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Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?

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FEDERAL CONSULTATION WITH INDIAN TRIBES: THE FOUNDATION OF ENLIGHTENED POLICY DECISIONS, OR ANOTHER BADGE OF SHAME?

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> *We were better able to understand how [tribes] felt on many very important issues. Their testimony did make a difference in our final product. That is why Tribal consultation is important. Tribes, more than anyone else, know what is best for them. They know better than anyone else what policies would be bad for them.*
>
> — Phillip Martin[1]

> *They sat there through presentation after presentation by the Tribe, fooling us into believing that there could be a sincere dialogue between the federal government and its constituents. . . . We made countless proposals. We got nothing of substance back, no effort on their part to even meet us part way. Instead of dialogue and a respectful exchange of ideas, we were stonewalled.*
>
> — Pauline Esteves[2]

I. Introduction

The proliferation of tribal consultation requirements in federal statutes and policies[3] is arguably a laudable first step toward a mature understanding by the

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1. *Prepared Testimony of Phillip Martin, Chief, Mississippi Band of Choctaw Indians, Box 6010 Choctaw Branch, Philadelphia Mississippi, 39350, Before the Senate Committee on Indian Affairs on Bureau of Indian Affairs Reorganization*, FED. NEWS SERV., May 18, 1995, *available in* LEXIS, News Library, Arcnws File [hereinafter *Testimony of Phillip Martin*].

2. Secretary Babbitt Promises to Throw the Timbisha Shoshone Off Their Ancestral Homeland in Death Valley (Mar. 7, 1997) (press release issued by the Timbisha Shoshone Tribe of Indians, on file with the author).

3. *See, e.g.*, Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 4006(a), 106 Stat. 4600, 4757 ("Each federal agency must carry out its process for identifying and evaluating historic properties in consultation with, inter alia, Indian tribes and Native Hawaiian organizations.") (amending 16 U.S.C. § 470h-2); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203; Indian Self-Determination Act Amendments of 1994, § 102(18), Pub. L. No. 103-413, 108 Stat. 4250, 4259 (amending section 106(i)); Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601,

§ 5, 104 Stat. 3048, 3052 (1990) (codified at 25 U.S.C. § 3003 (1994)) ("The inventories and identifications required [under this section] shall be . . . completed in consultation with tribal government[s]"); Clean Water Act § 518, 33 U.S.C. 1377 (1994); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9604(d), 9626(a), 9604(c)(2) (1994) (stating that Indian tribes are to be treated as states for purposes of that subsection); 25 U.S.C. § 3502 (1994) ("In implementing the provisions of [the Energy Policy Act of 1992], the Secretary of Energy shall involve and consult with Indian tribes to the maximum extent possible and where appropriate and shall do so in a manner that is consistent with the Federal trust and the Government-to-Government relationships between Indian tribes and the Federal Government."); 25 U.S.C. § 3612 (1994) ("[T]he Secretary [of the Interior], in consultation with Indian tribes shall . . . conduct a survey of conditions of tribal justice systems and Courts of Indian Offenses . . . [and] shall actively consult with Indian tribes and tribal organizations in the development and conduct of the surveys."); 42 U.S.C. § 10,137 (1994) ("Consultation with States and affected Indian Tribes"); 42 U.S.C. § 1996 (1994) ("Protection and preservation of traditional religions of Native Americans"); 7 C.F.R. §§ 272.1, 272.2, 272.3, 281.1, 281.2, 281.4, 1994.674, 1995.9, 3100.45 (1997); 10 C.F.R. §§ 60.18, 60.62, 960.3, 960.3-2-1, 960.3-3, 960.5-2-6, 1021.215 (1997); 12 C.F.R. § 1805.901 (1997); 13 C.F.R. § 301.4 (1997); 15 C.F.R. §§ 922.152, 922.154 (1997); 18 C.F.R. §§ 4.32, 4.35, 4.38, 4.105, 16.8, 1312.5, 1312.7, 1312.6 (1997), 20 C.F.R. §§ 632.10, 632.171 (1997); 22 C.F.R. § 1104.15 (1997); 24 C.F.R. §§ 950.115, 950.962, 950.970, 950.3025 (1997); 25 C.F.R. §§ 1.4, 20.1, 20.25 (1997); 25 C.F.R. § 32.2 (1997) ("'Consultation' means a conferring process with Tribes, Alaska Native entities, and Tribal organizations on a periodic and systematic basis in which the Bureau and Department officials listen to and give effect, to the extent they can, to the views of these entities"); 25 C.F.R. §§ 32.4, 33.9, 36.3, 36.11, 38.3, 38.7, 39.2, 39.22, 39.94, 39.131, 82.5, 83.12, 87.4, 87.7, 89.41, 163.1, 163.3 (1997); 25 C.F.R. § 164.14 (1997) ("On individually owned Indian forest land . . . the Secretary may, after consultation, sell the forest products without the consent of the owner(s) when in his or her judgment such action is necessary to prevent loss of value from fire, insects . . . ."); 25 C.F.R. § 163.20 (1997) ("The Secretary may, after consultation with any legally appointed guardian, execute contracts on behalf of minors . . . ."); 25 C.F.R. §§ 163.28, 163.31, 163.40, 166.5 (1997); 25 C.F.R. § 211.20 (1997) (mineral leases); 25 C.F.R. §§ 211.28, 216.12, 241.6, 249.1 (1997); 25 C.F.R. § 262.4 (1997) (allowing agents of tribes to abbreviate consultation requirements); 25 C.F.R. §§ 262.5, 263.3, 273.3, 273.18, 273.31 (1997); 25 C.F.R. §§ 700.337, 700.717, 700.719, 700.831 (1997); 25 C.F.R. §§ 900.3, 900.87 (1997); 25 C.F.R. § 900.119 (1997) ("[T]he Secretary shall consult with any Indian tribe or tribal organization(s) that would be significantly affected by the expenditure to determine and to follow tribal preferences to the greatest extent feasible."); 25 C.F.R. §§ 900.131, 900.181, 1001.10, 1200.43 (1997); 28 C.F.R. §§ 31.301 (1997); 28 C.F.R. § 90.11 (1997) (developing anti-domestic violence programs); 28 C.F.R. §§ 90.51, 90.57 (1997); 30 C.F.R. §§ 228.102, 715.11, 750.6, 876.12, 886.25 (1997); 32 C.F.R. §§ 229.7, 229.16 (1997); 34 C.F.R. Pt. 325, App. C (1997); 34 C.F.R. §§ 222.91, 222.94, 361.18, 410.22 (1997); 36 C.F.R. §§ 7.28, 79.4 (1997); 36 C.F.R. § 296.7 (1997) (protection of historic and cultural properties); 36 C.F.R. §§ 296.16, 800.1, 800.5, 800.7, 800.11 (1997); 40 C.F.R. §§ 131.35, 192.01, 192.20, 307.23, 1501.2 (1997); 42 C.F.R. 36.15 (1997); 42 C.F.R. § 36.16 (1997) ("Indian Health Service may consult with the appropriate tribe or the Bureau of Indian Affairs on outstanding questions regarding an applicant's tribal membership . . . ."); 42 C.F.R. §§ 36.117, 36.203 (1997); 43 C.F.R. §§ 7.7 (1997) ("The Federal land manager should also seek to determine, in consultation with official representatives of Indian tribes . . . , what circumstances should be the subject of special notification to the tribe . . . ."); 43 C.F.R. §§ 7.16, 7.33, 7.35, 10.3, 10.5, 10.8, 10.9, 10.10, 417.5 (1997); 43 C.F.R. § 3420.0-2 (1997); 43 C.F.R. § 3420.1-7 (1997) (competitive mineral leasing procedures); 43 C.F.R. §§ 3420.2, 3420.4-4, 3461.5, 4180.2, 10010.2, 10010.5, 10010.9 (1997); 45 C.F.R. §§ 250.93, 250.94, 1357.10, 1357.15, 1357.16, 2503.4 (1997) 48 C.F.R. PHS 352.280-4 (1997); 49 C.F.R. § 397.71 (1997); 50 C.F.R. § 660.324 (1997); *see also* John E. Silverman, *The Miner's Canary: Tribal Control of American Indian Education and the First Amendment*, 19 FORDHAM URB. L.J. 1019, 1025 (1992) (concerning the Indian Self-Determination and Education Assistance Act of

federal government of the sovereignty of Native American tribes.[4] Indeed, successful consultations between tribal liaisons and federal decision makers — far beyond the halls of Congress — can contribute to the creation of more enlightened, better constructed, and more effective federal policies, projects, and regulations.[5] However, "consultation" remains an ill-defined term in the context of recent (fashionable) use by Congress, the President, and other federal policymakers. Consultation requirements vest tribes with uncertain benefits and create an unsettled set of responsibilities for federal stewards, most prominently the Secretary of the Interior and Assistant Secretary of Indian Affairs.

A useful definition of "meaningful consultation" is found in *Lower Brule Sioux Tribe v. Deer*,[6] which explains what potentially takes place during the formal process of consultations between federal agencies and tribal government officials. The typical consultation described in *Lower Brule Sioux* would have taken place between the Bureau of Indian Affairs (BIA) and the tribe:

> [c]onsultation comprised a one to two hour meeting, not more than one half day, during which meeting the [BIA] superintendent notifies the Council of the BIA's proposed action, justifying his reasoning. The Tribal Council may either issue a motion or

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1975) ("Funding was conditioned upon program development in consultation with Indian parents and approval by an Indian parent committee; still, the Act failed to provide for tribal control."); Peter W. Sly & Cheryl A. Maier, *Indian Water Settlements and EPA*, NAT. RESOURCES & ENV'T, Spring 1991, at 23, 24 (noting that the Clean Water Act requires "EPA, in consultation with states and tribes, to establish a dispute resolution mechanism to avoid unreasonable consequences that may arise from states and tribes having differing standards on a shared water body").

4. Throughout this article I have used the terms "Native American," "indigenous peoples," and "Indian" interchangeably. The lattermost term seems to be the most pervasive, and Indian activist Russell Means recommends use of the term "Indian," which was the label voted most acceptable by an assembly of indigenous peoples from North and South America. *See* RUSSELL MEANS & MARVIN J. WOLF, WHERE WHITE MEN FEAR TO TREAD: THE AUTOBIOGRAPHY OF RUSSELL MEANS 370 (1995).

5. *See, e.g., Testimony of Phillip Martin, supra* note 1; *Prepared Statement of Wendell Chino, President, Mescalaro Apache Tribe and Bernie Teba, Santa Clara Pueblo of New Mexico, Before the Senate Committee on Indian Affairs Hearing on the Joint Tribal/BIA/DOI Advisory Task Force on BIA Reorganization Report*, FED. NEWS SERV., May 18, 1995, *available in* LEXIS, News Library, Arcnws File ("As a result of this participatory consultation process, Tribes have been full partners in the recommendations presented."); William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN. L. REV. 37, 46 n.21 (1992) (citing an "almost unprecedented" series of consultations preceding the publication of 25 C.F.R. §§ 83.1-.11); *Prepared Testimony of Robert R. Nordhaus, General Counsel, Department of Energy Committee on Energy and Natural Resources Subcommittee on Oversight and Investigations United States Senate*, FED. NEWS. SERV., June 7, 1995, *available in* LEXIS, News Library, Arcnws File [hereinafter *Testimony of Robert Nordhaus*] ("[E]arly consultation with the public and affected States and Tribes . . . can help save money by identifying important issues and avoiding unnecessary or insufficient analyses.").

6. 911 F. Supp. 395, 401 (D.S.D. 1995).

> resolution of support for the decision, or reject the decision. The tribe recognizes that the BIA need not obey the Council's decision. *Meaningful consultation means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views to the BIA decision maker.* The decision maker is to comply with BIA and administration policies.[7]

This definition omits all the procedures that would precede any such meeting, such as notice and response, which are generally understood to be a part of the consultation process.[8] But more importantly, while this definition is perhaps a useful starting point, it fails to note the larger perspective, more subtle meanings, and contentious issues that are at the heart of federal-tribal consultations as they have come to be practiced. This article explores the problematic social and political dynamics and legal issues that underlie the obvious meaning of "consultation."

A. The Importance of Tribal Consultations

The image of an Indian and a white man meeting to talk is evocative of the romanticized negotiations of yesteryear. This image in turn is inextricably linked to lore of the Indian, defeated by fate yet participating in good faith, and the white man's subsequent betrayals. I will not examine the lore,[9] but offer the image as a starting point for the argument that consultations may be one method by which that betrayal is perpetrated today. By this view, the purpose of consultation requirements is to satisfy the desires of Native Americans to be involved in decisions that affect them, while not binding the government to anything resembling a commitment. Consultations, therefore, may confuse the real consent of Indian communities to federal actions with the procedural illusion of participation, in which Indian consent is never *really* asked for, and advice is never *really* heeded.

A more savory view of consultations is that government recognizes the wisdom of considering the unique perspectives of Native Americans during policy debate, and is making every effort to incorporate those views and interests in federal planning. Or, finally, consultations might be described in both of these ways, depending on which players and which projects are being discussed. Whichever view we choose to adopt at the outset of this inquiry, it should be clear that what may be at stake in consultations is the heart of this nation's relationship with its indigenous population.

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7. *Id.* at 401 (citing Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1987)) (citation omitted) (emphasis supplied).

8. *See, e.g.*, U.S. DEP'T OF THE INTERIOR, PROTECTION OF INDIAN TRUST RESOURCES (1996) (published pursuant to Secretarial Order 3175, "Departmental Responsibilities for Indian Trust Resources").

9. *See generally* JERRY MANDER, IN THE ABSENCE OF THE SACRED (1992).

B. Organization of This Article

Part II discusses the problems with the divergent meanings of consultation requirements. Part III is a capsule history of the federal trust relationship with tribes, the origins of consultations, and the political storm around the issue of tribal sovereignty, for which consultations become the natural, if not calm, centerpoint. Part IV reviews of some of the prominent federal appellate decisions that deal with consultation rights, to provide the reader a reference for the types of cases in which consultation issues are pivotal to the outcome of federal/tribal disputes.

Part V discusses how agents and agencies may not be impartial to the outcome of these processes, and reviews some of the more important ways that agency decision-making may be stacked against Indian interests. Consultations may also be a tool for bureaucratic inaction. Further, the Administrative Procedure Act's standard of review for agency decisions is too high when the decisions involve Native American trust properties. Part VI proposes that consultations, taken together with the federal agency decisions for which they are the prelude, are de facto adjudications.

