Matching Actions to Words: The Promotion of Tribal Sovereignty Through Negotiated Rulemaking

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MATCHING ACTIONS TO WORDS: THE PROMOTION OF TRIBAL

SOVEREIGNTY AND CONSENT THROUGH NEGOTIATED RULEMAKING

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Introduction

That governments derive “their just powers from the consent of the governed” is a self-evident truth in the Declaration of Independence and a fundamental principle of the Constitution.\(^1\) However, Indian people did not consent to the Constitution’s establishment, and their relationships with the federal government and state governments are unique.\(^2\)

Beginning in the pre-Revolutionary War eras of exploration and colonization, and continuing on with the United States government, Indian tribes have been treated as sovereign nations.\(^3\) The power to have dealings with Indian tribes was placed with the federal government,\(^4\) and the Supreme Court delineated the status of Indian tribes as “domestic dependent nations,” with inherent sovereignty rights.\(^5\)

In 1970, President Nixon announced a shift in federal Indian policy to promote Indian nations’ inherent sovereignty and self-determination.\(^6\) President Clinton built upon this policy to “create jobs, raise incomes, and develop capital for new
businesses” for Indian tribes. Indian gaming is important to Indian self-sufficiency.

To regulate the booming Indian gaming industry, Congress created the National Indian Gaming Commission (NIGC) under the Indian Gaming Regulatory Act (IGRA) in 1988. On May 25, 2006, the NIGC proposed a new definition concerning bingo games and new classification standards for Class II games. The proposed rules likely will require tribes to eliminate their Class II games or enter tribal-state negotiations to conduct Class III games, since no existing Class II machine meets the proposed regulation changes.

The process of proposing these rules included a government-to-government tribal consultation policy. However, the effectiveness of these procedures in carrying out the federal policy of tribal self-determination and sovereignty is not what the NIGC purports, as evidenced by seemingly unanimous tribal opposition. Although the NIGC met potent objections
to the proposed rules, the NIGC is moving ahead with the process of codification.\textsuperscript{14}

This Comment analyzes the NIGC’s tribal consultation policy and proposed regulations, and addresses how these affect tribal consent and sovereignty. Section I discusses how federal Indian policy has evolved from tribal sovereignty to self-determination. Section II reviews the IGRA and the NIGC and how they facilitate tribal sovereignty. Section III discusses the proposed rules and the NIGC’s tribal consultation process. Next, Section IV analyzes how the tribal consultation process and proposed rules negatively affect the sovereignty and consent of Indian people. Finally, Section V proffers negotiated rulemaking between the NIGC and tribal governments as a means to promote tribal sovereignty and consent in the rulemaking process.

**Section I: Federal Indian Policy From Treaties to Self-Determination**

The history of interactions between Indian people and others informs the environment of Indian affairs
today, and an understanding of the current controlling issues requires familiarity with past policies.15 Through the pre-Revolutionary War eras of exploration and colonization, European powers treated Indian people as sovereign nations.16 European and colonial governments negotiated with Indian tribes and entered into treaties, recognizing their sovereignty.17 This practice of negotiating treaties with Indian people established a precedent of government-to-government interactions that later generations followed.18

During and after the Revolutionary War, the new United States government treated Indian tribes as sovereign nations.19 In 1787, Congress announced that the “utmost good faith shall always be observed towards the Indians” and that their “land and property shall never be taken from them without their consent.”20 Indian tribes were thus treated as sovereign nations, and the federal government established the principle of consent as a significant and controlling factor in negotiations between the federal government and Indian governments.21
Though Indian tribes were classified as sovereign nations, relations between the federal government and Indian governments were, and continue to be, unique.\textsuperscript{22} The United States Supreme Court delineated this relationship\textsuperscript{23} as unlike foreign nations.\textsuperscript{24} Indian tribes are “domestic dependent nations,”\textsuperscript{25} subject to federal, but not state power.\textsuperscript{26} Therefore, although tribal sovereignty, and along with it Indian gaming traditions, existed long before the United States, it became a limited sovereignty, subject to Congress’ asserted plenary power under the Constitution.\textsuperscript{27}

In 1871, treaty-making with tribes officially ended,\textsuperscript{28} and various policies took turns directing interactions with tribes.\textsuperscript{29} After these worked their devastating effects,\textsuperscript{30} federal government officials reconsidered Indian policy,\textsuperscript{31} and in 1970, President Nixon redirected the policy in a message to Congress.\textsuperscript{32}

The new federal Indian policy ended paternalistic approaches and stressed self-determination and self-governance.\textsuperscript{33} Nixon called for developing tribes’ economic infrastructure and returning to tribes the
right to control government programs. These measures were designed to reduce tribes’ dependency on the federal government and to strengthen the Indian people’s self-determination and sense of autonomy.  

Section II: The IGRA and NIGC: Policy and Compromise

A. Prelude to the IGRA: Tribal Governments’ Need for Gaming

One barrier to tribal self-sufficiency and self-determination was, and continues to be, economic dependence on the federal government. Extreme poverty and high levels of unemployment on reservations seemed to cut off any hope of economic self-sufficiency, and, accordingly, the goals of self-determination and tribal sovereignty. Many tribes, however, pursued economic development in the face of depressed reservation economies through gaming.

Gaming, and especially bingo, was seen as one of the few viable options for tribal economic development. The popularity of gaming rapidly grew, and by 1985, about 80 tribes were conducting gaming with some bingo halls grossing one million dollars
each month. This growth attracted state and federal officials’ attention, and many pressured Congress to begin regulating Indian gaming more heavily. To balance the interests of the federal government, states, and tribes, Congress enacted the IGRA in 1988.

B. The IGRA: A Compromise of Interests

In 1988, Congress enacted the IGRA and dramatically affected the landscape of Indian Gaming. The IGRA divided Indian gaming into three classes and created the NIGC. Class I gaming is limited to traditional social games. Class II gaming includes all forms of bingo played for prizes and card games. Class III gaming encompasses all games that are not Class I or Class II, including electronic facsimiles of any game of chance or slot machines.

