action, the absence of policy makers from the process may signal difficulty in getting the recommendations approved and implemented.

Several additional possibilities should be considered with respect to an open-ended process. First, it may be advisable to agree upon a time limit by which a more specific agenda will be developed rather than to permit extended general discussion to substitute for the more difficult task of solving specific difficult problems. Second, both governments must demonstrate their dedication to the process by committing the time and attention of top leadership. If it is unrealistic to expect major time commitments of the tribal chairman and the governor or agency heads they should make a commitment to be briefed periodically on progress. The work plan should specify their participation at certain points in the process, and specify the level of staff people who will

meet in the interim for data-gathering, issue analysis, and the drafting of recommendations.

There should come a point in each unfocused process where generalities have been passed by and a realistic relationship--including appropriate but not blind trust--has been established. Specific issues will have emerged, different expectations will be appropriate and a greater involvement of top people will be necessary. The test of an unfocused process is whether this point is reached within a reasonable time or whether one government or the other seems to have decided to limit its participation to a process which aims only at "promoting better understanding."

#### The Participants

Frequently, both states and tribes wish to identify clearly who can negotiate and what they can negotiate for each government. It is fruitless to attempt to arrive at a comprehensive list of such people and the scope of their power to negotiate, given the comprehensive nature of the tribal-state relationship. Such questions have meaning only in a specific situation and depend upon the expectations of both parties, the political context and the intended outcome of negotiations in addition to such obvious factors as the legal power of the individuals involved.

Both states and tribes are often unnecessarily preoccupied with the formal negotiating process conducted between negotiators with specific portfolios. In such a process, negotiators are instructed in advance as to the commitments they are authorized to make on behalf of their principals and the degree to which they can compromise their government's



ideal goals in order to reach an agreement. Highly structured tribal-state processes such as these certainly have their place, but the full range of the intergovernmental relationship is much more complex and demands a greater variety of approaches.

There is a need to assure an orderly, coordinated process of intergovernmental relations. At the same time, given the vast range of possible agreements between the governments, to concentrate unduly in too few hands the authority to discuss mutual problems can only retard the growth of the relationship. The fundamental control on the officials of both governments is the limitation on their legal authority. Coordination efforts within each government should be directed at keeping abreast of discussions and ensuring that no official is exceeding his authority.

As an official of one government receives an offer from an official of the other to enter into discussions, the basic questions to be asked are: How far can he go? How far am I authorized to go? The answers to these questions will dictate the scope of the discussions. When the limits of one official's authority are reached and the nature of the discussions seems to require additional authority, that is a signal to seek the involvement of higher officials. But neither government should insist at the outset on talking only with officials of the other government with authority to make the broadest and most binding commitments regardless of the subject to be discussed.

A helpful tool of analysis is to define a desired outcome--the goal--of a particular process from one's own government's point of view and to work from there back to a definition of the scope of the negotiations and the appropriate level of government at which the negotiations

should be conducted. Both tribal and state governments are limited by federal law and their own constitutional and statutory provisions as to the commitments they can make. If the goals as defined necessarily entail the amendment of a federal statute or a tribal or state constitution, it is wise to re-examine the goals and try to achieve many of the same results without the complex, expensive and possibly unsuccessful attempt to make major changes in the fundamental law governing the tribal-state relationship. Often when the participants have concluded that the only solution to a problem requires changes in a federal statute, a state or tribal constitution, they have approached the problem too simplistically. Less drastic alternatives may involve the amendment of state or tribal legislation. These results will be easier to achieve than constitutional amendments or the amendment of federal statutes. In these cases a political judgement must be made as to the ability of the negotiating party to deliver. A tribal chairman or state governor, despite his best efforts, may be unable to assure passage of controversial legislation; in other cases the support of an agency head alone may be sufficient to secure passage of a legislative amendment.

If after a full analysis, the only solution to the problem is such a drastic alternative, the parties must remember that the negotiators can only commit themselves to recommend and work for these changes. Each side must make its own judgement as to the value of such a commitment and the likelihood of its success. But joint tribal-state support, founded on mutual benefit, may be crucial to the success of such an attempt.