II. The Meanings of Consultation

At bottom, consultations are about communicating: they are the legal mechanism used to facilitate communication between tribes and the federal government in the context of a pending decision. This communication is important not (only) as an end in itself, but because of its relationship to the decision being made. However, this point may be lost on the decision makers for whom tribal consultations are just one more procedural rung on the ladder of bureaucratically acceptable decision-making processes. As a result, there is a natural tension between participating parties as to the definition of a successful consultation. For tribes, consultations will be successful when the outcome that they advocate is adopted, in whole or in some significant part. Or, as suggested by Navajo tradition, it may be that by talking things out, a completely different outcome is possible, however, unforseen, and one with which everyone can agree. For federal agencies, success may be measured merely in procedural terms: the decision will be acceptable if and only if the proper procedures were used to reach it, and those procedures include consulting (dutifully, if not enthusiastically) with tribes. This tension alone is enough to make consultations problematic.

A. Different Authorities, Different Meanings

When dealing with consultation requirements, the important question to ask is by what authority the rules are promulgated. The various branches of the federal government and its agencies use the same term — "consultation" — to refer to procedures with two different legal meanings. The first referent of consultation is the procedures required of federal agencies by statute or

published regulations. These consultation requirements can create a cause of action for the party who the federal agency has neglected to consult, and can result in injunctions and similar orders to ensure compliance.

The second referent is the consultation procedures promulgated by executive agencies — independent of statutory mandate or authority — primarily pursuant to the "government-to-government" federal tribal relationship policy of the Clinton administration. These unpublished policies — typically available to the public for the asking — govern the internal management of the bureaus and agencies. The DOI has ordered each of its subordinate agencies to develop these policies, with the caveat that all policies created pursuant to that order are "for internal management guidance only."[10] One obvious result is that the meaning of consultation, and the institutional wisdom that supports that meaning, varies between each branch of the DOI, and varies for each federal agency depending on the source of the requirement.[11]

B. Different Meanings, Damaging Results

President Clinton's directive of April 29, 1994, has resulted in the promulgation of consultation policies that supposedly do not "grant or vest any right to any party"[12] with whom the agency is thereby "required" to consult. However, the promulgation of these policies, in conjunction with statutes such as the Indian Self-Determination and Education Assistance Act[13] and a failure to carefully delineate internal policy from statutory duty, creates consultation expectations on the part of tribal members, which several courts have recognized amount to the creation of expectation rights.[14]

Further, the federal trust responsibility engenders a higher standard of duty by the federal government to tribes than Clinton's directive would seem to suggest. This gap alone is apt to create a damaging divergence of understanding. One commentator notes,

> Although the language of [Clinton's] memorandum does much to restore respect for, and an understanding of, the sovereign status of tribes, it notably falls short of establishing any policy regarding the fulfillment of the government's trust obligation toward the tribes. . . . The memorandum's silence with respect to that binding and enforceable obligation is a significant shortcoming and leaves an ill-founded impression that the full duty of executive agencies in dealing with tribes is simply a

10. *See* INTERIOR DEP'T PROCEDURES MANUAL, *supra* note 87, app. at 2 (Order No. 3175).
11. *Id.*
12. *Id.*
13. 25 U.S.C. §§ 450-450n (1994).
14. *See, e.g.*, Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979); Mescalaro Apache Tribe v. Rhoades, 804 F. Supp. 251 (D.N.M. 1992) (first heard by the court in Mescalaro Apache Tribe v. Rhodes, 755 F. Supp. 1484 (D.N.M. 1990)).

> procedural one of consultation. . . . If federal officials believe that they need only provide tribes with special procedural access to agency decisionmaking, but then may disregard native rights after gaining tribal input, breaches of the trust obligation will become not only routine but seemingly sanctioned.[15]

I will return to this argument below.

An apparent split between the Eighth and Ninth Circuits is indicative of the unsettled state of this area of federal Indian law. The split is over how the BIA's internal policy guidelines on tribal consultation should be enforced, a disagreement that logically extends to all similar internal policy guidelines.[16] In the Eighth Circuit, the BIA argued that its policies were binding but not applicable to the case, and the court found they were both binding and applicable.[17] By contrast, in a remarkably similar Ninth Circuit case, the court found the same unpublished policies nonbinding, and distinguished the Eighth Circuit case by the fact that the BIA had there made the concession that the policies were binding, whereas in the Ninth Circuit the BIA did not so concede.[18]

The fact that the vague term "consultation" is used to indicate two distinct types of requirement — one enforceable, the other not — is elusive. Nowhere is that distinction laid out except implicitly (and, as illustrated, the federal appellate courts have not resolved the issue between themselves). Interested parties are unlikely to have a comprehensive understanding of the source of the authority and of the legal weight of the various federal policies, regulations, internal management documents, case law and statutes wherein the consultation requirements are found (assuming to begin with that such a reader — or an Indian law practitioner, for that matter — had the savvy to know how and where to access the relevant documents). Because there are no differences in the term's common usage, there are also no clues to prompt such a search for the precise meaning of the term unless one is prompted to do so by the details of a legal battle. In the meantime, everyday usage is apt to confuse the two referents. The fact that "consultation" has entered into the terminology of federal-tribal government relationships means that confusions will likely continue.

As a result, consultation requirements ultimately will damage federal-tribal relations.[19] Tribes know that consultations can be beneficial, as they may be

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15. Wood, *supra* note 81, at 749.

16. *See* Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979); Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1987).

17. *Oglala Sioux*, 603 F.2d at 708.

18. *Hoopa Valley*, 812 F.2d at 1099; *see also* Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395, 399 (D.S.D. 1995) (rejecting the Ninth Circuit's attempt to distinguish *Oglala Sioux* and *Hoopa Valley*).

19. *See generally infra* Part VII.

the sole means of official communication between a tribe and an agency whose actions may impinge on tribal interests. However, to the extent that an agency is legally able to ignore its own "internal management" policies — which is to say, to the extent that the policies or rules do not create legally enforceable rights — a federal agency's poor behavior may reduce the tribes' willingness to work with the agency, whether the consultations are "enforceable" or not.

C. Damaging Results, by Any Meaning

The problem with confused and confusing meanings is dwarfed by the larger problem with consultations, which is the fact they are merely procedural by nature. If tribal suggestions and requests are disregarded, discounted, misunderstood or ignored when they are solicited, federal-tribal interactions are apt to be viewed ever more suspiciously by tribes. This is a familiar phenomenon, perhaps especially to tribal authorities. Like the parable of the boy who cried wolf, the government that clamors for "consultation" without providing substantive influence on the decisions is likely to soon be viewed with greater and greater indignation, and then ignored.[20] The wolf-crying metaphor works on both levels of the problem, with reference to the confusion over the meaning, and with reference to the results of the consultation effort. Worse, tribes may develop a "learned helplessness" response, after years of being taught that whatever they say, the only thing worth spending energy on is learning to cope with the imposition of unacceptable alternatives.[21] The federal agency may in turn interpret the resulting tribal nonresponsiveness as intransigence, or hostility (appropriately), and may in the end make decisions in reaction to those interpretations instead of in reaction to tribal suggestions (inappropriately). Obviously any combination of these possible results is likely to further damage the interests of the tribe.

So this remains the ever-present criticism of consultation: even in instances where there is a statutory duty to consult, there is no duty to be bound by the suggestions of the consultees, and therefore consultations are ultimately worthless. However accurate that conclusion may be, the specific failures of consultations require more careful attention.

III. History and Current Tensions

In the first section of this part, I review the historical underpinnings of federal Indian law; readers familiar with the Marshall Trilogy may wish to skip to sections B and C of this part.

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20. Indeed, this suspicion and resentment is already in evidence. *See infra* Part V.B.

21. Practicing Indian law attorney and University of Southern California Adjunct Professor Frederick Marr says he sees examples of these dynamics frequently. Interview with Frederick Marr (n.d.) (notes on file with author).

A. The Federal Trust Responsibility and Indigenous Nations

Consultation as it arises between the federal government and Indian tribes cannot be fully understood separate from the legal history of federal-tribal relations. That history begins early in the nation's history, with three case opinions that laid the foundation for the bulk of federal Indian law. The most influential opinions in each of these cases were drafted by Chief Justice John Marshall, and have since become known as the Marshall trilogy.

Johnson v. McIntosh,[22] the first opinion of the trilogy, recognizes Indian title in the lands they inhabit, but deems this title to be a right of occupancy, not a fee simple absolute or its equivalent. In *Johnson*, Marshall determines that by application of the European doctrine of discovery, by purchase, or by conquest, Indian aboriginal title may be extinguished by the United States — but not by individuals acting independently of the authority of U.S. sovereignty. Integral to the decision is the conception that the sovereignty of Indian nations, and by extension the legal stature of Indian people, is something less than that of the United States and its citizens. One commentator notes,

> Perhaps most important, *Johnson's* acceptance of the Doctrine of Discovery into United States law represented the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples. . . . The Doctrine of Discovery's underlying medievally derived ideology — that normatively divergent "savage" peoples could be denied rights and status equal to those accorded to the civilized nations of Europe — had become an integral part of the fabric of United States federal Indian law.[23]

Another writes, "Whatever subtler meanings and motives underlay Marshall's decision in *Johnson v. McIntosh*, one practical result is clear: it rationalized and girded a legal framework for extinguishing Indian title."[24]

Eight years after *Johnson*, the Cherokee Nation brought an action to enjoin the State of Georgia from routing the Cherokees and usurping their lands. Marshall's plurality opinion in *Cherokee Nation v. Georgia*[25] was written in the context of a monumental constitutional crisis: Georgia seemed to be thumbing its nose at U.S. treaties with the Cherokees, and thus at the Court's authority, with scant approbation (and possibly some encouragement) from President

22. 21 U.S. (8 Wheat.) 543 (1823). The other two cases are *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

23. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 316-17 (1990), *quoted in* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW CASES AND MATERIALS 81 (3rd ed. 1993).

24. GETCHES ET AL., *supra* note 23, at 81.

25. 30 U.S. (5 Pet.) 1 (1831).

Jackson.[26] Marshall had privately expressed his dismay over the Cherokees' plight,[27] but dismissed the case for want of jurisdiction, holding that Indian nations were not foreign nations for purposes of the Constitution:

> [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will . . . . Meanwhile they are in a state of pupilage. *Their relation to the United States resembles that of a ward to his guardian.*[28]

Though dictum, the italics mark perhaps the single most famous phrase in all of federal Indian case law, as it marks the beginning of the federal trust relationship to the tribes (as well as the patronizing attitude of the Court towards Native Americans. Unfortunately, both have survived).

The third case in the trilogy is *Worcester v. Georgia*,[29] in which a missionary from Vermont was arrested by Georgia officials for residing in Cherokee territory without a license from the State of Georgia to do so. Marshall held that Indian tribes are sovereign nations, and therefore the Georgia law can have no effect in Cherokee territory.[30]

Taken together, these cases establish the foundation of Indian law, and the federal duty to protect Indian interests due to their "domestic dependent nation" status. Indian tribal sovereignty is subservient to United States sovereignty, such that Indians hold their land at the sufferance of the greater sovereign. This sufferance was, in turn, defined in terms of a "trust," where the federal government "trustee" holds legal title to all Indian lands for the benefit and use

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26. *Id.* at 128-29.

27. In a letter to a Massachusetts justice, Marshall wrote,

> It was not until the adoption of our present government that respect for our own safety permitted us to give full indulgence to those principles of humanity and justice which ought always to govern our conduct towards the aborigines when this course can be pursued without exposing ourselves to the most afflicting calamities. That time, however, is unquestionably arrived, and every oppression now exercised on a helpless people depending on our magnanimity and justice for the preservation of character. I often think with indignation on our disreputable conduct (as I think) in the affairs of the Cherokees in Georgia.

Letter from Chief Justice John Marshall to Justice Joseph Story (Oct. 29, 1828), *in* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 712-13 (1988) (vols. 3 and 4 in the *History of the Supreme Court of the United States* by the Oliver Wendell Holmes Devise), *cited in* GETCHES ET AL., *supra* note 23, at 129.

28. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17 (emphasis supplied), *cited in* GETCHES ET AL., *supra* note 23, at 130.

29. 31 U.S. (6 Pet.) 515 (1832), *cited in* GETCHES ET AL., *supra* note 23, at 139.

30. GETCHES ET AL., *supra* note 23, at 146.

of the Indian "beneficiaries." While the terms of this "trust" are vague, and malleable according to the wishes of any particular court, the relationship is commonly understood to impart a fiduciary duty for tribal resources and property on the federal government. Consultations, then, can be roughly understood as communication by Indian beneficiaries of their desires to the federal trustees who make ultimate determinations about what happens with the lands Indians occupy.

B. Origins of Consultations

It is not necessary to discover when the first consultation requirement was promulgated to know that the concept of binding the federal government to consult with tribes before the taking action is an old one.[31] In *Peoria Tribe of Indians of Oklahoma v. United States*,[32] the tribe contended that in 1857 that the federal government violated its treaty rights through the below-value sale of tribal land.[33] One of the apparently uncontested clauses in that treaty reads: "[I]t is agreed that the President may, from time to time, *and in consultation with said Indians*, determine how much shall be invested in safe and profitable stocks . . . ."[34] Discovering how many times the government has violated such requirements would be perhaps an impossible task. However, the long series of government betrayals and breaches of trust regarding Native Americans is well documented. Two noted Indian law commentators write:

> It is impossible to avoid the conclusion . . . that the young nation's ideals were often subservient to its ambitions when it came to honoring solemn promises contained in the treaties. Breach by the United States was common; in one case a treaty was respected for only 12 days before it was violated by the government negotiator.[35]

The policy of dealing with Indians on the basis of treaties, which had been the practice since the first European colonizers arrived, was ended by statute in 1871.[36] The federal government has since dealt with tribes through congressional, executive, and judicial orders. One result is that tribes have had to deal with the often dire consequences of several major turnabouts in federal

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31. I make no attempt here to provide a thorough history of federal Indian law. While no background in this subject is necessary, it is presumed that the interested reader will have some fundamental understanding of the Indian law.

32. 390 U.S. 468 (1968).

33. *Id.* at 469-70.

34. Treaty with the Kaskaskia, Peoria, Etc., May 30, 1854, art. 7, 10 Stat. 1082, 1084 (emphasis supplied).

35. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows upon the Earth" — How Long a Time Is That?*, 63 CAL. L. REV. 601, 611 (1975), *quoted in* GETCHES ET AL., *supra* note 23, at 156.

36. 25 U.S.C. § 71 (1994); *see also* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 105, 107 (Rennard F. Strickland et al. eds., 1982).