The IGRA introduced a new jurisdictional scheme over Indian gaming, with implications well beyond bingo. The IGRA requires tribes to share authority over gaming with not only the NIGC, but also with states. Tribes exercise sole jurisdiction only over
Class I games.\textsuperscript{50} They share jurisdiction over Class II games with the NIGC,\textsuperscript{51} and to operate Class III games, tribes must negotiate and enter compacts with states which then must be approved by the Secretary of the Interior.\textsuperscript{52} The IGRA compromised various interests of the federal government, states, and Indian tribes.\textsuperscript{53}

C. The NIGC: A Facilitator of Economic Development and Self-Determination

The NIGC is an independent federal regulatory agency within the Interior Department.\textsuperscript{54} It is charged with promulgating regulations and guidelines as it deems appropriate to implement the provisions of the IGRA,\textsuperscript{55} including “tribal economic development, self-sufficiency, and strong tribal governments . . .”\textsuperscript{56} The NIGC plays a significant role in the industry,\textsuperscript{57} and there is evidence that it has expanded its powers and grown beyond its authority.\textsuperscript{58}
D. Current Federal Policy Aims to Promote Tribal Sovereignty

Building on Nixon’s 1970 message to Congress and in accordance with the purposes of the IGRA, President Clinton issued Executive Order 13175 (Order 13175) in 2000.\(^{59}\) In Order 13175, Clinton recognized the Indian tribes’ right to self-government, tribal sovereignty, and self-determination.\(^{60}\) With inherent sovereign powers, tribes are to be consulted with on a government-to-government basis, with the maximum administrative discretion possible.\(^{61}\) Federal agencies must seek to defer to Indian tribes, and consult with tribal officials concerning federal standards to preserve tribal authority.\(^{62}\) Tribal sovereignty and consent are potent principles in federal policy.\(^{63}\)

The current emphasis on tribal sovereignty and self-sufficiency, as clearly evidenced in the IGRA and Order 13175, hearkens back to Congress’ direction to observe the “utmost good faith . . . toward the Indians,” and to never take their property “without their consent.”\(^{64}\) Some argue that the cycle of federal
Indian law and policy is moving back to a period of “negotiated settlements which resemble the old treaty-making procedures.” The return to the negotiation model represents a return to the principle of consent, or the notion that tribes, states, and the federal government should negotiate to achieve a balance of power among the three sovereigns. This approach derives its saliency from the constitutional principle that power should be based on the consent of the governed. The principle of consent is evident in the treaties and policies of the past, and informs the policies and trends of today.

Section III: The NIGC Attempted to Involve Tribes through Tribal Consultations

On May 25, 2006, the NIGC proposed changes to definitions associated with bingo and to the classification standards for Class II games. According to the NIGC, advances in technology and the pursuit of greater profits have blurred the line between Class II and Class III games. The intention of the changes is to clarify Congress’ terms that
distinguish Class II and Class III gaming and create a brighter line between them. To develop these rules, the NIGC established a tribal consultation process.

The tribal consultation process consisted of three parts. First, the NIGC endeavored to consult in person at least twice with each gaming tribe between May 2003 and March 2006 regarding development of the proposed regulations. Second, the NIGC established a joint federal-tribal advisory committee to assist the NIGC in formulating the rules. Finally, the NIGC published all five preliminary drafts on its website to make the information available to all tribes and their leaders for review and comment. These efforts were made to promote and strengthen the government-to-government relationship between tribes and the federal government and to more effectively implement the IGRA.

However, whether the NIGC accomplished its goals of promoting self-determination and tribal sovereignty as stated in the purposes of the IGRA and Order 13175 and informed by the principle of consent is not made
clear by the mere actions of forming committees, holding hearings, and posting information on a web site. The fact that none of the comments that tribes submitted to the NIGC in response to the Class II Classifications supports the NIGC’s procedures or the results of the process suggests that the NIGC has, in fact, failed to adequately approach achievement of its goals. Rather than support, the tribes objected to the procedures and results as arbitrary restrictions that limit tribal sovereignty. The NIGC even reported as background to the proposed rules that, although there were many “instances of accord,” there were many times that the tribal committee representatives strongly disagreed with the NIGC’s decisions. Despite this lack of consent, the NIGC is moving forward with finalizing the proposed rules.

Section IV: The NIGC’s Consultation Policy and Proposed Rules Limit Tribal Consent and Sovereignty

The NIGC’s procedures undercut tribal sovereignty and did not sufficiently incorporate the principle of consent in three ways. First, the procedures lacked
tribal participation in the actual drafting of the proposed rules. Through an association of 64 federally recognized tribes, the Bishop Paiute Tribe asserted that tribal representatives should be active participants not only in providing advice, but in the drafting process itself. The tribal advisory committee’s input was not sufficiently incorporated into the proposed rules, and was “limited at best.” Indian people viewed the tribal consultations as mere perfunctory actions with no substantive value. While advisory committees are valuable, they do not necessarily equate with meaningful consultations between tribal and governmental officials. Because the tribal advisory committee was not permitted to participate in the drafting of the proposed rules, the procedures failed to incorporate tribal consent and further the NIGC’s goal of promoting tribal sovereignty.

Second, the proposed rules shift many Class II games to Class III games, exacting significant economic and political costs from Indian tribes and
their surrounding areas. Because no existing Class II machine meets the proposed changes, tribes will be forced to either modify their games, making them less lucrative since they will be slower, more cumbersome to use, and less diverse, or permanently shut them down, suffering substantial direct revenue loss. This revenue loss is particularly severe for tribes that only operate Class II games. The proposed rules will cause an estimated 142.7 million dollar loss in Class II gaming revenue, increase costs, and decrease jobs. Moreover, gaming tribes have made substantial investments in reliance upon NIGC and court actions under the current regulations, and the proposed rules threaten to eliminate those investments without sufficient input from tribal governments.