Subtle political judgements must be made by both governments on the questions of what a negotiating party can commit to, what constitutes a

reasonable scope for a particular negotiation, and what is the likelihood that a negotiating party can and will deliver. It is obvious that when someone commits him-self beyond his area of discretion or authority, all he can promise is that he will take a certain position and advance it to the limits of his power and ability. There are many circumstances in which a sincere commitment of this type is the most politically realistic outcome to be achieved. Seeking anything more would be to ignore the political realities of the other government's process.

Most government officials, however sincere they may be, will be reluctant to act even within their authority in a way that may needlessly bring them political problems. Thus, for example, an agency head with the power to amend regulations may be reluctant to promise to implement an agreement through the exercise of this power unless he is confident he can deal with any opposition which may arise within his system. Because of this, judgements must be made frequently as to which individuals and institutions to include at certain points in the process to assure that implementation of an agreement is politically possible.

Because of the legal limitations on the authority of any negotiator, the governments should not indulge an undue fascination with the idea of "commitment" of a government as a necessary outcome of a negotiating process. Certainly, binding commitments are often desirable. But it is often sufficient in the circumstances to work incrementally toward long-term solutions. In such cases the promise of a government official to advocate certain policies or to discharge his responsibilities in a certain way may be a desired outcome of a negotiating process. Within the limits of his authority and with the understanding that the

process includes full communication with his superiors, it might be worthwhile as a beginning phase to encourage any public official to meet with representatives of the other government in the interest of defining issues and outlining a process.

This approach may seem vague. It is certainly unstructured. But it must be remembered that the basic tribal-state relationship is widely perceived to be a negative one. A lower level official may be able to explore issues in a general and tentative way with less political risk in the beginning, with the expectation that higher level officials may become interested and involved in the process if a politically acceptable solution seems possible. The fundamental rule is this: rather than impose an unnecessarily rigid structure upon the tribal-state relationship, both governments should remain flexible as to the process and realistic in their expectations of a particular negotiating effort.

#### Linking Issues

"Linkage" is a phenomenon which is related both to the scope of a negotiating process and to the interplay between stated and unstated goals of governments. Linkage can be defined for this purpose as the practice--either formal or informal--of making two issues dependent on each other in a negotiating process, so that a government's willingness to agree on one issue depends upon reaching agreement on the other. The practice of linkage can be fair or unfair, wise or unwise depending upon the circumstances and depending on one's point of view. Linkage is impossible to avoid completely in a negotiating process involving two entities with so complex a relationship as that between a state and a

tribe.

In one sense, the process of agreeing on the scope of a negotiation is a form of linkage: it involves agreeing on the number and types of issues which will be considered together. Where there is some rationale for linking issues, the process of defining the scope of a negotiating process should not be overcomplicated by focusing on this issue. The process itself will develop an internal logic which will tend to indicate whether a particular grouping of issues is appropriate. And each process should be flexible enough to allow for the scope to be adjusted by adding or dropping issues from time to time. Improper linkage occurs when one government seeks to link issues which are clearly unrelated: e.g., "we will discuss a law enforcement agreement when you are ready to accept our position on water rights." It isn't always clear when linkage is appropriate but, as tribes and states gain experience in dealing with each other, each will develop notions of the limits of fair and sensible linkages among issues. Until then, because both sides must agree on the outcome of a negotiation, there seems to be little point in stalling the process on the early question of the scope of the agenda.

There are controls on the improper linkage of issues, both within and outside of the process. Within the process, a government may simply refuse to move forward until an issue is dropped from or added to an agenda or until the other government agrees to consider issues separately. The external control lies in a government's accountability to its constituency. For example, linking a law enforcement agreement to concessions on water rights could well stimulate a response from the residents of a community poorly served by the existing law enforcement system. Their immediate interest in improved law enforcement outweighs

their interest in water rights. They might well denounce the attempted linkage as an unnecessary complication which threatens a straightforward solution to their law enforcement needs. It is conceivable, too, that a segment of the general public would react to some efforts at linkage simply on humanitarian grounds or on the ground that their government is acting foolishly, short-sightedly or too harshly.

There are advantages to this public dimension of the tribal-state relationship. The scrutiny of press and public takes an intergovernmental relationship which is now vaguely perceived as antagonistic and gives it form and structure, enabling the public and all observers to understand, to judge the details, to look at the merits of both positions and, in effect, to keep score. Ideally, both governments will believe that it is to their advantage to have their positions understood by their own and the other government's constituency.