Indian policy, many of which were accomplished without any significant input from tribes.[37] The Indian Reorganization Act of 1934 (IRA),[38] Termination Period[39] policies, and the Termination Period statute known as Public Law 280[40] each effected radical changes in policy and had correspondingly marked effects on Indian life, and each took effect without any record of tribal consultations.[41] Public Law 280 was amended in 1968 to require that states obtain tribal consent before any further expansion of state jurisdiction. It is noteworthy that there has been no significant extension of Public Law 280 jurisdiction since that amendment took effect.[42]

President Nixon's 1970 message to Congress on Indian affairs is the landmark beginning the "Self-Determination" era.[43] Nixon asked Congress in unambiguous terms to renounce Termination Period policies,[44] which Congress did; and then in a series of statutes began the process of giving the tribes greater control of tribal affairs.[45]

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37. *See generally* COHEN, *supra* note 36; GETCHES ET AL., *supra* note 23; WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (1988).

38. 25 U.S.C. §§ 461-479 (1994); *see also* GETCHES ET AL., *supra* note 23, at 215 (citing commentary on the IRA as having both positive and negative effects on Indian tribes).

39. Termination referred to the ending of the recognition of tribes by the federal government, as part of an effort to assimilate Indians into the dominant society. *See* GETCHES ET AL., *supra* note 23, at 229-49. The "Termination Period" began with numerous congressional actions in the early 1940s and lasted until the political force behind it ebbed in the early 1960s. *Id.* at 251-52. The threat created by termination policies are credited with helping to rally tribal leaders, who in the summer of 1961 held the "largest multitribal meeting in decades" which in turn helped rally state leaders and non-Indians against termination policies. STEPHEN CORNELL, THE RETURN OF THE NATIVE 123-24 (1988), *quoted in* GETCHES ET AL., *supra* note 23, at 251-52. The Kennedy administration took no action to terminate tribes, and Johnson's Great Society programs of the mid-1960s embraced tribal interests. GETCHES ET AL., *supra* note 23, at 252. President Nixon's 1970 message to Congress is seen as the landmark for the beginning of the "self-determination" era in federal Indian policy. *Id.*

40. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588. Public Law 280 shifted jurisdictional power over Indian disputes away from the federal government and toward the states. *See* CANBY, *supra* note 37, at 176-77 ("State governments resented the fact that they were given the duty of law enforcement without the means to pay for it . . . . The tribes, on the other hand, resented the fact that state jurisdiction was thrust upon them without their consent and they particularly objected to the provision that additional states could acquire jurisdiction without even consulting the concerned tribes.").

41. *See generally* GETCHES ET AL., *supra* note 23, at 215-49.

42. *See* CANBY, *supra* note 37, at 177.

43. *See* President's Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970); *see also* H.R. DOC. NO. 91-363 (1970) (outlining tribal self-determination policy).

44. Nixon's message included the following:

> Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to . . . expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress.

President's Special Message to the Congress on Indian Affairs, *supra* note 43, at 567.

45. *See* GETCHES ET AL., *supra* note 23, at 254 n.1; Ralph W. Johnson & Berrie Martinis,

President Reagan's Indian policy, announced in 1983, emphasized a "government-to-government relationship" with tribes, a policy followed in turn by both President Bush and President Clinton.[46] On April 29, 1994, Clinton announced his government-to-government policy with a memorandum that included the following language:

> Each executive department and agency shall consult, to the greatest extent practicable, and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.[47]

Ironically, there is no indication that this policy was developed in consultation with Indian tribes; rather, it was presented as a fait accompli at the April 29 summit of tribal leaders.

Pursuant to Clinton's memo, Secretary of the Interior Bruce Babbitt issued Secretarial Order 3175, "Departmental Responsibilities for Indian Trust Resources," which required DOI bureaus and offices to prepare policy guidelines and explained the consultation clause thus:

> Bureaus and offices [of the DOI] are required to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect, the appropriate office of the Bureau of Indian Affairs, and the Office of the Solicitor (for legal assistance) if their evaluation reveals any impacts on Indian trust resources.[48]

The order disclaims the creation of any legal rights not already established by law.[49] Disclaimers aside, the compilation of the policies from DOI's branches is one source of authority regarding consultation requirements. Another result has been an explosion in the number of federal regulations that include consultation requirements: in 1996, only a handful of regulations had such requirements, while today they are liberally sprinkled throughout the Code.[50]

Chief Justice Rehnquist and the Indian Cases, 16 PUB. LAND L. REV. 1, 4-5 & nn.21-25 (1995).

46. *See* Judith V. Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, KAN. J.L. & PUB. POL'Y, Summer 1991, at 89, 93, 99 n.77 (vol. 1, no. 1).

47. President William J. Clinton, Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies (Apr. 29, 1994).

48. U.S. Dep't of the Interior, Departmental Responsibilities for Indian Trust Resources (Nov. 8, 1993) (Secretarial Order No. 3175).

49. *Id.*

50. *See supra* note 3.

Court cases in recent years have tested consultation language in statutes such as the National Environmental Protection Act (NEPA), the American Indian Religious Freedom Act (AIRFA), and the National Historic Preservation Act (NHPA). The results of these cases have typically not been favorable to Indian interests, with a few notable exceptions in the lower courts.[51]

C. Tension Between the Three Branches of Federal Government Regarding Tribal Sovereignty and Consultation Issues

Indian law commentators observe that there is a tension between Congress and the Supreme Court on issues of tribal sovereignty.[52] I argue that one effect of this tension may be that federal-tribal consultation is important in a way that it never has been before. If so, this newly assumed role for consultation as a central element of federal-tribal relations, issues regarding consultation will continue to become more contentious and divisive until some clear resolution is reached.

1. The Supreme Court, the Federal Bench, and Tribal Sovereignty

a) The Court's Erosion of Tribal Sovereignty

Regarding the tension between Congress and the Supreme Court, one Indian law commentator writes:

> Indian nations today are faced with a critical dichotomy in their treatment by the federal government. For the most part, Congress has embarked on a path of promoting and encouraging economic development and self-sufficiency, while the Supreme Court has taken virtually every opportunity in recent years to undercut the legal and practical basis of reservation self-government.[53]

Others observe that the Court, specifically as led by Chief Justice Rehnquist, has returned to a policy long since abandoned by Congress, which they dub "Rehnquist's New Judicial Termination Policy":

> Although Congress has rejected the policy of termination, Rehnquist and the Court seem to have adopted it. Chief Justice Rehnquist has made it his policy to chip away at the sovereignty of Indian nations. His policy contradicts not only the will of Congress, but also a long line of Supreme Court decisions affirming inherent tribal sovereignty.[54]

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51. See *infra* Part IV for a selection of case briefs.
52. *See* Royster, *supra* note 46, at 89.
53. *Id.*
54. Johnson & Martinis, *supra* note 45, at 7.

This may not be the only item on Rehnquist's agenda.[55] Based on a survey of seventy-nine cases involving Indian claims that Rehnquist has participated in, the authors conclude:

> First, when [Rehnquist] can find disestablishment or termination of an Indian tribe or treaty right through federal legislation, even when the legislation is murky or ambiguous, he will do so. Second, when he can find a means of limiting tribal court jurisdiction, he will so hold. Third, he has created new tests for determining the limits of tribal court jurisdiction, based on the tribes' dependent status and the 'unspoken assumption' of Congress. These phrases are so vague that they establish no principled standards. They give the Court carte blanche to decide cases subjectively. Fourth, he believes that state regulations and taxes should apply on reservations, especially to non-Indians, unless federal legislation can be found expressing an opposite intent. This position reverses a long-standing rule of construction in Indian cases — that state law does not apply on a reservation unless Congress clearly expresses that intent. Finally, he attaches little importance to the long-standing rules of construing treaties, agreements, and statutes in favor of Indian interests. . . . He is, at least, consistent and predictable.[56]

The authors also note that Rehnquist has not joined a dissent in an Indian case since 1989.[57]

But it would appear that Rehnquist is not alone in his apparent indifference toward tribal sovereignty interests. The most startling evidence of this is in the unanimous decision in *Alaska v. Native Village of Venetie Tribal Government*,[58] in which the Court, in an opinion by Justice Clarence Thomas, found that lands reserved to Native Americans under the Alaska Native Claims Settlement Act did not quality as "Indian county."[59] The decision has had grave effects on Alaskan tribes' jurisdiction and sovereignty, and repercussions will likely be felt elsewhere in federal Indian law cases. In *Venetie*, as one commentator points out, the Court apparently ignored long-standing canons of construction, which require statutory interpretations that favor Indian interests: "[i]f the canons had been applied, it appears likely the ultimate outcome of the decision would have been different."[60] What is particularly remarkable about this development is

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55. *Id.* at 25.
56. *Id.* at 24-25.
57. *Id.*
58. 522 U.S. 520, 523 (1998).
59. *Id.*
60. David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 59 (1999).

that the unanimity of the decision seems to cut across political lines among the justices:

> It is difficult to believe all the justices were so politically opposed to the Venetie Tribal Government's position that they would ignore legal precedent that had been presented in a manner demanding recognition. The unanimity of the Court suggests the justices did not feel legally constrained to apply the federal Indian law canons of construction.[61]

Whether this development is an anomaly, or a determined change of course remains to be seen. Given these trends, however, to say that the Court is probably hostile to Indian interests in tribal sovereignty risks vast understatement. This trend gives Native Americans and tribes a strong incentive to stay out of federal court: "One can only hope that Rehnquist loses his majority before his judicial agenda completely devastates tribal sovereignty."[62]

b) The Erosion of Procedural Safeguards

Recent Supreme Court decisions suggest that even if there are protective procedural hoops to jump through — including consultations — ultimately federal agencies are neither substantively or procedurally bound to those procedures.[63] Two Supreme Court cases that have a direct bearing on what federal-tribal consultations might mean are *Lujan v. Defenders of Wildlife*[64] and *Lyng v. Northwest Indian Cemetery Protective Ass'n.*[65]

Lujan is remarkable for the Supreme Court's decision to ignore congressionally created citizen standing provisions with regard to procedural rights valid against action by the executive branch.[66] Additionally, it is relevant to a discussion about consultation because the injury complained of in *Lujan* was the DOI's refusal to hold consultations with the public before engaging a project that would adversely effect endangered species abroad.[67] The decision turns on an interpretation of what is required for standing. Scalia, for the majority, writes:

> This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement

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61. *Id.*

62. Johnson & Martinis, *supra* note 45, at 25.

63. Lower courts have ruled that consultations are nonbinding. *See* Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1987); *see infra* Part IV.

64. 504 U.S. 555 (1987).

65. 485 U.S. 439 (1988).

66. *See Lujan*, 504 U.S. at 560-62; *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 64 (2nd ed. 1994).

67. *Lujan*, 504 U.S. at 558-59.

> for hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). . . . Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the executive observe the procedures required by law. We reject this view.[68]

Justices Blackmun and O'Connor, in dissent, note that whatever this might mean, the Court "cannot be saying that 'procedural injuries' as a class" are insufficient for purposes of article III standing:

> Most governmental conduct can be classified as "procedural." . . . Yet, these injuries are not categorically beyond the pale of redress by the federal courts. . . .
>
> . . . [T]he principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the executive at the expense — not of the courts — but of Congress, from which that power originates and emanates.[69]

From the examples quoted in Scalia's opinion, it is possible that *Lujan* will not affect tribal assertions of injury through federal disregard of consultation requirements. However, *Lujan* clearly undermines the ability of citizens to enforce congressionally granted procedural rights against the executive through court action, an unsettling result given the already tenuous nature of consultation requirements.

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Court, in an opinion by Justice O'Connor, certified the federal government's ability to use federal land in any manner it chooses, without regard to concurrent Native American religious interests.[70] As long as the purpose of the federal action is not specifically to burden any party's religious freedom, then the inadvertent effect of destroying the practice of a certain religion is not prohibited by the Constitution.[71] Significantly, the majority found that it was unnecessary to reach the compelling state interest test that had to this point been used by the court to decide if a plaintiff's rights to free exercise of religion had been violated.[72]

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68. *Id.* at 572-73 (citations omitted).

69. *Id.* at 601-02 (Blackmun, J., dissenting).

70. *Lyng*, 485 U.S. at 449.

71. *See id.*

72. *See id.* The compelling state interest test was again abandoned in another important Indian freedom of religion case, *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990) (upholding an Oregon regulation prohibiting the use of peyote as applied to its sacramental use by the Native American Church).

> [t]he *Lyng* Court never reached the "compelling governmental interest" test . . . because the tribes did not prove to the majority that the government's actions were sufficient to "prohibit" the free exercise of their religion. Justice O'Connor said that "governmental programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs [do not] require government to bring forward a compelling justification for its otherwise lawful actions."[73]

Justice Brennan, in dissent, called this result "cruelly surreal," and noted that in effect, the Court was holding that to destroy a religion was not to burden it.[74] *Lyng* provides a sense of how far the Court is willing to solidify federal rights at the expense of Native American interests, which in turn overshadows all discussions about the value of federal consultations with tribes.

c) Hostility Toward Tribal Sovereignty on the Federal Bench

Economic conservatism is traditionally hostile to restraints on land development, and thus Indian land claimants have found few friends either in Congress or the White House in recent years. Moreover, the predominance of politically conservative appointees to the federal bench during the Reagan and Bush years, combined with the failure of the Clinton administration to secure Senate approval for scores of its appointees, has made taking federal cases that much less attractive to tribes as a means of defending their interests.

2. Congress and Tribal Sovereignty

Meanwhile, perhaps in reaction to the high court's decisions (or perhaps in reaction to the increased lobbying on the part of tribes that has resulted from these decisions), or for other unrelated reasons, Congress has pursued a countervailing trend buttressing tribal sovereignty that began in the early 1970s.[75] One recent example is the passage of a bill that incorporated the Indian Self-Determination Act Amendments of 1994 and the Indian Self-Determination Contract Reform Act of 1994,[76] signed into law in October 1994. The law makes dozens of changes that promote tribal control of tribal

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73. GETCHES ET AL., *supra* note 23, at 748-49.

74. *Lyng*, 485 U.S. at 472.

75. The strength of this countervailing trend, however, is subject to debate. Claudeen Bates Arthur, director of litigation at DNA People's Legal Services, Inc., and former Navajo Nation Attorney General, feels such talk is "more rhetoric than reality. Laws without money to carry out the responsibilities leave tribes with nothing but rhetoric." Interview with Claudeen Bates Arthur (Oct. 27, 1999).