One category of costs that shifting Class II games to Class III will cause is revenue sharing with states. The IGRA requires tribal-state compacts for Class III games, and revenue sharing is a critical, though costly aspect of securing compacts. The compact process with states limits tribal
sovereignty,\textsuperscript{103} as these are often “take it or leave it” processes in which states have an upper hand over tribes.\textsuperscript{104} Furthermore, with revenue loss and increased costs under the proposed rules, tribes will have less leverage at the bargaining table with states.\textsuperscript{105} Shifting the market toward more Class III games would be economically and politically costly to tribes, and would not only fail to further the policy of tribal self-determination and consent, but would increase state power over tribes.\textsuperscript{106}

Finally, under the proposed rules, only the chairman of the NIGC is able to object to classification decisions.\textsuperscript{107} This undermines the tribes’ position as a sovereign government, and leaves them subject to the waves of politics.\textsuperscript{108} Tribes may appeal the chairman’s objection to the full Commission, and if upheld, it will be a final agency action for purposes of suit.\textsuperscript{109} However, this can be a costly and lengthy process, and tribes should be able to challenge decisions on a government-to-government basis.\textsuperscript{110} In practice, tribal governments are the
primary regulators of Class II gaming, and, in accordance with tribal sovereignty and consent, should be recognized as having power to object to a classification decision to balance the chairman’s power to object.\textsuperscript{111}

Section V: Increased Tribal Sovereignty and Consent Through Negotiated Rulemaking

The NIGC can begin to counter these three areas of sovereignty and consent loss through negotiated rulemaking\textsuperscript{112} that has tribal sovereignty and consent as its goals.\textsuperscript{113} Negotiated rulemaking would involve tribal leaders from the beginning of the process,\textsuperscript{114} allow tribal leaders to influence the process and represent tribal interests,\textsuperscript{115} and give tribal leaders a level playing field on which they may object to particular issues before pursuing costly and lengthy litigation.\textsuperscript{116}

Negotiated rulemaking brings public parties into the development stages of rulemaking, rather than leaving it to bureaucratic initiatives.\textsuperscript{117} As it is formally a process for generating proposals for
rulemaking rather than the final rules as such, tribes would be involved much earlier in the rulemaking process. Negotiated rulemaking would involve tribal leaders who have ideas on how to solve the problem, not just the NIGC, directly and immediately in the decision.

Like the enactment of the IGRA, negotiated rulemaking will necessarily include important compromises to reach a consensus. For example, compromises may include the closure of some games or may initially require more tribal-state compacts for Class III games. However, negotiated rulemaking allows tribal and government leaders to focus on the primary issues, attempt to accommodate the competing interests, and make substantive decisions. This removes tribal leaders from the role of fact-giver and places them at the decision-making table where they can effectively voice the concerns of their constituents and influence the process to protect their primary interests. Negotiations will also generate more support for the compromises that
representatives make. Tribes and their interests will be better represented in the process, and tribal sovereignty and consent will be better promoted.

Negotiated rulemaking levels the playing field between tribes, states, and the federal government on which tribes may object to decisions in a government-to-government relationship. The process involves 25 representatives from interested parties, including government leaders from the NIGC and states, and a neutral facilitator. Balance in the committee membership and records of the proceedings are controlled by the Federal Advisory Committee Act. At this balanced negotiating table, tribal leaders and all other participants may raise objections and generate solutions equally. Allowing tribal leaders equal opportunity to object in negotiated rulemaking proceedings, rather than merely providing facts and preliminary advice, promotes government-to-government relations, tribal sovereignty, and consent.

The breakdown of consultations between tribal representatives and the Department of Housing and
Urban Development (HUD) in 2001 illustrates the tribal preference for negotiated rulemaking. On the second day of a four-day summit, 200 tribal representatives walked out of a meeting in protest of HUD’s implementation procedures of a new policy. Tribal representatives felt that negotiated rulemaking should be applied to all changes in regulations. Otherwise, the tribal representatives asserted, HUD would continue a paternalistic relationship rather than engage in a government-to-government relationship.

Through negotiated rulemaking, tribal governments can better receive treatment as sovereign nations than through the NIGC’s tribal consultations and advisory committees. The process would directly involve interested parties in the process of developing rules, allow tribal leaders to influence the process and represent tribal interests in more meaningful ways, and create a level playing field for government-to-government interactions where tribes may voice objections in a manner equal to the NIGC chairman.
Conclusion

Based on the Constitution, treaties, executive orders, court decisions, and the IGRA, the federal government and the NIGC have established policies of treating Indian tribes as sovereign nations. The NIGC’s tribal consultation policy and proposed rules, however, fall short of this policy and the consent principle. The consultation policy and proposed rules do not promote tribal self-determination and consent because they failed adequately to include Indian participation in drafting the rules, shift Class II games to Class III without sufficient tribal input, and do not allow tribes to object to classification decisions. The NIGC should promote tribal sovereignty and consent through negotiated rulemaking. Negotiated rulemaking will allow tribal representatives to participate in the drafting of proposed rules, interact with the NIGC on a government-to-government basis, and voice objections and concerns on a level playing field.
1 The Declaration of Independence para. 2 (U.S. 1776); see Richard B. Collins, Indian Consent to American Government, 31 Ariz. L. Rev. 365, 370 (1989) (discussing popular consent through ratifying conventions and Locke’s vision of the original compact among free men).

2 See Collins, supra note 1, at 371 (explaining that voting is the foundation of consent in a democracy and Indian people could not vote until the 1900s).

3 See Francis Paul Prucha, The Great Father: The United States Government and the American Indians 5-9 (Univ. Neb. Press 1984) (explaining that little, if anything, concerning the United States’ Indian policy was entirely de novo).

4 See U.S. Const. art. I, § 8 (giving power to Congress to regulate commerce with foreign states, the several states, and with Indian tribes).

5 Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); see generally Worcester v. Georgia, 31 U.S. 515 (1832); Johnson v. M’Intosh, 21 U.S. 543; David E. Wilkins & K. Tsianina Lomawaima, Uneven Ground: American Indian Sovereignty and Federal Law (2001) (analyzing the plenary power and three Supreme Court cases, the “Marshall Trilogy,” which
framed the federal government’s relationships with tribes).

6 See 116 Cong. Rec. 23258 (daily ed. July 8, 1970) (Message from President Nixon) (stating that Indian people ranked at the bottom on virtually every scale).