Finally, linkage may be implicit rather than explicit. A government may, for any number of reasons, play a guessing game and be unwilling to state the fact that agreement on one issue is linked to others. This possibility exists in any negotiating process and each government should be aware of its potential. The judgement of whether to reveal the suspicion or existence of a "hidden linkage" is one tactical judgement among many to be made throughout the process. Those judgements must be made in light of a government's own strategic considerations and its obligation to be candid with its constituents.

CHAPTER FIVE

THE FEDERAL ROLE

Confusion over the federal role in the tribal-state relationship is common and forms a major barrier to improved and expanded tribal-state relationships. Much of the confusion stems from a basic misunderstanding of the tribal-federal relationship. Federal recognition of an Indian tribe is essentially an acknowledgement of the political existence of the tribe within the American system. Among other things, recognition broadly preempts state power over that Indian political entity, its lands and those subject to its jurisdiction. But federal recognition does not of itself constitute the same kind of broad limitation of tribal power. To be sure, the tribal-federal relationship does involve limitations of two kinds on tribal power: limitations based on specific treaty and statutory provisions (Indian tribes may not alienate trust land without the approval of the Secretary of the Interior or the Congress); and limitations inherent in the tribes' status as domestic dependent nations (tribes lack the power in domestic American law to conduct foreign relations independently or to exercise criminal jurisdiction over non-Indians).

Federal Preemption

The federal constitutional "Indian power" preempts state power over Indian tribes, not state power to make with Indian tribes arm's length agreements which are within the competence of both governments. The Indian Reorganization Act specifically confirms in the tribes which have

organized under it or accepted its provisions the power to negotiate with state and municipal governments. Similar provisions are included in many tribal constitutions as well. It is unlikely the Congress would confirm the tribal power to negotiate agreements if final agreements could not be made.

This does not mean that tribes and states are free to negotiate and conclude agreements on all subjects. Rather, it means that the limits on tribal and state power to negotiate agreements must be found in their usual sources: limitations in federal treaty, statutory and constitutional law; tribal and state constitutions; tribal and state statutes (unless amended to accommodate an agreement).

The erroneous assumption that the federal government controls all tribal affairs is so strong in some quarters that there is a danger that federal, tribal and state officials alike will assume that all tribal-state agreements must be approved by the Bureau of Indian Affairs or ratified by Congress. Some state and tribal officials have even expressed the view that tribal-state negotiations cannot even begin without federal permission. The reality is quite different. The commission has already identified a wide variety of valid tribal-state agreements, many of which give no indication of any federal involvement.

Agreements which would transfer jurisdiction from one government to another are governed by the 1968 Indian Civil Rights Act and require a tribal referendum if tribal jurisdiction is to be ceded to the state. Other agreements which might purport to change the legal relationship between states and tribes would likely require new statutory authority from the Congress. Neither of these expedients is likely to be necessary for the solution of most tribal-state coordination issues, however.



Agreements which would affect Indian trust property rights would require, at a minimum, the approval of the Secretary of Interior or his representative. If such approval is beyond the power of the Secretary, Congressional ratification may be required. Again, these issues--while subject to wide public attention--are relatively rare in the total tribal-state relationship.

#### Involvement of Federal Officials

Regardless of whether an agreement requires federal approval, it may be advisable to keep appropriate federal officials informed of the progress of negotiations or even to involve them as observers. The recent Presidential veto of the Papago water settlement act passed by Congress teaches that, if the federal government is expected to assume a part of the financial burden for implementing an agreement or if federal policy and practice must be coordinated with those of the tribe and the state in the implementation of the agreement, federal officials should be involved throughout the process. Where federal participation is strategically desirable but not legally required, protocol and courtesy would seem to suggest that such a decision be a tribal prerogative. But some states, no doubt in a sincere effort at caution, have proposed in legislation authorizing state agencies to negotiate with tribes that federal participation and approval of any resulting agreement be mandatory. Such a requirement could prohibit a state from participating in an otherwise legal agreement. It would not affect the desired result because state legislative action cannot confer to the federal executive an approval power which Congress has not chosen to give it.