76. Pub. L. No. 102-413, 108 Stat. 4259 (specifying the terms of Self-Determination Act contracts, making permanent the Tribal Self-Governance Demonstration Project, and providing for the addition of new tribes to the program).

affairs.[77] Among these are responsibilities assigned to the Secretary of the Interior that include consultation requirements.[78] Another example is in the area of environmental regulations:

> For the past decade, Congress and the Environmental Protection Agency have been promoting and strengthening the tribal role in environmental regulation of Indian territories. Each of the major federal pollution control acts that has come up for reauthorization has been amended to include provisions that treat Indian tribes as states for environmental protection purposes. . . . The Supreme Court, on the other hand, has hobbled the ability of many Indian nations to take full control over environmental affairs in their territories.[79]

It may be that tribal sovereignty will continue to expand through this promulgation of statutes that serve tribal interests well. However, the Supreme Court has continued to limit tribal sovereignty. Meanwhile, Congress has yet thoroughly to discuss what it means to do in creating consultation procedures.[80]

3. The Executive Branch and Tribal Sovereignty

As this conflict between Congress and Court continues, the Clinton administration has formulated its own Indian policy. President Clinton has led tribal leaders to believe that he is a supporter of tribal sovereignty interests, and tribal leaders have expressed their willingness to hold him to his word.[81] On April 29, 1994, Clinton, who is the first president in history to invite leaders from all 547 recognized tribes to meet and develop federal Indian policy,[82] signed a directive that requires all federal agencies and departments to:

> consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are

77. *See id.*

78. *See id.*

79. Royster, *supra* note 46, at 89 (citing Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994 (1989) (holding that significant non-Indian ownership of Indian territory undermines Indian authority to zone the non-Indian lands)).

80. Various Westlaw database searches of legislative history reveal no discussions concerning the meaning of consultation.

81. Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 800 n.4 (1995) (citing Keith White, *Mankiller Calls Clinton Meeting an Act of Faith*, Gannett News Service, Apr. 29, 1994, *available in* LEXIS, News Library, Arcnws File (stating that many tribal leaders who attended Clinton's tribal summit would hold him accountable for promises made)).

82. *Id.* at 734-35.

> to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.[83]

The memorandum also directed federal agents to "undertake activities . . . in a knowledgeable, sensitive manner respectful of tribal sovereignty."[84] Ironically, there is no evidence that the memo was itself the product of consultation.

One direct result of the memo was the issuance by Interior Secretary Bruce Babbitt of Order 3175, "Departmental Responsibilities for Indian Trust Resources." The order reiterated the goals of the Presidential memo, and required the heads of Department of the Interior (DOI) bureaus and offices to "prepare and publish procedures and directives prior to the expiration of this Order"[85] to ensure awareness of and compliance with the memo.[86] Of the eleven policies submitted to the Office of American Indian Trust, all of them rely to greater or lesser extent on the concept of consultation with the tribes.[87]

Federal agencies have also been busy drafting new consultation requirements for the Code of Federal Regulations. A search of the 1996 version of the Code revealed only a handful of such requirement clauses. In 1997, well over 150 individual consultation-invoking clauses can be found.[88]

D. The Uncertain Centerpiece of Federal Tribal Relations

While the Indian policies of Congress and the executive branch seem to be roughly in accord and opposed to the Supreme Court's apparent agenda, this conflict puts consultations in the middle of the controversy. Because the Supreme Court and the conservative bench have made federal court challenges such an unsavory prospect, and because the President and the Congress created a forum for participation not otherwise available, consultations would seem to offer a means for tribes to participate in federal decision-making, while the atmosphere of federal courts provide the incentive to avoid judicial involvement.

Tribal leaders willing to participate in consultations are nevertheless faced with uncertainty that their participation is meaningful. This uncertainty alone, however, is not enough to dissuade tribes from working to take advantage of every opportunity available to them to increase their influence over the policies and decisions that affect them. Despite their successes lobbying and garnering

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83. Clinton, *supra* note 47.

84. *Id.*

85. The order expired October 1, 1994. As of this writing, draft copies of each branch's policy had only just been compiled for review by the Office of American Indian Trust.

86. U.S. Dep't of the Interior, Departmental Responsibilities for Indian Trust Resources (Nov. 8, 1993) (Secretarial Order No. 3147) (stating the intent that "each bureau and office will operate within a government to government relationship with federally recognized Indian tribes . . . .").

87. *See* U.S. DEP'T OF THE INTERIOR, PROTECTION OF INDIAN TRUST RESOURCES PROCEDURES MANUAL (1996) [hereinafter INTERIOR DEP'T PROCEDURES MANUAL] (on file with the author) (also available from Office of American Indian Trust, U.S. Department of the Interior, 1849 C Street, N.W., MS-2472-MIB, Washington, D.C. 20240, (202) 208-3338)).

88. *See supra* note 3.

political support for a limited range of issues in recent decades, Native Americans remain a largely disenfranchised minority. Although the pervasiveness of consultation requirements underscores the importance of finding a consistent practical use of the term, agencies have been given free reign to create individualized policies, not necessarily — and from the available evidence, usually not — in consultation with tribes. This opens consultations to the potential for bureaucratic abuse and breach of faith. While other options are reduced, consultation is increasingly at the core of federal/tribal participation policies, ambiguities in and among various consultation requirements create confusion at the same time that tribal entities seek reliable means of influencing federal actions in a meaningful way.

IV. Consultation Case Law

While no statistically significant picture can be drawn from the few reported consultation cases, I have provided capsule sketches of fourteen prominent cases that provide useful insight into the difficulties with consultation requirements. It is my intent that this brief survey may provide guidance to the practitioner — or legislator — who requires an understanding of the nature of consultation in the context of litigation. In some cases, I have provided commentary on the potential implications on the discussion of consultation. I have also indicated the source of the consultation requirement, or the source of the claim that a consultation requirement exists.

A. Federal Tribal Consultation Case Law

1. Oglala Sioux Tribe of Indians v. Andrus

The Eighth Circuit's decision in *Oglala Sioux Tribe of Indians v. Andrus*[89] and the Ninth Circuit's *Hoopa Valley Tribe v. Christie*[90] decision are perhaps the two seminal opinions on consultation, particularly consultation as required by an agency's policies. The dispute in *Oglala Sioux* arose when the BIA transferred its Pine Ridge, South Dakota superintendent, Anthony Whirlwind Horse, to the DOI office in Aberdeen, South Dakota, without first consulting the tribe.[91] The superintendent was himself an Oglala Sioux, the first BIA superintendent in the area to speak Lakota, and his continued tenure was enthusiastically endorsed by the tribal council on many occasions.[92] The BIA chose to transfer Anthony after his brother, Elijah Whirlwind Horse, was elected tribal president, because Elijah's election supposedly created a prohibited conflict

89. 603 F.2d 707 (8th Cir. 1979).
90. 812 F.2d 1097 (9th Cir. 1987).
91. *Id.* at 710.
92. *Id.* at 709.

of interest under Interior Department guidelines with regard to his brother's BIA position.[93]

Immediately following Elijah's election, rumors circulated that the BIA was considering transferring Anthony Whirlwind Horse.[94] After the transfer decision had been made, but before the decision was announced, the BIA welcomed to its Washington, D.C. offices two representatives from the Oglala Sioux Tribe, who argued against any possible transfer of Anthony Whirlwind Horse.[95] Following that meeting and the announcement of the transfer, BIA Assistant Secretary Forrest Gerard agreed to reconsider the decision, but subsequently decided to proceed with the transfer.[96] At trial, the government argued the meeting constituted adequate consultation, but the court rejected this contention, saying,

> By the time that the . . . audience was granted, the decision to remove Anthony Whirlwind Horse had already been made. "Permitting the submission of views after (an administrative decision has been made) is no substitute for the right of interested persons to make their views known to the agency in time to influence the (administrative) process in a meaningful way" . . . Although Gerard agreed to reconsider the Bureau's decision, it appears that this reconsideration . . . did not involve a reconsideration of the wisdom of the application of the Interior Department's conflict-of-interest policy to Indian employees of the BIA.[97]

The tribe, with Anthony Whirlwind Horse as an intervening plaintiff, sued the government for violations of the provisions of a BIA consultation policy,[98] for violation of the letter and spirit of the Indian Self-Determination and Education Assistance Act),[99] the IRA,[100] and on the grounds that the decision was arbitrary, capricious and an abuse of discretion as set forth in the APA.[101]

The court agreed that the BIA decision violated the IRA, and consequently the APA, and that the action "was procedurally defective in that it was not

93. *Id.* at 710 (citing 43 C.F.R. § 20.735-32(d)).

94. *Id.*

95. *Id.*

96. *Id.* at 711.

97. *Id.* at 720 (citation omitted) (quoting City of New York v. Diamond, 279 F. Supp. 503, 517 (S.D.N.Y. 1974)).

98. *Id.* at 711 (citing Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs (May 5, 1972)).

99. 25 U.S.C. §§ 450-450n (1994).

100. 25 U.S.C. §§ 461-479 (1994).

101. 5 U.S.C. § 706 (1994), *cited in Oglala Sioux*, 603 F.2d at 710.

made in accordance with the Bureau's own procedure requiring prior consultation with the Tribe."[102] The court summarized its holding thus:

> [W]here the Bureau [of Indian Affairs] has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, that opportunity must be afforded. Failure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking, but also violates "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[103]

Notably, the government did not argue that the Bureau was "not bound by the consultation guidelines, or that the guidelines [were] not enforceable by the affected tribes or by the members of the tribes," and instead argued only that the particular guidelines did not apply.[104] The court said the action violated "the letter and the spirit of the Bureau's consultation guidelines."[105]

2. Hoopa Valley Tribe v. Christie

Hoopa Valley Tribe v. Christie[106] is the Ninth Circuit counterpoint to *Oglala Sioux*. The Hoopas argued that an unratified 1864 treaty, which established the Hoopa reservation, also created a property right in the assignment of a federal agent to live on the reservation for the benefit of the tribe.[107] The court rejected that contention, on the grounds that the United States was not bound to the unratified treaty, and because none of the tribes other claims succeeded in demonstrating the creation of a property right.[108] The court found no violation of the federal trust responsibility, and no violation of the APA.[109] The court further rejected the district court's acknowledgment of a tribal right to consultation, following *Oglala Sioux*:

> The "Guidelines for Consultation with Tribal Groups on Personnel Management within the Bureau of Indian Affairs" are not

102. *Oglala Sioux*, 603 F.2d at 714.

103. *Id.* at 721 (citations omitted) (quoting Morton v. Ruiz, 415 U.S. 199, 236 (1974), quoting in turn Seminole Nation v. United States, 316 U.S. 286, 296 (1942)).

104. *Id.* at 718. Trial testimony by Assistant Secretary Gerard disposed of that argument. *See id.* at 719.

105. *Id.* at 718-19.

106. 812 F.2d 1097 (9th Cir. 1986).

107. *Id.* at 1099.

108. *Id.* at 1102-03.

109. *Id.*

> conceded by the Bureau to have the force of law, in contrast to the governmental concession made in *Oglala Sioux Tribe v. Andrus*. Nor are these Guidelines the same as regulations that must be applied because "the rights of individuals are affected." The Guidelines are in letter form and are unpublished. They call for consultation where major moves affect the Indians. They give direction to the Bureau. They do not establish legal standards that can be enforced against the Bureau.[110]

The court then found that even if the Guidelines had binding effect, the BIA had substantially complied, and gave this definition of consultation: "Consultation is not the same as obeying those who are consulted. The Hupas were heard, even though their advice was not accepted."[111]

3. Lower Brule Sioux Tribe v. Deer

Lower Brule Sioux Tribe v. Deer[112] is a 1995 update that also builds on the 1979 *Oglala Sioux* decision. Again the BIA had made an unpopular personnel management decision, again without consulting the tribe as required by the policies set forth in the BIA's consultation manual.[113] The sole issue in this case is the consultation issue. The case contains a rare definition of "meaningful consultation," in the introduction:

> consultation comprised a one to two hour meeting, not more than one half day, during which meeting the superintendent notifies the Council of the BIA's proposed action, justifying his reasoning. The Tribal Council may either issue a motion or resolution of support for the decision, or reject the decision. The tribe recognizes that the BIA need not obey the Council's decision. *Meaningful consultation means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views to the BIA decision maker.* The decision maker is to comply with BIA and administration policies.[114]

The case is also valuable for its language regarding holding the BIA to its consultation policies:

> The BIA now contends the guidelines and policies do not have the force of law and thus create no duty upon the BIA which would support the tribe's complaint . . . . The BIA is not to be

110. *Id.* at 1103 (citations omitted).

111. *Id.*

112. 911 F. Supp. 395 (D.S.D. 1995).

113. *Id.* at 398-401.

114. *Id.* at 401 (citing Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1987)) (citation omitted) (emphasis supplied).

> permitted to disavow its own policies and directives. The BIA could easily at any time have narrowed or eliminated guidelines, memorandums, directives, policies and promises of meaningful consultation. They did not do so, even after *Oglala* was decided. The guidelines and policies clearly embody the policy of the BIA . . . .[115]

The court reviewed a BIA memo that discussed the "precarious position" involved in moving forward on the decision without consulting the tribes: "This court agrees. It was a precarious position. It was also in violation of tribal rights."[116]

The court examined the tribe's contention that a presidential memorandum created enforceable consultation rights, and concluded the memo "does not, however, create any enforceable duty. . . . The memorandum is, however, further evidence of BIA policy, the interpretation of BIA policy by the BIA and by the federal government and the tribe's reliance thereon."[117]

Finally, the court noted that "[t]he BIA is unlike any other agency, however, and . . . reducing the number of employees may not be accomplished without meaningful prior consultation with the tribes."[118]

4. Morton v. Ruiz

Morton v. Ruiz[119] is typically cited for the proposition that the federal trust responsibility extends to Indians in Native American communities beyond reservation borders. In *Morton v. Ruiz*, the Supreme Court decided that a husband and wife, who were members of the Papago Indian tribe but who lived off the reservation, were entitled to apply for general assistance under the Snyder Act.[120] The Court found no indication that Congress intended the BIA to withhold assistance from full-blooded Indian tribal members who had significant economic and social ties with the reservation.[121]

In *Morton v. Ruiz*, the BIA did not publish the eligibility requirements for the general assistance applied for by the plaintiffs.[122] Because the BIA's own Manual required the bureau to publish all directives that "inform the public of privileges and benefits available" and of "eligibility requirements," the

115. *Id.* at 400.
116. *Id.*
117. *Id.* at 401.
118. *Id.*
119. 415 U.S. 199 (1974).
120. *Id.* at 199.
121. *Id.*
122. *Id.*

Court found the BIA in substantial noncompliance with its own regulations:[123]

> No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds.
>
> The Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligation be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc decisions . . . .
>
> Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.[124]

The reasoning of *Morton v. Ruiz* does not deal with consultation, however the case may be relevant to consultation issues in light of this language about the promulgation and administration of federal agency policies. Perhaps the bulk of the consultations engaged in the field are done pursuant to unpublished, "internal" policies and procedures, similar to those cited in *Oglala Sioux* and *Lower Brule Sioux.* It may be expected that future cases will argue that consultation policies confer a benefit to the tribes according to the principles in *Morton v. Ruiz.*

5. Native Americans for Enola v. United States Forest Service

In *Native Americans for Enola v. United States Forest Service,*[125] plaintiffs charged the United States Forest Service (the Forest Service) with a violation of the NHPA pursuant to a decision to allow a logging company to haul logs on certain roads in Mt. Hood National Forest.[126] The central issue was whether the Forest Service's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," according to the APA.[127]

The relevant discussion on consultation arose with respect to 36 C.F.R. §§ 800.4(b), (c) and (d), which require federal agency officials, inter alia, to work to identify and evaluate any cultural resources on the property "[i]n consultation with the State Historic Preservation Officer."[128] The court found

123. *Id.* at 235.
124. *Id.* at 233-35.
125. 832 F. Supp. 297 (D. Or. 1993).
126. *Id.* at 298.
127. 5 U.S.C. §§ 704-706 (1994).
128. Protection of Historic and Cultural Properties, Subpart B: The Section 106 Process, 36 C.F.R. § 800.4(b)-(d) (1996).

that the Forest Service had conducted "several field inventories seeking sites traditionally used by Native Americans," and sought comments from a committee comprised of archaeologists, "an American Indian Liaison," a Forest Service cultural resource technician, and attorneys.[129] Neither the field inventories nor the committee found traditional cultural properties in the studied area.[130] The court concluded that these efforts "satisf[ied] the 'consultation' requirement set out in 36 C.F.R. § 800.4(b)," and further concluded that in the absence of any evidence of cultural resources, as in this case, the federal agent need only provide documentation of that finding, pursuant to 36 C.F.R. § 800.4(d).[131]

6. Pueblo of Sandia v. United States

In *Pueblo of Sandia v. United States*,[132] the Pueblo of Sandia alleged the Forest Service failed to comply with the NHPA[133] in evaluating the Las Heurtas Canyon in the Cibola National Forest.[134] The Forest Service concluded the area had no traditional cultural property, and subsequently instituted a new management strategy for the area.[135] The bulk of the opinion examined the facts to answer whether the Forest Service's activities constituted (1) "reasonable effort," and (2) "good faith effort" pursuant to 36 C.F.R. § 800.4.[136] The court concluded the that the Forest Service failed both these tests.