8 See Charles Wilkinson & The American Indian Resources Institute, Indian Tribes as Sovereign Governments, 77 (2d ed. 2004) (stating that gaming is needed to bolster inadequate social services on reservations); Bryan H. Wildenthal, Native American Sovereignty On Trial, 103 (2003) (listing health care, schools, and governmental programs as recipients of gaming revenue); Kathryn R.L. Rand & Steven Andrew Light, Indian Gaming Law and Policy, 20–21 (2006) (describing how tribes opened bingo palaces as one of the few viable means of raising revenue).

9 See The National Gambling Impact Study Commission, Report, 6–1 (1999) (documenting tribal gaming growth from primarily
bingo parlors to large-scale casino gambling, and stating that under the Indian Gaming Regulatory Act (IGRA), tribal revenues consistently have grown at a faster rate than commercial casino gambling); 25 U.S.C. § 2701-21 (2002); see also NATIONAL INDIAN GAMING COMMISSION, GROWTH IN INDIAN GAMING 1995-2004, http://www.nigc.gov/TribalData/GrowthinIndianGamingGraph19952004/tabid/114/Default.aspx. (charting consistent growth in revenues from Indian gaming since 1995).

See Alan Meister, The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations, 13 (2006) (finding that tribes would be required to remove, modify, or replace every Class II machine currently in operation which would be a costly process).


See National Indian Gaming Commission, Class II Game Classification Standards, Comments Received From Tribes, http://www.nigc.gov/ClassIIGameClassificationStandards/tabid/620/Default.aspx (listing comments
received from tribes that object to the National Indian Gaming Commission’s (NIGC) procedures and actions concerning the proposed rules).

14 See Class II Standards, supra note 10, at 30240 (stating that the NIGC determined that it should proceed despite litigation and opposition concerning the proposed rules).


16 See FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 9 (Univ. Neb. Press 1984) (stating that tribes were dealt with as distinct political entities with political structure familiar to Europeans frequently attributed to them).

17 See COHEN, supra note 15, at 16-17 (listing treaties between King James and Massasoit in 1621 and between
the Mohawk Nation and the Governor of New York in 1679 as examples); PRUCHA, supra note 3, at 16 (explaining that colonial laws declared void all bargains made with Indian people without government approval); see also Richard B. Collins, Indian Consent to American Government, 31 ARIZ. L. REV. 365, 372 (1989) (explaining that after treaty making formally ended, the government continued to deal with tribes by agreement).  

18 See COHEN, supra note 15, at 26-28, 31 (stating that treaties between the United States government and Indian tribes frequently recognized the separate sovereignty of tribes, but recognizing that, though the treaties had a moral and legal force that could not be easily ignored, they were not always respected).  

19 See U.S. CONST. art. 1, § 8 (placing the regulation of trade with Indians within the authority of the national government rather than state governments); see, e.g., ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 86-87 (1970) (describing a Revolutionary War treaty between the federal government and the Delaware
Nation that allowed troops to travel through Delaware land to attack British outposts).

20 Northwest Ordinance of 1789, art. III (1789). See also 1 Annals of Cong. 83 (Gales & Seaton eds. 1789)(statement of George Washington) (delineating guidelines for treaties ratified by Congress).

21 See Collins, supra note 1, at 372 (stating that the new United States government sought Indian consent by dealing with tribes primarily through treaties).


1984) (emphasizing the exclusivity of the federal government’s interaction with tribes, although Indian treaties and those with foreign nations were similar).

25 *Cherokee Nation*, 30 U.S. at 17.


27 See *Wilkins & Lomawaima*, supra note 5, at 98-116 (attempting to reconcile the contradictory notions of jurisdictional monopoly and multiplicity inherent in the federal government’s plenary power over the sovereignty of tribal governments); *Kathryn R.L. Rand & Steven Andrew Light, Indian Gaming Law and Policy*, 10-11 (2006)
explaining that colonizers believed that tribal sovereignty was rightly trumped by the settlers’ “manifest destiny”).

28 25 U.S.C. § 71 (2006). But see Tsosie, supra note 26, at 30 (illustrating the significance of treaty-making between the federal government and Indian tribes by stating that the last major agreement was signed in 1914); Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 310 (1994) (indicating that because the treaties already made remained in effect, their history did not end in 1871).

29 See Tsosie, supra note 26, at 29 (arguing that Indian law is cyclical and is returning to negotiated settlements that resembles the treaty period).

30 See generally Cohen, supra note 15, at 95-97 (describing the economic, cultural, property, and sovereignty loss Indian tribes suffered).

31 See Remarks of Secretary of the Interior Fred A. Seaton, reprinted at 105 Cong. Rec. 3105 (1959) (stating that “it is absolutely unthinkable” to force a termination plan on a tribe without the
understanding and acceptance of a clear majority of
the members of the affected tribe).

(Message from President Nixon) (repudiating the
preceding policy of termination as morally and legally
unacceptable, stating that it tends to discourage
self-sufficiency among Indian groups, and promoting
tribal take-over of programs run by the federal
government); see also Cohen, supra note 15, at 100-01
(noting President Johnson’s articulation of self-
determination and self-governance and promotion of
partnership and self-help that shortly preceded
President Nixon’s formal message).

33 See Cohen, supra note 15, at 101 (stating that
termination ignored moral and legal obligations
involved in the special relationships between tribes
and the federal government and paternalism resulted in
the erosion of Indian initiatives and morale).

(Message from President Nixon) (endeavoring to make
progress commensurate with promises made in the past);
Francis Paul Prucha, The Great Father: The United States Government and the American Indians 1112-13 (Univ. Neb. Press 1984) (using Nixon’s argument that the government must follow the moral and legal force of the agreements between tribes and the government and that they cannot be terminated unilaterally, emphasizing the significance of tribal consent in interactions between tribes and the government); see also Tsosie, supra note 26, at 32 (stating that this new federalism acknowledged the tribes’ status as separate governments and encouraged them to assume control of federal programs).

