# Appendix C11: [Native American] Foreign Policy

## *Gaaching Ziibi Daawaa Anishnaabe*[344]

TRIBAL owned land will become a larger land use issue in Wexford County. Issues of taxation, jurisdiction, zoning authority, and tribal sovereignty will be increasingly important.

Indigenous people (Native Americans) and their communities have an historical relationship with their lands and are descendants of the original inhabitants.

By treaty, dealing with indigenous peoples, other nations, and the United Nations, the United States (and thus Michigan, Michigan municipalities) has agreed to foster a partnership with Native American governments and thereby:

A. should establish a process to empower Native Americans, in establishment of county and municipal policy, laws, programmes;
B. Native American lands should be protected from environmentally unsound activities, lands should be protected from what Native Americans feel are socially and culturally inappropriate activities;
C. recognize Native American values, resource management practices with a view toward sustainable development;
D. recognize traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting;
E. Develop and strengthen dispute-resolution concerning land use, resource-management.

This *Plan* is intended to set the stage for common and cooperative land use planning.

## Historical Context

The Little River Band of Ottawa Indians is the political successor to nine of the nineteen historic bands of the Grand River Ottawa people. The permanent villages of the Grand River Bands from which the Little River Ottawa descend were originally located on the Thornapple River, Grand River, White River, Pere Marquette River and the Big and Little Manistee Rivers. Those southern bands shared a hunting and trapping territory along the Pere Marquette and Manistee River systems and had close kinship ties to the northern Grand River Bands at Pere Marquette and Manistee.

The Treaty of Chicago (1821), the Treaty of Washington (1836), and the Treaty of Detroit (1855) are all documents of the tribe's relationship with the United States.

Following the 1855 treaty, the Grand River Bands were removed from their permanent villages to permanent Reservations in Muskegon, Oceana, and Mason Counties. The nine Bands from whom the Little River Ottawa descend, established a major settlement known as "Indian Town" on the Pere Marquette, near present day Custer in Mason county's Eden Township. The other ten Grand River Bands settled on the Pentwater River near modern Hart, Michigan.

The 1836 Treaty of Washington was signed between the United States and the Chippewa and Ottawa Indians. This treaty gave all lands in Wexford County to the United States (along with much of the northern part of the lower peninsula and the east half of the upper peninsula), and reserved an Indian reservation along both sides of the Big Manistee River from Lake Michigan east to what is today the Tippy Dam backwater (see map on page 333). The 1836 Reservation on the Manistee River was, in large part, to provide the Bands with a permanent home which gave them access to important hunting and trapping territories on the Manistee River system.

That reservation was abandoned in spring of 1839 upon recommendation by Henry Schoolcraft because only a small number of Indians settled on the reservation. The United States government reservation services were moved to Grand Traverse Bay. Government Land Office surveying of section lines in the reservation did not take place until 1847.

Between the last treaty and the present, the Grand River Ottawa, now called the Little River Band of Ottawa, were known by many names, including "Indian Village" on the Manistee River, residents of the Pere Marquette Village or "Indian Town," Unit no. 7 of NMOA, the Thornapple Band and finally the Little River Band of Ottawa.

Unfortunately, the Federal government failed to protect the Grand River Ottawa from unscrupulous land speculators and many families lost title to their allotments in the Reservations in Muskegon, Oceana, and Mason Counties. Some of the Bands from Indian Town moved to settlements in Mason County at Fountain, Freesoil, and Ludington, Michigan. A number of Bands from Indian Town moved to the 1836 Reservation on the Manistee River and established settlements along the Manistee River near Brethren and Wellston.

The Grand River Bands which are now known as the Little River Band have continued to maintain close political and social ties to the remaining Grand River Bands who reside in the communities Hart, Newaygo, Muskegon, and Grand Rapids. As a result, many Little River Ottawa families also reside in these areas, as well as other Ottawa communities in Michigan.

Discussions with Tribal members during the development of the tribe's Constitution, addressed the need to focus on community development efforts within the Tribe's historic Reservations. Tribal members participating in community forums understood that the tribe's land acquisition efforts would need to focus on restoring tribal lands in and near the Manistee Reservation and the Mason County

portion of the Reservation established in the 1855 Treaty of Detroit.

Congress also recognized the logic in this approach in the legislation which restored/reaffirmed the government-to-government relationship with the Little River Ottawa. On September 21, 1994 the status of the Little River Band *Ogema* (tribal leadership) was reaffirmed as a federally recognized tribe by public law 103-324 (108 Stat 2156). Congress recognized the Little River Ottawa people's historic claims to Reservation lands within Manistee, Wexford, and Mason Counties and the "restoration" of lands to the tribe in those two Counties was a critical component in the restoration/reaffirmation of the tribe's rights.

The flag of the Little River Band is the Seal of the Tribe centered on a field. The flag is the outward symbol of the tribe's sovereignty. The design on the flag is a representation of the tribe's riverine history. The river in the design is one of many, and the lands around the rivers are represented by the "hills" and tree visible. Around the "river" is the circle made up of the four sacred colors, symbolizing the traditions of the Band's people. From the circle is suspended nine feathers of the Eagle to represent the nine *ogemuk* (bands) that the Little River Band descends from.