The portion of the opinion that deals with consultation is found under the "Good Faith Effort" subheading, wherein the court recognized that consultation with the State Historic Preservation Officer (SHPO) was an integral and required part of the NHPA section 106 process.[137] The court found that the Forest Service had withheld information that was to prove crucial to the SHPO's decision,[138] and framed "consultation" thus "[a]ffording

129. *Enola*, 832 F. Supp. at 300.

130. *Id.*

131. *Id.*

132. 50 F.3d 856 (10th Cir. 1995).

133. 16 U.S.C. §§ 470-470mm (1994).

134. *Pueblo of Sandia*, 50 F.3d at 857. Plaintiffs had originally alleged that the Forest Service's Final Environmental Impact Statement (FEIS) violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1994), the National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1994), the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994), the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994). However, plaintiffs abandoned all but the NHPA claim on appeal, and the district court granted summary judgment for defendants on the NEPA and APA claims, which the plaintiffs did not appeal. *Pueblo of Sandia*, 50 F.3d at 858 n.1.

135. *Pueblo of Sandia*, 50 F.3d at 856.

136. *Id.* at 859-62.

137. *Id.* at 862 (citing Attakai v. United States, 746 F. Supp. 1395, 1407 (D. Ariz. 1990)).

138. *Id.* (quoting the SHPO's statement that "our not having received [the relevant documents] has affected our ability to consult appropriately under Section 106 of the [NHPA]").

the SHPO an opportunity to offer input on potential historic properties would be meaningless unless the SHPO has access to available, relevant information. Thus, 'consultation' with the SHPO mandates an informed consultation."[139] There is arguably an implicit meaning of consultation found in the courts words. If consultations with an uninformed participant are meaningless, and if "'consultation' . . . mandates an informed consultation,"[140] then one of the requirements for meaningful consultations may be that the consulted interlocutor be informed.

The *Pueblo of Sandia* case is especially interesting for its exposure of the Forest Service's delaying tactics,[141] disregard of tribal concerns,[142] and bald mendacity.[143] Finally, it seems the Forest Service preferred in this instance to deal with an ignorant interlocutor — whose opinions it could ignore as meaningless — than to take seriously the implications of an informed consultant.[144]

7. Attakai v. United States

The *Attakai v. United States*[145] litigation arose from one battle in the ongoing Navajo-Hopi land dispute.[146] In this case, the dispute arose over the construction of a fence and livestock watering facilities near the home of Navajos still living on Hopi partition land.[147] The plaintiff Navajos alleged, inter alia, that the construction violated their free exercise rights, and that the project was executed in violation of the consultation requirements of NHPA section 106.[148]

The facts show that field surveys, including "walkover[s]" of the sites, were done by the BIA, but that the "no effect" reports were never sent to the

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139. *Id.* at 862.

140. *Id.*

141. "The Forest Service did not provide the SHPO copies of the Lauriano and Brandt affidavits [which suggested, inter alia, that the Forest Service's plan would cause traditional tribal uses to be "significantly impaired if not totally destroyed," *id.* at 860] until after the consultation was complete and the SHPO had concurred." *Id.* at 862.

142. "'[T]he Forest Service does not appear to have taken the requirements of [the NHPA] very seriously.'" *Id.* at 862 (quoting the district court order).

143. "In fact [contrary to evidence and tribal communications the Forest Service was aware of] the Forest Service informed the SHPO during consultation that '[c]onsultations with the pueblo officials and elders, and other users of the Las Huertas Canyon area, disclosed no evidence that the . . . area contains traditional cultural properties.'" *Id.*

144. This argument is developed further at *infra* Part VI.

145. 746 F. Supp. 1395 (D. Ariz. 1990).

146. *See* Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1962) (holding that Navajo and Hopi tribes shared equal interest in reservation land lying outside of the boundaries of the land management district); Navajo and Hopi Indian Relocation Amendments Act of 1980, Pub. L. No. 96-305, 94 Stat. 929 (providing for the relocation of Hopi and Navajo tribal members living on land partitioned to the other tribe).

147. *Attakai*, 746 F. Supp. at 1399.

148. *Id.* at 1398.

Arizona SHPO.[149] The court found that no consultations of any manner were performed.[150] The defendants argued that the consultations are required to determine the need for a survey, and since they performed surveys, they were in compliance.[151] The court disagreed: "Without consultation with the SHPO *or reference to other available information*, the Agency Official has no reasonable basis under the regulations to determine what additional investigation aside from a survey may be warranted."[152]

Although the court held that the regulations "clearly require consultation with the SHPO," the language "or reference to other available information" seems to open the possibility of side-stepping this requirement.[153] Nevertheless, the court ruled for the plaintiffs on this point, and noted that the BIA's procedures were "contrary to the letter and spirit of the regulations, which rely on consultation, particularly with the SHPO, as the principal means of protecting historical resources."[154]

Plaintiffs further contended that the section 106 process required consultation not only with the SHPO, but also with Navajo "cultural leaders," or the plaintiffs themselves.[155] Under the NHPA, "[w]hen an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement . . . ."[156] The court first found that the regulations "clearly require that an Indian Tribe participate as a consulting party and that it must concur in any agreement regarding undertakings which affect its lands."[157]

The next question the court addressed was which tribe, the plaintiff Navajos or the defendant Hopis, would suffice for that consultation.[158] The court had earlier noted that section 106 makes a distinction between consulting parties and interested persons.[159] The consulting parties include the Agency Official, the SHPO, and the Advisory Council on Historic Preservation.[160] Interested persons are those parties who are concerned with the effects of a project, and may include local governments and Indian tribes; further, "[c]ertain portions of the regulations require that interested persons be invited to be consulting parties, while the Agency Official, SHPO and Council

149. *Id.* at 1407.
150. *Id.*
151. *Id.*
152. *Id.* (emphasis supplied).
153. *Id.*
154. *Id.* at 1408.
155. *Id.*
156. *Id.* (citing 36 C.F.R. § 800.1(c)(2)(iii)).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* (citing Protection of Historic and Cultural Properties, 36 C.F.R. § 800.1(c)(1), (c)(2)).

may agree to invite others to become consulting parties where it will advance the objectives of section 106."[161] The court decided that the Navajos had a right to participate, but the decision was unclear as to what that right consisted of:

> The regulations clearly contemplate participation by Indian tribes regarding properties beyond their reservations. . . . Navajos still reside in the areas affected by these projects awaiting relocation. Under these circumstances, it is clear that input from the Navajo tribe would advance the objectives of section 106. Accordingly, I find that *the regulations require that the Navajo tribe be afforded the opportunity to participate as interested persons. This conclusion does not extend to consultation with the plaintiffs, as interested persons or otherwise*, or other individual members of the Navajo tribe. This conclusion does not infringe on the right of the Hopi tribe to develop or use its lands, as the Navajo Tribe is not entitled to be a consulting party or to concur in any agreement. It merely assures, as the regulations contemplate, that decisions regarding historic properties will be made upon reasonably adequate information.[162]

Presumably this means that the Navajos should have had the opportunity to offer information if the Hopis chose to ask them. What is mysterious about this decision is how the Hopis could have violated the Navajos' right to participate as an interested party, if that status does not even confer a consultation right. Nevertheless, the court granted the plaintiffs' motion for a preliminary injunction based on violations of NHPA.[163]

8. Mescalero Apache Tribe v. Rhoades

In *Mescalero Apache Tribe v. Rhoades*,[164] plaintiff Lewis LaPaz, a tribal member, was employed by federal Indian Health Services (IHS). Once elected to tribal council, his employer claimed a conflict of interest, and told LaPaz he had the choice of resigning from the council, or resigning from his job with IHS. LaPaz and the tribe, after having exhausted administrative remedies, sued the government for violation of the IRA[165] and the Indian Self-Determination and Education Assistance Act[166] by applying general

161. *Id.*

162. *Id.* at 1408-09 (emphasis supplied).

163. *Id.* at 1409.

164. 804 F. Supp. 251 (D.N.M. 1992). The case was first heard by the court in *Mescalaro Apache Tribe v. Rhodes*, 755 F. Supp. 1484 (D.N.M. 1990).

165. *Id.* at 253 (citing Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1994)).

166. *Id.* (citing Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n (1994)).

conflict of interest regulations to LaPaz's political activities, in violation of the APA.[167]

The court found that the case turned on whether it was appropriate to apply Health and Human Services civil service standards of conduct without involving the Tribe.[168] The court noted both the deference required of the court toward the agency's interpretation of its own regulations, as well the principle that statutes regarding Indians must be construed liberally in favor of the Indians.[169] Further, it noted both the stated policy and legislative intent of the ISDA, and the federal government's continuing commitment to the unique trust relationship, and concluded that "[a] unilateral ultimatum that directly impinges on tribal members' expression of electoral will must be preceded by meaningful consultation."[170]

The court found that although the IHS had no prior policy of consultation, the ISDA "'created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views' before the agency makes its decision."[171] The court cited *Oglala Sioux* for the proposition that failure to consult violated the federal government's trust responsibility to tribes.[172]

The court provided two options that "would constitute meaningful consultation with the Tribe, under the Self-Determination Act."[173] First, if the defendants wanted to continue to apply the same standards,

> defendants must afford tribal input, by formally soliciting the Tribe's view of the purported conflict and of the appropriateness of any proposed agency action. After the Tribe has had an opportunity to express its views, the agency shall then consider the views expressed. The agency does not have to defer to the Tribe's views, but must take them into account in coming to a decision consistent with applicable law.[174]

This alternative would require tribal input in every instance of an agency action that involved application of the disputed standards.[175] The other alternative would be to promulgate a new rule, requiring tribal input during

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167. *Id.* (citing 5 U.S.C. §§ 704-706 (1994)).
168. *Id.* at 260-61.
169. *Id.* at 261.
170. *Id.*
171. *Id.* at 261-62 (quoting Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 721 (8th Cir. 1979)).
172. *Id.* at 262 (citing *Oglala Sioux*, 603 F.2d at 721, and quoting Morton v. Ruiz, 415 U.S. 199, 236 (1974)).
173. *Id.*
174. *Id.*
175. *Id.*

the promulgation phase, but not requiring consultations upon its subsequent application.[176]

9. Wilson v. Block

Wilson v. Block[177] stands for the proposition that the AIRFA does not create a specific fiduciary relationship or the obligations imposed by such a fiduciary relationship. "AIRFA requires federal agencies to evaluate their policies and procedures . . . and to consult with Indian organizations in regard to the proposed action, but that *AIRFA does not require Native traditional religious considerations always [to] prevail to the exclusion of all else.*"[178] This underscores the problem with all consultations: it is not necessary for the government to heed Indian wishes.

10. United States v. Means

The court in *United States v. Means*[179] held that the Forest Service's failure to consult meaningfully with Indian religious leaders regarding a special use permit for the Black Hills conflicted with AIRFA, and that the denial of the permit was arbitrary and capricious.[180]

11. Pyramid Lake Paiute Tribe of Indians v. Morton

The decision in *Pyramid Lake Paiute Tribe of Indians v. Morton*,[181] discussed at greater length in Part VII.A., focused on an Interior Department decision that the court held failed to take the federal trust responsibility into adequate consideration.[182] Faced with a decision concerning how water from the Truckee River should be allocated between Indian and non-Indian interests, the DOI made what was described in testimony as a "judgment call:"[183]

> A "judgment call" was simply not legally permissible. . . .
>
> . . . [T]he Secretary was required to resolve the conflicting claims in a precise manner that would indicate the weight given each interest before him. . . . The Secretary's action is therefore doubly defective and irrational because it fails to demonstrate an

176. *Id.*

177. 708 F.2d 735, 745-47, *cert. denied*, 464 U.S. 956 (1983).

178. *Id.* (quoting Havasupai v. United States, 752 F. Supp. 1471 (1990)) (emphasis supplied).

179. 627 F. Supp. 247 (1985).

180. *Id.* at 266-69.

181. 354 F. Supp. 252 (D.C.C.) (mem.), *modified*, 360 F. Supp 669 (D.D.C 1973), *rev'd in part*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

182. *Id.* at 255-58.

183. *Id.* at 255, 256.

> adequate recognition of his fiduciary duty to the Tribe. This also is an abuse of discretion and not in accordance with the law.[184] The idea that the federal government's trust responsibility to the tribe must inform federal agency decisions may be relevant to consultation issues, in that consultations may be a bookmark for places where the trust responsibility must be taken into consideration.