35 See Prucha, supra note 3, at 1113 (stating that Nixon’s policy sought to strengthen Indian communities and to make it clear that Indians can become independent of federal control without being cut off from federal concern and federal support). But see Kathryn R.L. Rand & Steven Andrew Light, Indian Gaming Law and Policy, 11 (2006) (noting that while the new policy encouraged tribal economic self-sufficiency, it also drove cuts in federal assistance to tribes).

37 See PRUCHA, supra note 3, at 1201 (classifying the economic situation as the most serious problem underlying the search for self-determination); FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 7 (1995) (stating that between one- and two-thirds of reservation Indians lived below the poverty level and unemployment rates climbed as high as 70 percent); see generally PRUCHA, supra note 3, at 1093 (describing President Johnson’s “war on poverty” and the American Indian Capital Conference on Poverty’s goal as “help[ing] the Indian people help themselves achieve the very highest that they can achieve.”).
See Heidi L. McNeil, Indian Gaming – Prosperity, Controversy, in The Gaming Industry on American Indian Lands 141 (Heidi L. McNeil, Chair 1994) (analogizing Indian gaming to the “return of the white buffalo,” a sign of good fortune, and characterizing Indian gaming as a major catalyst for community growth and economic development); Bryan H. Wildenthal, Native American Sovereignty On Trial, 115 (2003) (quoting a tribal leader, saying, “We had tried poverty for 200 years, so we decided to try something else.”).

See Steven Andrew Light & Kathryn R.L. Rand, Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy, 4 Nev. L.J. 262, 271 (listing reasons for the attraction to bingo, including relatively low start-up costs, minimal environmental impact, and the potential for high returns on the tribes’ investments).

See Kathryn R.L. Rand & Steven Andrew Light, Indian Gaming and Tribal Sovereignty: The Casino Compromise 42 (2005) (stating that many tribes owned and operated their establishments, but others contracted with outside
management companies and a few were owned by individual tribal members); see also Steven Andrew Light, Kathryn R.L. Rand & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-sharing Agreements*, 80 N.D. L. REV. 657, 657-58 (stating that Indian gaming has become big business, accounting for a significant portion of the gambling industry nationwide, and nearly doubling in the past five years); National Indian Gaming Commission, *Tribal Gaming Revenues*, http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/tribalgamingrevenues05.pdf (reporting tribal gaming revenues for 2000-2005, with the 2005 total surpassing 22 billion dollars).
41 See S. REP. No. 100-446, at 1-3 (1988) (reciting the states’ interest in more control over gaming operations to prevent the infiltration of organized crime into Indian gaming and the states, and the federal government’s interests in Indian self-government and economic development).
42 25 U.S.C. § 2702 (2006) (stating the purpose of the IGRA as providing a statutory foundation for Indian
gaming as a means of promoting tribal economic
development and strong tribal government, preventing
organized crime, and establishing independent federal
standards and the NIGC to regulate such gaming).

43 See RAND & LIGHT, supra note 40, at 6 (declaring that
Indian gaming cannot be understood without
understanding the IGRA, because it is a complex
statutory scheme governing regulation at three levels
of government – tribal, state, and federal – with
critical subsequent legal developments).

44 See FELIX S. COHEN, FEDERAL INDIAN LAW 859-60 (Nell Jessup
Newton et al. eds., LexisNexis 2005 ed.) (explaining
how the classes of games with different jurisdiction
over each class of games was designed to balance the
interests of states, tribes, and the federal
government).


tribes may use their revenues to funding tribal
government operations and programs, providing for the general welfare of the tribe and its members, promoting tribal economic development, donating to charitable organizations, and funding operations of local government agencies); see generally INDIAN GAMING (Stuart A. Kallen, ed.) (presenting differing opinions on various aspects and effects of Indian gaming, including addictions, local businesses, Christian activists, crime, and racism).

49 See Ronald N. Johnson, Indian Casinos: Another Tragedy of the Commons, in SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS 236 (Terry L. Anderson, et al. eds. 2006) (stating that although some tribes recognize regulation as an integral part of the gaming business, some still consider it an affront to their sovereignty); KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 3-4 (2005) (positing the view that the IGRA is the result of one-sided negotiations that impose state and federal law on tribes in direct contravention of tribal authority).

25 U.S.C. 2710(a)(2) (2006); see also United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 364-65 (1990) (holding that Congress intended Class II gaming to be subject to tribal and federal oversight, and the states’ regulatory role be limited to overseeing Class III gaming pursuant to a tribal-state compact).

25 U.S.C. 2710(d) (2006); see generally Harry Reid, The Indian Gaming Act and the Political Process, in INDIAN GAMING AND THE LAW 18 (William R. Eadington, ed., 2d ed.) (crediting the state-tribal compact provision with breaking the “logjam” of competing interests holding up the legislation, and noting that the compact provision expanded state power over tribes).

See generally Kathryn R.L. Rand & Steven A. Light, Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity, 4 Va. J. Soc. Pol’y & L. 381, 401-08 (juxtaposing myriad benefits and drawbacks to the IGRA); Heidi L. McNeil, Indian Gaming – Prosperity, Controversy, in THE GAMING INDUSTRY ON AMERICAN INDIAN LANDS 158 (Heidi L. McNeil, Chair
1994) (concluding that the IGRA can work to the benefit of all).

54 25 U.S.C. § 2704 (2006) (establishing the NIGC as three members who each serve three-year terms: a chair, appointed by the president with consent from the Senate, and two associate members, appointed by the Secretary of the Interior, and at least two members must be enrolled members of a tribe); see generally Sandra J. Ashton, The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming, 37 NEW ENG. L. REV. 545 (2003) (summarizing the NIGC’s regulatory role and issuance of regulations).


gambling have had the greatest effect on reservation commerce in recent years).

58 See Colorado River Indian Tribes v. Nat’l Indian Gaming Comm’n, 383 F.Supp.2d 123 (D.C. Cir. 2005) (holding that the NIGC exceeded its statutory powers in promulgating standards for Class III gaming, and that the NIGC lacks a regulatory role over Class III gaming). But see Oversight Hearing on the Regulation of Indian Gaming Before the Committee on Indian Affairs, 109th Cong. 4 (2005) (statement of Phil Hogen, Chairman, National Indian Gaming Commission) (expressing concern over the Colorado River decision, stating that the NIGC “would be out of most of the business because 80 percent of the gaming is class III gaming.”).