This issue--the involvement of federal officials--is another of the many instances where a simple knowledge of human nature and the ability and willingness to understand another's point of view are important. It is only natural that some federal officials, who have historically seen their role as the "protector" of tribal interests from state encroachment (and who continue that role in many respects), would be skeptical about a state-tribal cooperative arrangement which was developed without their approval and participation. Bluntly stated, the rule of thumb might be said to be to invite appropriate federal participation without losing sight of the fact that the parties are the tribe and the state, and the parties cannot surrender control of the process.

It must be remembered that, despite the federal trust responsibility to Indians, the federal government is a third party with distinct interests of its own and separate relationships with both tribal and state governments. There may be instances in which the effective tactic will be for the state and the tribe to reach agreement between themselves, presenting a united front to the affected federal agency. Both the Congress and the Executive should give great weight to tribal-state agreement on the best solution to a problem. States and tribes are, after all, closest to the situation. If they have reached an agreement the rationale for federal control of their affairs is reduced. Such a tactical judgement involves practical and political risks, however, and should be made with those risks foremost in mind.

#### The Responsibility of Federal Officials

Despite the reality of the federal role in tribal-state relations

the exaggerated view of that role is likely to persist. That simple fact places serious responsibilities on federal parties in a position to affect these negotiations. No less than the tribal and state participants in the negotiations, federal agency officials must have--and must reflect in their actions and attitudes that they have--a clear-headed and accurate view of the situation. If federal officials--seeking to narrow their responsibilities or force an agreement--indicate that they believe the tribe's position is weak, that they lack enthusiasm for their duties as trustee, or that they are eager for a tribal-state agreement to relieve them of the need to support the tribal position, they irresistably tempt the state to delay negotiating in the hope and belief that the tribe's position will collapse. By taking the lead in a clumsy and unprofessional manner, federal officials may discourage the very tribal-state cooperation they seek. On the other hand, by vigorously exercising their trust responsibilities, federal officials may encourage cooperation.

There is a corresponding danger on the other end of the scale. In seeking to discourage states from holding to unrealistic positions, neither federal officials nor the tribe's attorneys should mislead tribes into thinking the tribe's legal position is stronger than in fact it is. A tactic of unwavering support for any tribal position, intended to bring the state to the bargaining table, may have the effect of discouraging the tribe from negotiating. The burden on all parties--and their responsibilities to their constituents--is to represent their legitimate interests effectively and sensibly and to recognize a fair and effective settlement when it is presented.

State and tribal officials frequently turn to the federal courts or to Congress in an effort to change an existing jurisdictional balance or to "clarify a jurisdictional ambiguity." The federal government, because of its powers over Indian affairs, offers the "once and for all" illusion which has caused many tribes and states to postpone dealing with their own relationships in the hope that the federal government will settle their problems for them.

#### The Limits of Litigation

There are several characteristics of the judicial process which make it unsuited for resolving every problem which arises between the tribes and states. Any litigation is costly, but litigation which must be taken to the Supreme Court is prohibitively expensive. Tribes and states represent two societies locked in a complex relationship which involves a bundle of treaties, agreements, statutes, previous court decisions and other legal paraphernalia. By their nature and by constitutional principle, federal courts can only resolve the specific case or controversy which is before them, leaving other tribal-state relationships subject to the continuing uncertainty which inheres in the process of interpreting judicial opinions and applying them to different fact patterns.

To a large extent, the litigation in the tribal-state relationship has become a game in which each side pursues a case which seems favorable to its cause. When the case has been finally decided, the losing side rarely applies the principles of that case to analogous situations in its own relationship. Instead, it characteristically looks for an

analogous case with a slightly different set of facts in the hope that the new case will:

- bring about a reversal of the previous decision;
- suggest a principle which severely narrows the application of the principles of the previous decision; or
- offer a principle which conflicts with the previous decision in such a way that a new area of ambiguity--and therefore maneuverability--can be established.

Both tribes and states have highly skilled and highly paid lawyers at their command and it is the essence of a lawyer's role to seek to limit the effectiveness of precedents which hold against his client's position. Therefore, the so-called finality of a specific case or controversy before the federal courts is illusory because, in some ways, the states and tribes are litigating specific cases only incidentally as a way to establish a new general rule of law. The real object of the process goes far beyond settling the specific case. It involves the use of the federal judicial process to attempt to obtain a broadly stated principle which will control the entire tribal-state relationship in favor of one client or another.