B. Non-Indian Consultation Case Law

1. Washington State Department of Fisheries v. Federal Energy Regulatory Commission

The court in *Washington State Department of Fisheries v. Federal Energy Regulatory Commission*[185] dealt with a non-tribal consultation requirement, which may be informative as to the latitude of consultation claims. Washington State Department of Fisheries (the Department) sued the Federal Energy Regulatory Commission (FERC) for, inter alia, failing to consult with the Commission and other regulatory agencies, pursuant to a consultation provision in the Fish and Wildlife Act, when FERC issued hydroelectric permits for the Snohomish River Basin.[186]

The consultation issue was the only one brought on appeal.[187] The Department argued that not only did FERC fail to consult with the required parties, but also that "issuing permits on a case-by-case basis without first developing a comprehensive plan imposing uniform study guidelines, or requiring permittees to gather data useful for measuring cumulative impacts, made it impossible as a practical matter to conduct the consultations contemplated by the statute."[188] The court agreed that there was no evidence that FERC had done any consultations, but rejected the Department's argument

184. *Id.* at 256-57.

185. 801 F.2d 1516 (9th Cir. 1986). This case was heard and decided another case that involved the issuance by FERC of hydroelectric permits without consultation on the Salmon River. *See* National Wildlife Federation v. FERC, 801 F.2d 1505 (9th Cir. 1986) (holding that FERC did not justify foregoing preliminary studies and consultations before approving preliminary permits for hydroelectric power projects).

186. *Washington State Dep't of Fisheries*, 801 F.2d at 1518 (citing 16 U.S.C. § 662, which provides, in relevant part "whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted . . . or modified for any purpose whatever . . . by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency *shall first consult with* the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State . . . ." (emphasis supplied)).

187. *Id.* at 1519.

188. *Id.*

for the creation of standards to guide consultations.[189] Defendant FERC was ordered to "consider and respond to petitioner's contentions."[190]

2. Confederated Tribes and Bands of the Yakima Indian Nation v. Federal Energy Regulatory Commission

Confederated Tribes and Bands of the Yakima Indian Nation v. Federal Energy Regulatory Commission[191] is similar to *Washington State Department of Fisheries* in that FERC again disregarded a non-tribal consultation requirement, this time by relicensing a hydropower project.[192] In this case, the requirement was codified among FERC's own regulations, pertaining to exhibits the applicant must provide before licensing: "The Applicant shall prepare this exhibit on the basis of studies made after consultation and in cooperation with the U.S. Fish and Wildlife Service [among other agencies] . . . The exhibit shall include a statement on the nature and extent of Applicant's consultation and cooperation with the above agencies."[193] FERC argued that the exhibit was the type of filing requirement that an "agency may relax, modify or waive."[194] The court disagreed, reiterating the maxim that agencies must comply with their own regulations.[195] Further:

> It is not enough that the FERC gave notice of Chelan's application to the agencies and Indian tribes. The consultation obligation is an affirmative duty. Also, it is safe to say that the respective fishery agencies believed the consultation process would take place in the preparation of Exhibit S. Instead, however, FERC issued the license before the exhibit was submitted.[196]

The court concluded that consultation was the "primary means" for FERC to comply with fisheries' examination requirements, and that the failure to consult supported the court's decision to reverse and remand FERC's relicensing order.[197]

C. Case Law Holdings Summarized

Unfortunately, the small number of cases, and the fact that these cases are substantially fact-driven, means that no statistically significant conclusions can be drawn from this sample. Nevertheless, the case law at least tends to show

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189. *Id.*
190. *Id.*
191. 746 F.2d 466 (9th Cir. 1984).
192. *Id.* at 473.
193. *Id.* at 474 (citing 18 C.F.R. § 4.41 (1976)).
194. *Id.*
195. *Id.* (citing Papago Tribal Utility Auth. v. FERC, 628 F.2d 235, 242 (D.C. Cir.), *cert. denied*, 449 U.S. 1091 (1980)).
196. *Id.* at 475.
197. *Id.*

the tentative and slippery nature of consultation requirements: courts are split on whether or not they exist and split again as to whether those found have been violated or not. For reference purposes, the cases may be broken into several categories.

First, there are the cases where a federal agency's internal policy guidelines refer to consultations (*Oglala Sioux*, *Hoopa Valley*, *Lower Brule Sioux*, *Morton v. Ruiz*). Of these four cases, three courts held that the unpublished policies bound the agency to consultations (the *Hoopa Valley* court found the policy to be nonbinding).

Second, there are the cases where the complainant tribe argued that a statute required consultations (*Enola*, *Pueblo of Sandia*, *Attakai*, *Havasupai*, *Means*). Of the three complainants that argued a failure of consultations required by NHPA, two courts (*Pueblo of Sandia* and *Attakai*) found that the federal agency had failed those requirements. One of the two courts found that the requirement had been breached where it was argued that consultations failed as required by AIRFA (*Means*; the *Havasupai* court found no AIRFA consultation duty on non-Indian lands).

The *Pyramid Lake Paiute* case is salient for its holding that the federal trust responsibility requires agencies do something more than simply make a "judgment call" when dealing with Indian trust assets.

Finally, the non-Indian consultation cases show that consultation issues at least are viable in other contexts, which is important to the extent that Indian consultation requirements might need support in litigation.

V. Discussion: Agencies, Consultations, and Anti-Indian Bias

Consultations are the almost exclusive realm of federal executive agencies and bureaus, and predominantly offices of the DOI. This section introduces some of the problems to which agency decisions are susceptible with regard to Native American issues, both with reference to consultations and otherwise. I suggest that anti-Indian bias is inherent in some federal agency mechanisms and that in others, abuses are predictable.

A. Conflicts of Interest

Perhaps it is axiomatic to note that Native Americans' interests do not necessarily coincide with those of the federal government — this could be said of any group of Americans. But importantly, the federal government has a special role with respect to tribes. What is known as the federal trust relationship with tribes makes the federal government the *trustee* of all tribally held land. As a result, a divergence of interest between tribes and the federal government gives rise to what in other contexts would be a conflict of interest: the federal government must make impartial decisions regarding interests for which, as trustee, it must also be the zealous defender. That conflict can be found wherever the federal government makes a decision that affects Indian interests in combination with the interests of any branch of the federal

government, states or other third parties. Federal agencies are required on a daily basis to fulfill responsibilities corresponding to legislative, judicial, and executory functions. Those potentially conflicting roles create special problems regarding fairness where federal-tribal consultations are concerned.

An example of such a conflict is found in the facts of *Pyramid Lake Paiute Tribe v. Morton.*[198] The court in *Pyramid Lake Paiute* focused on an Interior Department decision that the court held failed to take the federal trust responsibility into adequate consideration.[199] Faced with a decision concerning how water from the Truckee River should be allocated between Indian and non-Indian interests, the DOI made what was described in testimony as a "judgment call."[200] The court called this a misconception of the legal requirements involved in the decision, and wrote:

> A "judgment call" was simply not legally permissible. The Secretary's duty was not to determine a basis for allocating water between the [Truckee-Carson Irrigation] District and the Tribe in a manner that hopefully everyone could live with for the year ahead. . . .
>
> . . . .
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> . . . [T]he Secretary was required to resolve the conflicting claims in a precise manner that would indicate the weight given each interest before him. . . . The Secretary's action is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe. This also is an abuse of discretion and not in accordance with the law.[201]

Despite the strong words concerning the Secretary's inappropriate action, the remedy to the problem — a decision made based on a better accounting of the interests taken into consideration — seems inadequate. It is tempting to read "the most exacting fiduciary standards"[202] as being equivalent to the duty a lawyer owes a client. If that were the case, well-established ethical guidelines would determine whether the lawyer could continue to represent the client when faced with a conflict of interest.[203] In a case like *Pyramid Lake Paiute*, if the Secretary had been a lawyer representing the tribal interests, it is unlikely that any court would allow the Secretary to take on the competing

198. 354 F. Supp. 252 (D.C.C.) (mem.), *modified*, 360 F. Supp 669 (D.D.C 1973), *rev'd in part*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

199. *Id.* at 256-58.

200. *Id.* at 256.

201. *Id.* at 256-57.

202. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

203. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), DR 5-105(A), (B), (B)(2) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.16(a)(1) (1983) (defining when it is an impermissible conflict for a lawyer to take a case or continue representing a client).

party as a client — and then make a decision that would bind each client without getting either client's consent!

Yet, the Supreme Court set aside this type of conflict as a non-issue, unless Congress addresses the problem. In *Nevada v. United States*,[204] which arose from the same conflict as the *Pyramid Lake Paiute* case, Justice Rehnquist resolved the apparent conflict of interest with deference to congressional choice:

> [I]t may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing other interests as well. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.[205]

The red flag in this statement seems to be the bald statement of what the government cannot do, without any reference to a constitutional limitation. There is no apparent reason why "the Government cannot follow the fastidious standards of a private fiduciary," and Rehnquist gives none.[206] On the contrary, it is perhaps exactly this standard of behavior that is demanded by the Court in *Seminole Nation v. United States*,[207] where Justice Murphy wrote,

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204. 463 U.S. 110, 127-28 (1983) (barring a water rights claim on the basis of res judicata, and addressing the issue of the conflict of interest between branches of the federal government with regard to representing Indian interests).

205. *Id.*

206. *Nevada* need not be read in quite such alarmist terms, however:

> As bad as *Nevada* is, we should be careful to give it its narrowest reading, especially since later cases, like *Mitchell II* [United States v. Mitchell, 463 U.S. 206 (1983)] have endorsed that reading. *Nevada* at its narrowest is a res judicata case and involves the situation in which Congress has explicitly authorized the Secretary of the Interior to undertake duties that would be a conflict otherwise — [that is, to] represent tribes and represent water users. . . . When the Bureau [of Indian Affairs] is told to manage trust funds, for example, the highest standard is still required.

Letter from Nell Jessup Newton, Dean, University of Denver Law School, to the author (Oct. 25, 1999) (on file with the author).

207. 316 U.S. 286 (1942).

> [T]his court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[208]

More recently, in *United States v. Mitchell*,[209] an opinion issued several years after *Nevada*, the Court held that:

> a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees),and a trust corpus (Indian timber, lands, and funds).[210]

From this latter decision it seems clear that Rehnquist's dismissal of the problem of conflicting interests does not go so far as to eviscerate the trust relationship. But this makes sense: Rehnquist approves of the trust relationship, at least to the extent that it serves to *limit* Indian power. This becomes clear when Rehnquist's most obvious alternative is examined.

For the government to extract itself from the conflict of interest, it would have to change the nature of its relationship with tribes. This is why it is "simply unrealistic" to demand that the government abide by ethical guidelines that are *de riguer* in the private sector: disposing of the trust system introduces questions of what such sovereignty would look like without the paternal federal government as a check on tribal sovereignty. Rehnquist fails to explain this because, although he does not shy away from judicial activism, he does not want to upset a system that gives lip service to tribal sovereignty while keeping tribes under tight federal control. It may be that the Supreme Court's attachment to the trust system of federal tribal management is related to its apparent distaste for tribal self-governance, however, this is only one small part of federal *and tribal* dedication to the trust system. Further exploration of problems with the trust system is beyond the scope of this article.[211] However, it is clear that the

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208. *Id.* at 296-97.

209. 463 U.S. 206 (1983).

210. *Id.* at 225. The court also noted that the trust relationship exists "'though nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection.'" *Id.* (quoting Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183 (1980)).

211. Federal obligations and their relation to consultation issues are discussed further,

conflicts of interest that tribes endure are a side effect of that system, and political realities suggest that this system will not soon change.

Nevada recognizes the long-standing (and arguably racist) exception to a trustee's duty when the trustee is the government and the "beneficiaries" are tribes. Rehnquist does little more than define what a conflict of interest is — without bothering to examine why such conflicts pose ethical (or bureaucratic) challenges — and then dismisses the issue so long as Congress sees fit to allow these conflicts to continue. Yet, the exception is in fact a misreading of Supreme Court precedent and congressional actions which, as the canon of construction goes, err in favor of tribes.

The *Nevada* decision has a subtle but extensive reach: Rehnquist eliminates a key benefit of the trust relationship for tribes, that being the service of a dedicated and ethically responsible trustee, apparently without disturbing the "trust" relationship's other aspects, many of which are not very desirable for tribes.[212] Further, the decision effectively bookends any further judicial effort to eliminate such a conflict. Therefore, federal agencies will likely continue to have inter- and intra-agency conflicts of interest that there remains no clear judicial means to resolve, and the losers, no matter what the issue being decided, invariably will be tribes.

B. Consultations as a Tool of Bureaucratic Inertia

Consultations may be used by federal bureaucracies to hinder progress by their very existence. One long-time tribal official reported to a Senate committee:

> We may have reached a point at which the Bureau [of Indian Affairs] has discovered that its best defense is the very thing it has for so long feared — tribal consultation. The Bureau is now able to use the apparent conflicts among the views of different tribes as an irrefutable reason for inaction.[213]

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however, at *infra* Part VI.

212. Aspects which, on the whole, are not beneficial: the "guardian . . . ward" relationship established by Marshall's *Cherokee Nation v. Georgia* cannot in this day be seen as anything but a harmful paradigm on which to base a relationship between nations.

213. *Testimony of Phillip Martin, supra* note 1. Martin also stated, glumly:

> I need to preface my remarks by stating that, with over 35 years' experience in tribal government relations with the Bureau, I am not hopeful about the possibility of truly reforming it. Over the years I have participated in many exercises . . . in which tribes have told the Bureau how to reorganize itself; and all have resulted in frustration and a cosmetically-changed Bureau. As time has gone on, the BIA has got smarter about defending itself.

Id.

Another observer reported to the same committee, "the Bureau of Indian Affairs has no consistent philosophy regarding the obligation of consultation and the provision of information to Indian tribes and people."[214]

An especially notable complaint comes from a tribe involved in an ongoing effort to establish a reservation in the Death Valley area of California. The Timbisha-Shoshone tribe claims that several hundred thousand acres in and around what is now Death Valley National Monument constituted their aboriginal homelands, but since 1933 the tribe has been relegated to a forty-acre plot in lieu of a permanent reservation.[215] In 1994, the California Desert Protection Act included a provision that instructed the Secretary of the Interior to identify "lands suitable for a reservation," with specific instruction that the Secretary work "in consultation with the Tribe."[216] In a press release, Acting Tribal Chairperson and tribal elder Pauline Esteves made these comments about the consultations that resulted:

> It was one long eleven-month "charade." Those pasty-faced bureaucrats knew from the beginning that they would not restore ancestral lands to us. They sat there through presentation after presentation by the Tribe, fooling us into believing that there could be a sincere dialogue between the federal government and its constituents. We spent over a hundred thousand dollars, hiring the best anthropologists, historians, lawyers and economic consultants, gathering data, establishing the "suitability" of segments of our traditional homelands proposed to be taken into trust. We made countless proposals. We got nothing of substance back, no effort on their part to even meet us part way. Instead of dialogue and a respectful exchange of ideas, we were stonewalled. Instead of a commitment to right an old wrong, to fulfill the government's trust responsibility to this nation's first people, this Democratic Administration has used its enormous power to clobber us.[217]

While the scope of these problems is debatable, the frustrations could not be more clear. Further, the charges leveled against the BIA can be read in the context of the agency's widely known reputation for exemplifying the worst stereotypes of bureaucratic inertia. Given what has already been noted about the uncertain nature of consultation requirements, it is not surprising to find evidence that they may be twisted to fit the uses of government bureaucrats.