59 Exec. Order No. 13,175, 65 C.F.R. 67249, § 2(a) (2000) (stating that the United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution, treaties, statutes, Executive Orders, and court decisions); 116 Cong. Rec. 23258 (repudiating termination and calling for
strengthening of Indian self-determination and sense of autonomy).

60 See Exec. Order No. 13,175, 65 C.F.R. 67249, § 2(c) (2000) (listing the guiding fundamental principles for formulating or implementing policies that have tribal implications). But see id. § 8 (encouraging independent agencies to comply with the provisions of the order).

61 See id. § 2(b), § 3(b) (declaring that agencies shall respect Indian tribal self-government and sovereignty, and strive to meet the responsibilities that arise from the unique legal relationship between tribes and the federal government).

62 See id. § 3(c) (emphasizing the need to limit the scope of federal standards to preserve the prerogatives of Indian tribes and promote tribal sovereignty and self-determination).

63 See Richard B. Collins, Indian Consent to American Government, 31 Ariz. L. Rev. 365, 373 (1989) (stating that as recent as 1968, laws have been made subject to tribal consent by referendum, and since 1960, both
major political parties have expressly established
Indian consent as the basis for federal policy).
64 Northwest Ordinance of 1789, art. III (1789).
65 Vine Deloria, Jr., Laws Founded in Justice and
Humanity: Reflections on the Content and Character of
(arguing that the belief that Indian law is comparable
to other fields of law which are informed by a few
basic principles and doctrines must make way for a
more accurate view informed by history, economics,
politics, and morality).
66 See Rebecca Tsosie, Negotiating Economic Survival:
The Consent Principle and Tribal-State Compacts Under
the Indian Gaming Regulatory Act, 29 ARIZ. ST. L.J. 25,
29 (1997) (exploring the overlapping spheres of
sovereignty involved in Indian affairs). But see id.
at 37-39 (noting arguments that negotiated agreements
do not reflect the consent principle but are coercive
misapplications of alternative dispute resolution that
works to the disadvantage of Indian tribes because of
unequal distribution of power and the subordination of Indian rights to state interests).

67 See, e.g., id. at 29-33 (illustrating how European powers and the federal government involved the consent principle before and after the Revolutionary War and even after treaty-making with tribes was officially abrogated); Collins, supra note 1, at 366, 372 (stating that Indian consent, obtained by groups rather than individually, has been honored, albeit imperfectly, through policy choices of Congress and the President).

68 See Collins, supra note 1, at 366, 372 (explaining that treaties were the primary way to observe the utmost good faith toward the Indians as called for in the Northwest Ordinance, and that the government extended treaty principles even to situations in Indian law where no treaty was involved); FELIX S. COHEN, FEDERAL INDIAN LAW 7 (Nell Jessup Newton et al. eds., LexisNexis 2005 ed.) (stating that to understand Indian issues today, one must be familiar with developments often dating back centuries, as seemingly non-legal data affects the legal relationship between
Indians and the federal government); see generally Edward Charles Valandra, Not Without Our Consent: Lakota Resistance to Termination, 1950-59, 5-6 (2006) (analyzing two referenda that help shape the current relationship between the Lakota and South Dakota, and arguing that the recurring patterns of Indian affairs provides a framework for understanding current conflicts).

69 Definition, supra note 10, at 30232-34 (redefining so that all games, including bingo, when played in an electronic medium, are facsimiles when they use all of the fundamental characteristics of the game); see Class II Standards, supra note 10, at 30238 (asserting that it is in the best long term interest of Indian gaming to clarify the classification standards).

70 See Class II Standards, supra note 10, at 30239 (stating that Congress could not have foreseen these technological changes).

71 See id. at 30241 (distinguishing the use of electronic, computer, or other technologic aids in the play of Class II bingo, lotto, other games similar to
bingo, pull tabs, and instant bingo from the play of Class III gaming machines).

72 See Consultation Policy, supra note 12, at 16973; see also Definition, supra note 10, at 30233 (stating that the NIGC purposely established the consultation policy in order to have guidelines in place for pre-rulemaking tribal consultation on the Class II classification standards).

73 See Definition, supra note 10, at 30239 (summarizing the consultation policy as background for the development of the proposed rules).

74 See id. (stating that the NIGC sent out over 500 separate invitations to tribes to consult and provide input, and many tribes accepted these invitations).

75 See id. at 30240 (explaining further that each gaming tribe was to nominate representatives to serve on the advisory committee, and from among those nominated, the NIGC selected seven of them).

76 See id. (stating that drafts were also successively mailed to each tribe inviting written comment).
77 See Consultation Policy, supra note 12, at 16973 (stating that the NIGC is strongly committed to meaningful consultation with tribes; see also Definition, supra note 10, at 30239 (reiterating the NIGC’s commitment to meaningful consultation and recognition of tribal sovereignty as the purpose of the consultation policy).

78 See Robert McCarthy, The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians, 19 BYU J. PUB. L. 1, 155-156 (2004) (characterizing a similar consultation policy as nothing more than informational updates, which renders the process meaningless to tribes who reasonably expect to have a voice in policy matters and decisions).

79 See, e.g., BUENA VISTA RANCHERIA ME-WUK INDIANS, COMMENTS ON CLASS II CLASSIFICATION STANDARDS AND ELECTROMECHANICAL FACSIMILE DEFINITIONS, 1-2 (2006), http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “Buena Vista Rancheria Me-Wuk Indians” hyperlink) [hereinafter BUENA VISTA] (objecting to the NIGC’s process since the advisory committee did not
participate in drafting the rules, little, if any, of the committee’s input was used, public hearings with comments recorded as part of the record are needed, and the Class II restrictions are arbitrary).

80 See id. at 2 (arguing that, as the primary regulators of Class II gaming, tribes should be able to challenge classification decisions on a government-to-government basis, whereas currently only the NIGC chairman may object); see also Class II Standards, supra note 10, at 30240 (stating that two tribes objected to parts of the federal-tribal advisory committee, and filed suit against the NIGC, alleging that several of the committee members were not eligible to participate).