On the one hand, each tribal-state relationship is unique because of the unique legal circumstances of the particular tribe and state. At the same time, general principles of federal law have been developed which seem to define tribal and state powers generically. Because it is in the nature of the historical process that troubled situations are the ones litigated, an additional risk of litigation as a means of solving tribal problems is that a judicially-mandated solution for a unique tribal-state problem may produce a legal principle which is taken to

govern the tribal-state relationship generally, sometimes disrupting effective relationships.

Litigation in federal court will always be one of the tools for adjusting the tribal-state relationship. But tribes and states should realize that they themselves have more flexible tools than federal courts to work out a balance between tribal and state governments which is suited to the situation. And their own solution can proceed on a trial and error basis and be adjusted on their own motion inexpensively and with relative ease.

#### Federal Legislation--an Imperfect Tool

The federal legislative process contains similar disadvantages as a method of adjusting the abstract tribal-state relationship. It is possible for the Congress to legislate with respect to a particular tribal-state situation, but it would be impractical to think that the Congress, with its great workload of truly national issues, would be able to do so effectively. Instead, the Congress often attempts to deal with the tribal-state relationship by passing general legislation that affects the jurisdictional balance, but that achieves generality without achieving the desired result in particular situations.

One ironic conclusion that has emerged from the Commission's fact-finding is that the tribes and the states each tend to believe that the other side has easy access to and great influence upon the Congress and that it must struggle merely to have its side heard. Certainly, when the Congress legislates on a tribal-state problem the result is influenced by members of Congress whose constituents do not face the problem

themselves and do not have to cope with the result. That is, of course, one of the principles of a federal system: to remove certain types of problems from the exclusive control of the people and governments affected by them on a daily basis. But the view that should be encouraged among tribal and state governments is that, while the Congress has the ultimate responsibility in this area, it should allow tribes and states to work out mutually acceptable relationships which are consistent with the overall federal trust responsibility. Above all, both tribes and states should abandon the view that the support of Congress is a prize to be captured, useful for forcing one government's views on the other.

Frequently, federal statutes of general applicability have complicated the tribal-state relationship by inadvertently creating jurisdictional problems. Federal rules of statutory construction generally hold that Indian rights will not be narrowed or abolished by implication, that the Congress must specifically manifest an intent to abrogate a treaty right, narrow the scope of tribal self-government, or extend the scope of state power over a reservation. Yet recent federal environmental legislation, for example, has purported to use state enforcement mechanisms without a clear indication of how tribal enforcement powers will be integrated into the overall regulatory scheme. In other instances, states are given powers to administer service programs, funded in whole or in part by federal funds, without the power to license providers or to enforce accountability on the reservations.

It seems clear from the legislative history of such statutes that the congressional committees are largely unaware of the confusion that they are creating among the states and tribes affected. There are

numerous remedies for this problem. Individual congressional committees could become more aware of the need to create manageable schemes suitable for the tribal-state relationship. The Senate Select Committee on Indian Affairs and the House Committees on Interior and Insular Affairs and Education and Labor could be more assertive of their Indian affairs interests with respect to the impact of general legislation on Indian affairs. The Bureau of Indian Affairs, the Indian Health Service, the various federal agencies' Indian Desks and, above all, the Office of Management and Budget, should be much more diligent in pointing out in the administration's report on general legislation the impact on Indian affairs and the tribal-state relationship. And finally, the major lobbying organizations for state and tribal governments could develop unified positions on such legislation which would assist the committees and recognize the legitimate interests of both state and tribal governments.

Plainly stated, then, tribes and states should not view the federal role in Indian affairs as a barrier to tribal-state cooperation for it decidedly is not. Neither should they view the prospect of some ultimate congressional or judicial intervention as an excuse for failing to work out intergovernmental problems between themselves. It is both appropriate and inevitable that the Congress will continue to legislate, and the federal courts to adjudicate, in Indian affairs. But neither the courts nor the Congress can be as flexible or as responsive to a given complex situation as the tribes and the states themselves. And no one is better equipped to craft appropriate solutions to specific intergovernmental problems than the two governments involved.