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214. *Prepared Statement of Carey N. Vicenti, Chief Judge, Jucarilla Apache Tribe, Former Special Assistant for Tribal Justice, Support Office of Tribal Services, Bureau of Indian Affairs, Before the Senate Committee on Indian Affairs Oversight Hearing on the Implementation of the Indian Tribal Justice Act, P.L. 103-176*, FED. NEWS. SERV., Aug. 2, 1995, *available in* LEXIS, News Library, Arcnws File.

215. *Id.*

216. *Id.* (citing California Desert Protection Act).

217. *Id.*

There is, however, testimony to the effect that these problems are avoidable: "[E]arly consultation with the public and affected States and Tribes . . . can help save money by identifying important issues and avoiding unnecessary or insufficient analyses. We anticipate cost savings from these initiatives of at least $9.0 million over the next five years."[218]

Consultations may lead to enlightened policy choices, but perhaps this result occurs only when consultations are overseen by those already aware of — and interested in pursuing — their most laudatory exercise. The fate of Indian interests should not pivot on the random chance that consultations will be overseen by enlightened civil servants.

C. Failure to Account for Erroneous Decision-Making

An agency that carefully, and in good faith, considers every decision it makes is not necessarily equipped, by that effort alone, to make the best or even the right decisions. However, a certain amount of human error in decision-making is acceptable. Additionally, there is no reliable mechanism available to measure the wisdom of a decision, and even apparently wise decisions may sometimes render the least favorable results. Nevertheless, we take exception to egregious errors, and have codified remedies.

But what if we have no reliable mechanism available to alarm us to egregious errors? That is, what if we make egregious errors, consistently over time, yet we fail to appreciate the errors as such? This situation could arise from a system that has no checks and balances or self-regulating mechanisms. Or, it could result from a fundamental lack of understanding of the decision being made; that is, one option is not fully appreciated by the decision maker and is thus dismissed prematurely in favor of the more familiar option. I briefly discuss both issues, and address this latter problem as a question of "incommensurability."

1. Absence of Adequate Checks on Administrative Decision-Making

a) The Remote Possibility of Judicial Review

One noted administrative law commentator has written, "[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."[219] That "necessary condition" is available in only the most limited sense with regard to the review of decisions made in consultation with tribes.

As with any administrative action, to challenge a federal agency decision with regard to consultation, the challenger must first exhaust all administrative remedies. Once that process is complete, the unsatisfied challenger must either

218. *Testimony of Robert Nordhaus, supra* note 5.

219. Christopher C. Taintor, *Federal Agency Nonacquiescence: Defining and Enforcing Constitutional Limitations on Bad Faith Agency Adjudication*, 38 ME. L. REV. 185, 185 (1986).

(1) find procedural grounds on which to challenge, or (2) show the decision was so egregious as to be an abuse of the administration's discretion.

Procedural grounds include the failure to consult,[220] the agency making a decision before the consultation is scheduled,[221] or failure to make a good faith effort to evaluate a site for its value as a cultural resource.[222] However, federal agencies that are careful to follow the prescribed procedures may still "railroad through" decisions, and leave no procedural hook on which to hang an appeal.

If an agency decision completely disregards the facts, has no rational basis, or the decision incorporates authorization to act beyond the power of the issuing agency to grant, it may be shown to violate the standards set by the APA.[223] Under the APA, if a decision can be shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,"[224] then the decision may be overturned on review.

There are several problems with this system. First, exhausting administrative remedies can be a long, expensive process that may be incompatible with the flow of indigenous lifeways.[225] Second, procedural errors may be hard to find, and the remedies do not necessarily include a change in the decision. Third, only under the "arbitrary or capricious" standard will the *merits* of the case be the focus of the hearing by a federal judge.[226] However, even then, this is a relatively high hurdle, especially in view of the fact that consultations are nonbinding, for advisory purposes only. These factors may mean that judicial review remains a remote possibility in most cases, which undermines administrative legitimacy to the extent of that remoteness.

b) Judicial Review and the Federal Trust Responsibility

As noted above, regardless of consultations, federal agencies are always responsible to abide by the federal trust responsibility to Indians. The trust responsibility creates in the federal government a heightened responsibility to Indian nations with respect to federal decisions that affect Indian trust assets. However, it is unclear to what extent the trust relationship limits federal discretion, or by what mechanism adherence to that responsibility is enforced. One commentator notes,

> [T]he duty of protection is admittedly complex in the context of agency implementation of general environmental or land and resource management programs that have an impact on tribal property rights. Full adherence to the trust responsibility is vitally

220. *See, e.g.*, Attakai v. United States, 746 F. Supp. 1395, 1399 (D. Ariz. 1990).
221. *See, e.g.*, Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979).
222. *See, e.g.*, Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).
223. 5 U.S.C. §§ 704-706 (1994).
224. *Id.* § 706.
225. *See also infra* Part V.C.2 (discussion of incommensurability).
226. This topic is discussed further in Part V.C.1.b.

> important in this context, however, as a tribe's way of life can be wholly destroyed by agency actions that impair the full use and enjoyment of tribal property or treaty rights. . . . water rights, fishing and hunting rights, and gathering rights are all tribal property rights to which the federal government owes a duty of protection.[227]

Yet, Indian complainants have no special means to challenge agency decisions. Once an agency has made a decision, appeals may be made through the agency's internal appeals process. Should that appeal fail to obtain favorable results, the only way for agency decisions to be reviewed by a federal court is under the statutory guidelines of the APA, which require that a decision be "arbitrary, capricious, or an abuse of discretion" before a court will agree to reverse the decision.[228]

To illustrate how this plays out, consider how the Bureau of Reclamation sums up its own review process from decisions made in accord with their (internal, allegedly supposedly nonbinding) consultation policy:

> Following the decision, the [Indian] community would have the same channels of appeal open to other groups who disagree with conclusions reached by an administrative agency: they can appeal informally to the agency to reconsider its conclusions; or they can appeal formally if they feel the agency has acted in an arbitrary and capricious manner or that the agency failed to follow its own procedures.[229]

That is, although Native Americans warrant consultation, they do not warrant any further judicial review than that which is available to any other member of the community who might want to challenge the decision. To put this in perspective, remember that consultations are triggered when the decisions "impact the value, use or enjoyment of" Indian *trust assets*.[230]

It is important in this context to note that the Fifth Amendment's Takings Clause *does not apply* to takings of Indian trust lands for federal use, for the

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227. Wood, *supra* note 81, at 744.

228. *See* 5 U.S.C. § 706(2)(A) (1994); *see, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 42 (1983) ("[U]nder this standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. . . . The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made'") (citations omitted).

229. INTERIOR DEP'T PROCEDURES MANUAL, *supra* note 87, at 13 (containing Bureau of Reclamation Indian Trust Asset Policy and NEPA Implementing Procedures).

230. *Id.* at 9.

simple reason that trust lands do not belong to any citizen, but rather to the sovereign — thus no "taking" has occurred.

Now imagine a non-Indian American homeowner's response if they were to hear that the federal government had decided to turn their backyard into a strip mine, that they have no takings claim, and that if the want to have the decision reviewed, they must meet the "arbitrary, capricious" standard.

In light of the federal trust responsibility, the APA's arbitrary and capricious standard is far too high a standard to meet in order to be able to challenge federal action. By dint of a judicial mechanism supposedly meant to protect Indian interests, Indian nations have to meet a standard of review that we would consider preposterously high for any other land owner. This standard of review is incompatible with the trust responsibility: decisions regarding Indian trust assets should be subject to an especially low standard of review in light of the strict fiduciary duty that they command. Certainly "arbitrary, capricious, or an abuse of discretion" is a standard that neglects to correct many behaviors that would be considered a breach of a strict fiduciary duty.

2. Incommensurability

In his acclaimed book *The Structure of Scientific Revolutions*,[231] Thomas Kuhn argued that new scientific paradigms replace old ones by, among other things, winning more arguments, making better predictions and describing the state of the world more accurately.[232] However, in the period of crisis when two paradigms are jostling for position, neither having yet been shown to be clearly superior to the other, Kuhn says that the advocates of either position cannot understand each other, because their understandings are "incommensurable."[233] The advocate of each paradigm will reject the other's arguments wholesale, because, judged by the understandings and standards of the advocate's own paradigm, the other's arguments seem absurd, or fail some test of the dominant paradigm.[234] That is, although the advocates of each paradigm may use the same terminology, each uses it in a way that is so completely incompatible with the others' understanding, that no *prima facie* judgment can be made about whether the ideas of one advocate are "better than" the ideas of the other.[235]

This may be a useful context in which to understand the "competition" between western culture and Native American culture. Whatever progress the United States may claim toward the beneficent treatment of Native Americans, fundamentally theirs is a cultural paradigm that we do not understand — automatically, easily, or even with great effort. Kuhn might argue that because

231. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).
232. *Id.* at 144.
233. *Id.* at 148.
234. *Id.*
235. *Id.*

of our immersion in the dominant paradigm, we are *unable* to understand this divergent paradigm without working to accept it on its *own* terms. That is, we will find the practices, beliefs and terminology of the competing cultural paradigm absurd when understood in reference to the dominant paradigm. Their ideas are incommensurable with ours.[236]

Federal agencies have no established means of handling incommensurabilities, and there is no judicial means to redress errors of judgment that issue from such conflict.

Incommensurability plays a role in decisions that pit against each other interests whose values cannot be compared. For instance, the value of a coal mine, no matter what its expected dollar output, cannot in any meaningful way be compared against the same area's value as a sacred site. Yet, federal agencies must make such decisions, and readily do so, using the consultation process as the lever to justify their final decision.

Professor Robert A. Williams, in his commentary on the Mt. Graham telescope controversy, provides an example of how competing paradigms may clash.[237] The controversy involved the proposed construction of astronomy telescopes on the peaks of Mt. Graham in southeastern Arizona.[238] Pitted against the construction were an array of environmentalists and members of local Indian tribes, who publicized the otherwise almost certain extinction of the Mt. Graham Red Squirrel — a federally listed endangered species — as one reason not to complete the project. Williams writes,

> As I learned from the scientists I got to know on the project, conducting pure research in astronomical physics comes as close to a religious calling as secular humanism can provide its technological and scientific adherents. . . . It was a value, as I quickly came to appreciate, so venerated by the institutional culture of a major research university that to question the wisdom of pursuing pure scientific research anywhere, even on a mountaintop sustaining several diverse ecosystems and endangered species, is regarded as near-blasphemy by the people who really matter at such places. . . . Those environmentalists who had so vigorously opposed their occupation of the mountain were acting as irrational fanatics in their fetishistic idolatry of an inconsequential subspecies of rodent. In the mythology generated by the Mt. Graham controversy, it would be only fitting that when the large binocular telescope crusaders finally triumphed over the tree-hugging New Age neo-

236. This distinction between "us" and "them" works regardless of which side of the cultural gap you find yourself on.

237. Robert A. Williams, *Essays on Environmental Justice: Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1994).

238. *Id.* at 1134.

> luddites, the victory would be commemorated by the exquisite symbology represented by the mythical story of the destruction of a Red Squirrel piñata.[239]

Williams points out not only that the competing paradigms that would decide the fate of the mountain — and its endangered rodent population — did not understanding each other, but that the decision-making system was inherently biased toward the interests of one paradigm over the other:

> Unlike the mystically-revered values of free speech, religious freedom, or bodily integrity, which are protected by the courts from the majoritarian, log-rolling political processes of day-to-day democratic government, the system of values which has colonized our environmental law concedes the last word on how to protect a place like Mt. Graham to the political process. . . . [T]he Mt. Graham Red Squirrel never had a chance of surviving unmolested in its mountain habitat. Nor could it even hope to carry the load of assisting the public and policymakers in imagining what makes preserving Mt. Graham important from our perspective as human beings. *Given the terms of the debate and the symbols available* for waging the war for Mt. Graham, the mountain was destined for colonization by the large binocular telescope crusaders.[240]

The "terms of the debate and the symbols available" were those of the dominant paradigm, which the environmentalists' competing paradigm could not displace in the course of a single conflict. The momentum of the environmental movement suggests, at least, that more people understand the rough outline of that competing paradigm. However, that vague understanding is a far cry from a serious effort to examine and remedy cultural bias as it affects the way the United States makes decisions in its courtrooms and administrative bodies.

The Mt. Graham controversy also involved Native American interest in the sacred value of Mt. Graham, which members of the San Carlos Apache described as the home of the "elemental forces of the universe" represented by spiritual beings called the "Gaans."[241] The Gaans would reportedly be upset should the mountain be disturbed, and in response the Gaans would wreak havoc on the world. Williams writes:

> [O]ur environmental law subjects these Indian visions of environmental justice to a political process, which presents these myths and narratives in a simplified and pejorative way. . . .
>
> . . . .

239. *Id.* at 1138.
240. *Id.* at 1148-49 (emphasis supplied).
241. *Id.* at 1150-51.

> . . . It dismisses these visions through various mechanisms which have institutionalized environmental racism against Indian peoples at the deepest levels of our society.
>
> . . . .
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> . . . [T]he process by which Indian peoples, be they Apaches or members of other tribes, were supposed to voice their visions on their connections to Mt. Graham had been, in effect, colonized by a system of values antithetical to achieving environmental justice for Indian peoples.[242]

The antithetical system of values seems to be in essence a competing paradigm, which, viewed in light of the dominant paradigm, seems absurd, or at least couched in a context that subscribers of to the competing paradigm would consider "pejorative."

Legal commentator Richard Warner defines "incommensurability" thus: "Reasons are incommensurable when (and only when) they are not comparable as better, worse, or equally good."[243] Warner argues that "rational choice theory makes the wrong predictions where incommensurability is involved."[244] For instance, should he be offered an ever increasing amount of money for the sale of his daughter, a cost-benefit analysis might predict that at some point, the value the money would outweigh the value of the his love for his daughter. However, the prediction is wrong, in the sense that it is made on the basis of a balancing of values that, Warner says, never happens: he *excludes* money as a reason, and so no cost-benefit analysis takes place.