The Federal Government's vacillating between assimilating Indian nations and protecting their right to exist, has taught Native Americans to be suspicious of any municipal government actions that might affect Tribal sovereignty:

A. In 1853, the United States President desired to extinguish Indian title to tribal lands; to break up tribal estates by dividing the lands into parcels and assigning title to individual Native Americans. In 1887 this system became mandatory with passage of the General Allotment Act (Act 24 Stat. 388).

B. Many Native Americans did not settle and farm their land as expected. Thinking the parcels were unused, in 1906 the U.S. Congress acted to expedite the process and removed all restrictions as to sale and taxation of such lands. Thus from 1917 to 1920 the United States government issued patents for the sale of Native American owned lands to others. This was further aggravated by graft and corruption by government and developers using whatever means necessary to separate Indians from their land.

C. The Indian Reorganization Act of 1934 (48 Stat. 984) stopped this practice. Restoration of tribal self-government and alleviation of Indian poverty became the emphasis, helping tribes acquire lands to restore their land base. In 1936 an act of Congress exempted restricted Indian lands from taxation if purchased from restricted tribal funds or trust monies.

D. In the 1950's and 1960's, there was a backlash against reorganization of tribes and assimilation was emphasized; relocation of Indians to urban centers, termination of Indian trust relationship.

E. Starting in the 1960's a federal policy of Indian self-determination was adopted and continues today. The Bureau of Indian Affairs helped tribes with economic development planning, loans, grants, housing, and tribes are viewed by the federal government (HUD) as units of local government --all toward Tribal self-help.

This policy has been re-affirmed by each United States President elected since, and strongly endorsed by President Ronald Reagan and continued by Present George Bush and Bill Clinton.

## Jurisdiction-Generally

Only federal law (from treaties signed with tribes, executive orders, congressional legislation or judiciary decisions) and Tribal law apply on federal trust reservation lands[345] unless the U.S. Congress has determined otherwise. Title to trust lands are owned by the U.S. Government and tribes have the right to use those lands. The U.S. Secretary of Interior is charged with managing the trust.

Tribes are considered "domestic dependent nations" and have the power to govern themselves, in accordance with federally imposed limitations. Tribes are restricted from engaging in external relations with other nations. Tribes receive federal assistance, can regulate Tribal membership, make laws, establish courts, police, remove nonmembers from Tribal property, levy taxes on Tribe members, regulate land use (planning and zoning), resource development, environmental protection, hunting, fishing.

Because much tribal land is no longer in trust, Tribal jurisdictional authority can extend beyond the traditional notion of reservation trust lands to all of "Indian Country"[346].

A discussion of this topic, from the Native American viewpoint is found in this Appendix.

## Jurisdiction-Zoning

Zoning jurisdiction is confusing: The U.S. Supreme Court is moving from

1. balancing approach to resolve jurisdiction disputes by evaluation whether a state activity infringed on the right of Indians to govern themselves; toward
2. balancing approach of preemption analysis which evaluates whose interests are most at stake –those of the tribe or those of the state/municipal/county government.

Looks like the Supreme Court is headed toward "permitting Indians to govern only Indians and Indian-owned lands; Indian government will lack jurisdiction over non-Indians or non-member Indians (except in rare circumstances)."

As examples, but **not** necessarily directly applicable to Wexford County's specific situation, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation et.al.* (492 US 408, 1989) addressed zoning jurisdiction in a checkerboarded ownership pattern area. This case was appealed. The U.S. Supreme Court combined the case with others before hearing it. The Supreme Court case, also involving the Crow Tribe in *Montana v. United States* (450 US 544, (1981)) further modified the *Brendale* decision to say "fee" lands and "trust" lands are different. Trust lands are zoned by the tribal *Ogema* (government).

The tribe also retains its zoning authority over non-Indian members in portions of a reservation where only a few, isolated parcels had been alienated and the tribe's power to determine that

area's essential character remain intact. The tribe does not have zoning authority within a reservation in an area predominantly owned and populated by non-Indian members because such an area has lost its character as an exclusive tribal resource. The issue becomes where the lines --boundary-- for these areas are drawn. Thus resolution of where tribe or municipality jurisdiction exists is decided in court.

The court requires a case-by-case review to settle the issue of zoning jurisdiction arguing it is impossible to articulate precise rules that will govern whenever Tribal zoning or municipal/county zoning has jurisdiction.

At this time in Wexford County, the situation will be simple. Lands the tribe owns in trust will be zoned by the tribe. Other lands may be subject to municipal zoning.

A Michigan municipality and tribe thus have two choices: (1) go to court and litigate, or (2) cooperate. Because of this confusion, the only meaningful way to accomplish planning and land use regulation is through intergovernmental cooperative agreements.