81 Definition, supra note 10, at 30233 (stating that in particular, tribal representatives strongly advocated no change to the current definition of “electronic or electromechanical facsimile”).

82 See Class II Standards, supra note 10, at 30240 (adding that the NIGC requested that two members of the committee step down); Tony Thornton, The Gaming
Industry Is Turning Its Focus To Compacted Games, The Daily Oklahoman, August 8, 2006 (reporting that despite overwhelming tribal opposition, the NIGC plans to have the new rules in place by December).

83 See Kathryn R.L. Rand & Steven Andrew Light, Indian Gaming and Tribal Sovereignty: The Casino Compromise 144 (2005) (arguing that indigenous conceptions of tribal sovereignty should drive both public discourse and public law and policy concerning Indian gaming).

84 See Buena Vista, supra note 79, at 1 (protesting further that the tribal comments submitted to the NIGC during the drafting process were never made public).

85 See Bishop Paiute Tribe, Proposed Classification Standards; Class II Gaming; Bingo, Lotto, et al. (2006), http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “Bishop Paiute Tribe” hyperlink) [hereinafter Bishop Paiute] (alleging that the NIGC’s procedures differed significantly from interaction with tribal leaders in the past).

86 Id.; see also Buena Vista, supra note 79, at 1 (suggesting that the NIGC should hold public hearings
on the regulations with comments and submissions recorded as part of the administrative record); Confidential Salish and Kootenai Tribes of the Flathead Nation, Comments on Class II Classification Standards and Electromechanical Facsimile Definitions (2006), http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “Confederated Salish and Kootenai Tribes of the Flathead Nation” hyperlink) [hereinafter Confederated] (stating that it is impossible to determine which advice, if any, was used or ignored because the NIGC did not publish any record).

87 See Thornton, supra note 82 (quoting Janie Dillard, the Choctaw Nation’s gaming director, stating that the dye already is cast, and the NIGC’s consultations with tribes are “just to pacify” tribes); Mark Anthony Rolo, Indian Tribes, Government Differ On Relationship Definitions, INDIAN COUNTRY TODAY, February 25, 2000 (laying out tribes’ feelings toward consultation as a goodwill gesture at best, and, at worst, nothing more than an appeasement policy that allows the government to push through policy with minimal tribal opposition).
88 Bishop Paiute, supra note 85 (expressing surprise that the NIGC expects the advisory committee to substitute for consultation with tribes).

89 Compare Confederated, supra note 86 with Definition, supra note 10, at 30232 (asserting the NIGC’s consultation process was to facilitate early and meaningful tribal input, but ultimately failed).

90 See Alan Meister, The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations, i (2006) (alleging that the more restrictive proposed rules likely will limit the types of gaming machines currently operated).

91 See generally id. (conducting an independent study of the potential economic impact of the proposed rules on an aggregate nationwide basis).

92 See Northern Arapaho Business Council, Proposed Class II Regulations (2006), http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “Northern Arapaho Tribe” hyperlink) (arguing that Class II games provide essential resources and leverage to negotiate compacts with states, and removing this tool further undermines state incentives
to negotiate reasonably); CITY OF SAN PABLO, COMMENTS ON CLASS II CLASSIFICATION STANDARDS, 2 (2006), http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “City of San Pablo” hyperlink) (asserting that the regulations will have a devastating economic impact on tribes and the city since all gaming will be prohibited by the proposed rules, eliminating “500 much-needed jobs to the local community” and 67 percent of the city’s general fund).

93 See MEISTER, supra note 11, at 13; NOVA GAMING, COMMENTS ON CLASS II CLASSIFICATION STANDARDS, 1, 4 (2006), http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “Nova Gaming” hyperlink) [hereinafter NOVA GAMING] (stating that Nova has expended millions of dollars creating Class II games with NIGC consultation, and that none of these 4,000 games will be compliant).

94 See MEISTER, supra note 11, at 9-11 (explaining that the less appealing Class II games under the proposed rules will entice fewer total patron visits and patrons will spend less money on the slower machines).
See **SEMINOLE TRIBE OF FLORIDA, REQUEST FOR CONSULTATION** (2006),
http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “Seminole Tribe of Florida” hyperlink) (explaining that the tribe has been unable to obtain a compact from Florida and the Department of the Interior has failed to issue procedures, making Class II gaming the only option).

See **MEISTER, supra** note 11, at 48 (listing other negative economic impacts, including a loss of 9.6 million dollars in non-gaming revenue from facilities like restaurants and hotels).

See **id.** at 14-16 (discussing new and additional costs, including capital costs in modifying or replacing games and costs to train employees on the changes and new games).

See **id.** at 48 (estimating a loss of 458 tribal member jobs).

See **BISHOP PAIUTE, supra** note 85 (stating that tribes, manufacturers, and others in the industry have relied on the federal courts’ clarifications that the
proposed rules make uncertain); PLANET BINGO, COMMENTS ON
.gov/ (follow “Class II Game Classification Standards”
hyperlink; then follow “Planet Bingo” hyperlink)
(expressing surprise concerning the effective
dismissal of previous work and discussion on draft
standards in the proposed rules); see also NOVA GAMING,
supra note 93, at 3-4 (recounting the numerous
processes Nova has already undertaken and millions of
dollars spent to comply with the NIGC’s regulations,
and presenting several hurdles the new regulations
impose, including software and hardware changes and
redesign of games); NICK FARLEY & ASSOCIATES, RESPONSE TO
“Class II Game Classification Standards” hyperlink;
then follow “Nick Farley & Associates Follow-up
Response to Hearing Testimony” hyperlink) (estimating
costs associated with testing gaming equipment to
increase by 50 percent under the proposed regulations).

See MEISTER, supra note 11, at 15-16 (explaining that
these costs will vary depending on existing tribal-
state compacts); Kaw Nation, Comments on Class II Classification Standards (2006), http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “Kaw Nation” hyperlink) (stating that the effect of that shift would be the lessening of tribal income to the benefit of Oklahoma).