Federal decision makers, immersed in the dominant paradigm, are not equipped to make decisions that give the appropriate consideration to Native American interests. For instance, a coal mine, which can produce a commodity the value of which can be easily measured, and moreover, easily *appreciated* by the decision maker, will always be chosen over preservation of the sacred site, the value of which is either (1) erroneously and severely undervalued by the dominant capitalist paradigm, or (2) not appreciated as having inherent value by the dominant Judeo-Christian paradigm.[245] Either way, the sacred site is likely to be sacrificed on the basis of a balancing test the outcome of which was predetermined by the perceptual parameters of the decision maker, not the inherent value of the choices compared. That is, the balancing test is between

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242. *Id.* at 1135, 1157, 1158-59.

243. Richard Warner, *Impossible Comparisons and Rational Choice Theory*, 68 S. CAL. L. REV. 1705, 1706 (1995).

244. *Id.* at 1721.

245. For an excellent discussion of the Christian concept of man's project being a struggle to conquer and thereby impart value to the wasteland, and the implications of that paradigm for race relations and environmental degradation, see Williamson B.C. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, 63 U. COLO. L. REV. 849 (1992).

incommensurable ideas, competing paradigms, of what the world, or the particular site, is *worth*.

At this juncture, it is informative to review a relevant section of President Clinton's directive of April 29, 1994: "As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty." However well-meaning, asking federal agencies to work in a "knowledgeable, sensitive manner respectful of tribal sovereignty" falls far short of an earnest attempt to grapple with incommensurable terms. "Knowledgeable" and "sensitive" do not establish justifiable standards; rather, they are normative terms that will ultimately be decided politically at best, and ignored at worst.

D. Masking the Federal Trust Responsibility

When an agency implements a procedural consultation policy, the effect may be that the agency neglects its trust responsibility while giving the appearance of full compliance. One commentator notes,

> Though most [agencies] explicitly recognize the duty of protection stemming from the trust responsibility, many call for merely procedural steps to safeguard tribal interests by requiring, for example, consultation with tribal governments. . . . Such directives fail to reflect the full trust responsibility, the essence of which incorporates a substantive obligation on the party of every agency to fully protect Indian property interests. Interpreting the trust obligation as merely a procedural mandate makes it nearly inevitable that the implementation of programs will benefit the majority society at the expense of the tribes.[246]

The author recommends some sort of "prioritization scheme" to check this problem; "[f]ailure to do so will very likely result in the incremental loss of Indian rights behind a curtain of administrative discretion."[247] Tribes may claim a breach of the trust relationship whenever it occurs, consultations or no. There is serious a question, however, as to the practicality of such a solution, given the innumerable federal agency actions in a year, and the expense of litigating even one.

The trust responsibility should be integral to federal decision-making, not an afterthought appended to the decision when and if a concerned tribe has the resources to take the government to court.

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246. Wood, *supra* note 81, at 761 (citations omitted).
247. *Id.*

VI. Proposal: Consultations as Adjudications

> *We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or voting.*
>
> — Lon Fuller[248]

I propose that consultations, understood in tandem with the federal agency decision it predicates, function as a form of adjudication. This proposal allows an examination of consultations within a useful analytical structure, using references to standards applicable to a conceptually familiar system. This comparison may also facilitate a discussion about how this form of adjudication could be improved upon.

A. Consultations and Adjudications Compared: an Illustration

A comparison of consultations and adjudications shows a fit between the elements of each. Both have parties with adverse interests, both are resolved by a (nominally) neutral decision maker, and both can substantially effect the use of Indian trust assets. To illustrate this comparison, imagine a hypothetical conflict that requires a decision regarding the use of Bureau of Land Manipulation (BLM) land. The case involves an Indian nation, that has statutory claims to aboriginal homelands, and a mining company, that owns the mineral rights to the area.[249] The Indian claim is based on a federal statute that requires the BLM to set aside a reservation area for the tribe on the tribe's "aboriginal territory and sacred sites." The mining claim is based on a mineral exploration permits granted by the BLM, and the mining company's investment-backed expectation that a mineral lease will be granted if requested. The tribe can demonstrate that if the mining proceeds, its aboriginal territory and sacred sites will be destroyed, and it will be impossible to effectuate the federal statute. The mining company can show that if the mining does not proceed, a multi-million-dollar investment will be lost, and the BLM will fail its congressional mandate to maximize opportunities for logging and mining.

First, suppose that this case goes to court. The suit might arise in a number of different forms, with either party attempting to enjoin one action by the BLM or the other. Importantly, the BLM could be a defendant; for instance, the Indian nation could name the BLM as a defendant should BLM grant the mineral lease. In whatever manner the case arises, the adjudication creates a familiar triangular relationship between two adverse parties and a neutral decision maker — in this case a federal judge. Both parties have an equal footing before the court, and the judge is unlikely to be affected by many of the

248. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 367 (1978).

249. This hypothetical is based loosely on an actual conflict, involving a mining company and the Timbisha-Shoshone tribe. Some facts have been changed for the sake of simplicity.

vagaries and biases that may plague agencies (although the incommensurability problem is likely to remain. And this is not to suggest that any given judge is without biases and prejudices.).

Next, suppose instead that the conflict is handled by the BLM acting alone as a federal decision maker. Several changes are immediately noticeable. First, the BLM may or may not be a neutral decision maker, for any or all of the reasons discussed above.[250] Second, and in a related vein, while the various interests are still adverse, the identity of the named parties may change because of the BLM's role as decision maker. Because the BLM is a key player no matter what the specific facts are, the BLM is likely to be more naturally aligned with the agenda of one party over the other. It is easy to see which party is likely to prevail: the mining company probably deals with the BLM at various other sites, and undoubtedly exerts its presence through political channels, while the Indian nation, which enjoys less political and financial capital, is easily relegated to the minor role of "consultee" with no significant political fallout or friction.

Third, the procedure in making the decision changes. The BLM has largely unfettered discretion to choose among the options presented, given that the conflicting congressional mandates arguably cancel each other out of the equation. Perhaps the Indian nation will be able to challenge the disregard of the federal statue that would set aside reservation land, but that assumes they have the resources and resolve to engage an expensive legal battle. Further, so long as BLM agents dutifully consult with the Indian nation, and records the reasoning used to reach its conclusion, it is unlikely that the decision could be challenged on the "arbitrary, capricious" standard of the APA. Instead of suing to enjoin a BLM action, the Indian nation must now plead its case to BLM agents, who are not required to incorporate Indian suggestions in their final decision.

In this quick sketch, it is perhaps easier to see the differences than the commonalties between an adjudication and a consultation paired with a federal agency decision. It is also difficult to fail to observe the many potential sources for injustices with consultations. However, in both procedural situations, the adverse interests remain; it is the shift in decision makers and the consequent change in procedure that so dramatically changes the texture of the conflict. In the next section, I provide a structure to better analyze the elements of an adjudication, as a means to further clarify the comparison.

B. Fuller's Optimal Adjudications and Consultations

Commentator Lon Fuller's article *The Forms and Limits of Adjudication*[251] provides a workable definition of adjudication, which deals with "adjudication

250. *See supra* Part V.

251. Fuller, *supra* note 248.

in the very broadest sense." [252] Fuller defines adjudication, and then addresses the limits of adjudication — "what kinds of tasks can properly be assigned to courts and other adjudicative agencies?" — and its forms — "[w]hat are the permissible variations in the forms of adjudication?"[253]

Fuller begins with an effort to define "true adjudication," as perhaps it never exists, as a means of creating a standard by which to compare various attempts to create adjudicative processes.[254] He proposes that:

> the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself. Thus, participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he is insane, has been bribed, or is hopelessly prejudiced.[255]

By this description, then, adjudication has two elements: (1) the conferral on the affected party of a right to participate in the decision being made, and (2) presentation by the affected party of reasoned arguments designed to persuade the decision maker.

1. What Rights are Conferred by Consultation Requirements?

The crux of the consultation problem may be wrapped-up in the search for an answer to the first element of Fuller's description of adjudications: what rights, if any, are conferred, and on what party, where consultation requirements exist? This is a different version of the same question broached earlier in the section discussing the "meaning" or consultations.[256] As noted previously,[257] courts have recognized the violation of consultation rights as a redressable injury, both in cases where the rights were clearly drawn by statute, and where the rights were derived from supposedly unenforceable internal agency policies.

The few statutes that create consultation requirements leave the courts to decide what impact the requirements may have. In *Pueblo of Sandia*,[258] the court held that a statutorily created consultation requirement demanded something more than a consultation rendered meaningless by the ignorance of

252. *Id.* at 353.
253. *Id.* at 354.
254. *Id.* at 357.
255. *Id.* at 364.
256. *See supra* Part III.
257. *See supra* Part IV.C.
258. *See supra* Part IV.A.6.

the Indian interlocutor. If what makes consultations meaningful is that the decision maker gains by having consulted an informed interlocutor, then it seems to follow that a federal agent is *not allowed* to completely ignore the input of the informed interlocutor. To completely ignore the information provided would put the agent in roughly the same place as he would have been in had he (knowingly) consulted with an uninformed interlocutor, and that is a result the court prohibits.

Agency policies include clauses that deny the creation of any rights, but the effectiveness of these disclaimers may be a litigable issue.[259] Finally, there has been an explosion in the number of federal regulations that include consultation requirements.[260] While Indian nations may have more success enforcing the right to have these consultations, it remains — as always — an open question what impact these consultations will have on the decision maker.

2. "Reasoned Arguments for a Decision in His Favor . . . ."

With regard to the second element, consultations involve whatever presentation to the federal agency the tribe calculates will benefit its interests, and that certainly may include "proofs and reasoned argument." Whenever possible, tribes argue that a project infringes interests protected by statute, treaty or long-standing custom. However, there may be a problem with "reasoned argument" insofar as the other party to the consultation — the decision-making agency — may be unable to consider Indian advice fairly and evenhandedly. That is, the "participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he . . . has been bribed, or is hopelessly prejudiced." It has already been discussed how agencies may be subject to bias that is objectionable in any context, and that would be fatal to proper adjudications.

3. Less than Optimal Adjudications

In light of the problems with federal agency administration of consultations, there are significant problems that correlate with each of Fuller's two requisites for quality adjudications. First, it is not clear that consultation requirements

259. *See* INTERIOR DEP'T PROCEDURES MANUAL, *supra* note 87. The Interior Secretary's Order No. 3175, which ordered the creation of consultation policies by each Interior Department agency, includes the following disclaimer: "This Order is for internal management guidance only, and shall not be construed to grant or vest any right to any party in respect to any Federal action not otherwise granted or vested by existing law or regulations." *Id.* at app. However, it goes on to provide, "Bureaus and offices are required to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect, the appropriate office of the Bureau of Indian Affairs, and the Office of the Solicitor (for legal assistance) if their evaluation reveals any impacts on Indian trust resources." *Id.* There would seem to be a colorable claim that *somebody* must have a legal right to enforce such a requirement, and indeed, the *Oglala Sioux* and *Hoopa Valley* courts disagreed on the resolution of an almost identical issue.

260. *See supra* note 1.

always, in most cases, or even in a sizable minority of cases, create an enforceable right in the Indian parties to participate. Second, assuming Indian parties do participate, it is perhaps even less clear that there is a bona fide opportunity to present arguments that stand a chance of persuading the decision maker. Federal agency decision makers may be, in Fuller's words, "hopelessly prejudiced."

So it would seem that consultations fail to meet the requirements for either of the two prongs of Fuller's definition of a "true" adjudication. This does not necessarily show that the consultation process is not a species of adjudicative proceeding. Rather, if Fuller's definition is an expression of the *optimal* expression of adjudication, then we can conclude that consultations are decidedly not optimal. Nevertheless, it remains the case that where consultations are required, they are a procedural prelude to a decision in which one party — be it a federal agency or a private interest seeking federal agency approval — seeks to engage in some project that may be adverse to Indian interests or trust assets. So, the equation with adjudications makes sense intuitively, as a contest between adverse parties that is resolved by a decision maker. Moreover, consultations do provide some right to participate in a decision, however attenuated and unenforceable those rights, and however compromised the decision maker.

As Fuller notes of adjudications, "Whatever heightens the significance of this participation lifts adjudication toward its optimum expression." So too with consultations. The question then becomes, "whatever, indeed, will lift consultations toward its optimum expression." The *Pueblo of Sandia* case suggests how courts might shape consultations in the interest of fairness. Ultimately, however, it seems legislative action would be required to make the substantial changes necessary to overhaul a system that is simply inadequate for the task required of it.

VII. Commentary

Given the problems outlined here, and given the ever-present fact that consultation rights where they do exist ultimately create no substantive duty on the part of the agency, it is difficult to avoid the conclusion that "consultation" is the latest federal codeword for lip service. But the evidence suggests that they amount to something worse.

By mimicking substantive participation, consultations have the disquieting effect of masking larger problems with the manner in which the United States government deals with Indian nations. Consultation requirements bookmark places where federal decision-making infringes on Indian trust assets, and at present that infringement occurs with inadequate hearing or review. Consultations undermine, demean and displace a thorough commitment to the federal trust responsibility, which itself is an archaic and inadequate protection for Indian interests.

Consultations subject Indian interests to conflicts of interest within federal agencies, workaday political log-rolling, and may be the source of bureaucratic inertia. Unsurprisingly, perhaps, the evidence suggests that few consultation policies have been formulated in consultation with Indians. For all these drawbacks, the big payoff that consultations provide is the meager opportunity for Native Americans to express their opinions and desires — with no guarantee that their input will be fully considered or even respected.

The process of government-to-government communication suggested by current federal Indian policy is a laudatory goal. However, an ill-defined consultation policy is no substitute for increased recognition of tribal sovereignty, or substantive federal commitments to defend tribal interests. While consultations may be inadequate to provide native nations the voice they deserve, it is staggering to consider the many decades that Indians were not even allowed this much say in the policies that so intimately affect their lives. Consultation requirements are seemingly part remedy for and part symptom of these years of neglect. Congress must recognize that mere consultations are not enough by way of remedy, and that problems with consultations evidence a much broader malaise that must be addressed.

Nevertheless, the recent popularity of consultation requirements suggests they may be here for some time. If so, one course of progress — the legalistic course — would be to begin the process of raising consultations to their optimal expression as a legal device. I suggest that such expression would share the same characteristics as optimal adjudications.

The more drastic, and perhaps more difficult, course would be to recognize "consultations" for the dangerous disservice to Native American interests that they are, and root out this spurious procedure wherever it is found. This would force a hard look at what rights and responsibilities Congress meant to give to tribal nations in the first place, and what corresponding rights Congress is willing to cede. This option lands the discussion squarely in the realm of political maneuvering, which is where perhaps all Indian issues have historically been decided, so often for the worse.

However, whatever features the resolution of this problem may include, it would seem that the best way to determine the future course of federal-tribal relations must surely be to formulate the solutions in *partnership* with Indian nations.