101 Meister, supra note 11, at 48 (estimating revenue-sharing costs to increase between 49.6 million and 74.5 million dollars in Oklahoma alone).

102 See Ronald N. Johnson, Indian Casinos: Another Tragedy of the Commons, in Self-Determination: The Other Path for Native Americans 224-234 (Terry L. Anderson, et al. eds. 2006) (analyzing political and economic aspects of several tribal-state compacts).

103 See generally Heidi L. McNeil, Indian Gaming – Prosperity, Controversy, in The Gaming Industry on American Indian Lands 141 (Heidi L. McNeil, Chair 1994) (examining Arizona’s unwillingness to negotiate with several tribes, resulting in a lawsuit, police raids, and a protest march to the state capitol).
104 KAW NATION, supra note 100 (arguing that the present state negotiation process bears little semblance to a true negotiation); SAMUEL S. ALEXANDER, CLASS II PROPOSED REGULATIONS, (2006), http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “Alexandar, Samuel S.” hyperlink) (characterizing communication with Oklahoma in tribal-state compact negotiations as “much like talking to a fence post”); FELIX S. COHEN, FEDERAL INDIAN LAW 7 (Nell Jessup Newton et al. eds., LexisNexis 2005 ed.) (calling the state’s role in state-tribal compacts a powerful weapon for states). But see RICK DAY, COMMENTS ON ELECTRONIC OR ELECTROMECHANICAL FACSIMILE DEFINITION, 2 (2006), http://www.nigc.gov/ (follow “Class II Game Classification Standards” hyperlink; then follow “State of Washington Gambling Commission, August 22, 2006” hyperlink) (reassuring that Washington remains firmly committed to strong partnerships with tribal governments engaged in Class III gaming).

105 See MEISTER, supra note 11, at 16 (calling Class II games a fallback position for tribes when their
bargaining position is weak or when states do not
negotiate in good faith).

106 See Kaw Nation, supra note 100 (asserting that the
proposed rules do not reflect the NIGC’s mission
statement to ensure that tribes are the primary
beneficiaries of gaming revenue).

107 See Class II Standards, supra note 10, at 30259.

108 See Santee Sioux Tribe of Nebraska, Santee Sioux Nation Tribal
Game Classification Standards” hyperlink; then follow
“Santee Sioux Tribe of Nebraska” hyperlink) (arguing
that not allowing tribes the ability to object to a
classification is out of line with due process
fundamentals and would undermine tribal law).

109 See Class II Standards, supra note 10, at 30260.

110 See Buena Vista, supra note 79.

111 See Confederated, supra note 86 (stating that as the
primary regulators of Class II gaming, tribes should
be able to object without having to first subject
themselves to enforcement action).

See Kathryn R.L. Rand & Steven Andrew Light, Indian Gaming and Tribal Sovereignty: The Casino Compromise 159-60 (2005) (identifying mutual respect for each other’s interests and authority as what should be the foremost common goal between the federal and tribal governments).

See Peter L. Strauss, Administrative Justice in the United States 252 (2d ed. 2002) (explaining that negotiated rulemaking brings the statutory provisions for public rulemaking procedures forward in time).

See Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 47 (2d ed. 2001) (describing negotiated rulemaking as a forum for presenting arguments and evidence and a chance to generate ideas and opinions). But see id. at 47-48 (discussing critiques, such as negotiated rulemaking’s inapplicability to some rules and bargaining’s loss of disinterested agency judgments); Strauss, supra note 114, at 253-54 (listing claims of indifferent success in reducing costs and time demands)
and the production of consensual results that are beyond an agency’s authority as possible drawbacks).


117 See Strauss, supra note 114, at 253 (stating that development occurs through a mediated process that is external to the agency).


119 See Phillip J. Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1, 28 (1982) (reasoning that sharing in the development of the rule encourages concurrence with it).

participation is needed and welcomed . . . it does not mean they can dictate policy.”).

121 Administrative Procedure Act, 5 U.S.C. § 562 (2) (2006) (defining “consensus” as “unanimous concurrence among the interests represented on a negotiated rulemaking committee,” unless the committee agrees to define it as a “general but not unanimous concurrence” or “another specified definition”).

122 See generally Harter, supra note 119, at 50 (1982) (describing negotiation tactics, like yielding on low priority issues to gain ground on high priority issues).

123 See id. at 28-29 (explicating that removing the adversarial process enables free information sharing on the true issues rather than polarized positions).

124 See id. at 28.

125 See Ernest Gellhorn & Ronald M. Levin, Administrative Law and Process in a Nutshell 343 (5th ed. 2006) (stating that negotiation, subscribed to by representatives of interested parties, can encourage cooperation and is
more likely to be acceptable to the participants than any policy otherwise imposed).

126 See Harter, supra note 119, at 7 (valuing direct participation in the negotiation process as preferable to entrusting the decision to the judgment of the agency alone or relying on a hybrid rulemaking process in which tradeoffs are not easily made); Mark Anthony Rolo, Indian Tribes, Government Differ On Relationship Definitions, INDIAN COUNTRY TODAY, February 25, 2000 (reporting the views of the Tholpthlocco Creek Tribe of Oklahoma Chairwoman, that without more engagement of tribes, agencies merely attempt to appease tribal concerns with bureaucratic lip service).

127 See BUENA VISTA, supra note 79 (arguing that the ability to object without first subjecting itself to enforcement action promotes government-to-government relationships).


See Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 47 (2d ed. 2001) (emphasizing that the agency is a member of the committee, and no more than that).

See Brian Stockes, Native Americans Protest Policies of Housing and Urban Development Department, Indian Country Today, July 27, 2001 (reporting that protesters contend that the Department of Housing and Urban Development’s (HUD) consultation process did not respect tribal sovereignty and was not true government-to-government consultation).

See id. (stating that HUD had implemented a new consultation policy without consulting tribal governments as Order 13175 directs).

See id. (stating that tribal representatives wanted assurances that consultations will lead to results, and HUD did not give those assurances).

See id. (quoting Brian Wallace, chairman of the Washoe Tribe of Nevada and California as saying, “Give us a chance to act as the sovereign nations we are by allowing us the freedom to choose our own destiny.”).