One of the Little River Band Land Use Committee's charges is to be consistent with planning and zoning on tribal lands with that of surrounding areas zoned by municipalities. At this time the tribe's policy is to respect municipal zoning in this context. It is also incumbent on the municipality to do the same with its territory adjacent to tribal zoned lands.

## Jurisdiction-Taxes

In *County of Yakima v. Yakima Indian Nation* (112 S.Ct. 683, 1992) the court said Indian land patented in fee (pursuant to the General Allotment Act (Act 24 Stat. 388)) is subject to property taxes by local schools, county and municipalities.

This court decision is over-simplified here. Given checkerboard landownership the need for coordinated planning and provision of services is needed. Because of unique circumstances for each reservation and tribe, litigation may be necessary to clarify if property taxes are paid on Indian fee lands. Again, mutual agreements where payment in lieu of taxes and resource sharing for services and infrastructure is an attractive alternative.

The tribe does not have any jurisdiction over tribe member Native Americans on fee simple lands. This includes zoning, building permits and property taxes.

## Jurisdiction-In Wexford County Specifically

In the case of the Little River Band, the tribe is in the process of acquiring lands and submitting them for Trust status in Manistee and Mason Counties. To date this has not yet happened in Wexford County. In the case of Wexford County and the Little River Band, all this can be simplified further to deal only with the land ownership patterns which exist or are likely to exist here:

1. If the Tribe buys land, and places that land into "Trust" status with the Bureau of Indian Affairs, then that land is subject to taxes, zoning, and other regulation done by the Tribe. It is not subject to Michigan, county, or municipal laws.
2. There will not be individual Indian-owned fee lands within what will become the Little River Band reservation in Wexford County --effectively avoiding this issue.

## Indian Sovereignty

Tribes guard their sovereignty, and do not want to take the chance of doing anything which may jeopardize that. A clear discussion on this topic is found in this Appendix. Thus a tribe may pay a Michigan municipality or county for services received, but will not call it payment of taxes; a tribe will have a hard time "cooperating" if the perception is 'asking another what one can do on their reservation,' the tribe is who should make the decisions regardless of who owns the land, it is still reservation land.

## Municipal Concerns

Michigan municipal and county residents perceive an inequitable system of taxation and regulations, of tribes not paying for services they use.

Indians pay taxes, with the following exceptions for (1) member-Indians (2) living on federal trust Indian reservations: state and federal income tax for earnings made on trust lands, state (sales) taxes on transactions made on trust lands, local property tax is not paid on trust lands. Other income is taxed, just like non-Indians.

## Successful Coordination Elsewhere

It is always better to work out differences, by meeting and negotiating cooperative agreements on issues of mutual concern. Other communities have a history of distrust causing negotiations to be sensitive, and relations which can easily sour. In Wexford the stage is set with uncertainty over jurisdiction, a new player in the field of governments in the county. Now is the time to establish a formal framework for understanding, conflict resolution and trust.

Joint tribe-municipal/County efforts must proceed slowly at first. Start by focusing on building relationships and a framework for open communication and building trust. This means starting with points of common interest, a lot of education, and learning of the context each other works in. Avoid actions that might be misconstrued as overstepping Tribal authority or minimizing Tribal government value. Recognize and treat a tribe as a sovereign government.

There is help in seeking to avoid litigation from the Northwest Renewable Resources Center (NRRC). The NRRC (founded by leaders of industry, tribes, environmental organizations) has forums to resolve disputes over use and management of natural resources. Examples of agreement include:

Saginaw Chippewa Tribe and Isabella County Drain Commissioner agreement; the tribe pays $100,000 to pay ¼ the cost of a county drain project servicing tribe lands.

Saginaw Chippewa Tribe pays Isabella County Sheriff for jail space at the county jail.

Swinomish Tribal Community and Skagit County form a joint comprehensive planning effort through an intergovernmental agreement to establish coordinating regional planning, regulatory ordinances, administrative procedures, emphasizing planning principles rather than jurisdiction issues.

Comparing the Isabella County experience with the Leelanau County experience it became clear that fostering good relations between Wexford County and the Little River Band of Ottawa Indians is important. The long term good relations in Isabella County have resulted in many mutual benefits. In contrast the less than successful relations in Leelanau County have resulted in lack of cooperation, lack of trust, and little cross participation between governments.

# Native American Foreign Policy

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ALL NATIONS, including Indian nations, have foreign policies although some have more than others. National policy is typically divided into two main areas, foreign relations and domestic issues, and governmental agencies are structured around these two main areas. While domestic and foreign issues do inter-relate, the policy agendas for both areas are kept somewhat separate.

But the foreign and domestic policies of Indian nations are closely inter-related, because of tribal government's unique position in American law and their unique relationships with external governments. Nearly every internal action a tribal leader takes flows from the tribe's foreign policy and in turn affects the tribe's foreign relations.

In a general sense, a sovereign may determine its own foreign policy, but there are elements of every sovereign's foreign policy over which it has no control no matter how mighty it may be. Simple factors like geographical conditions can limit the free choice a sovereign has in dealing with other sovereigns. For example, the continental United States in bounded on the east by the Atlantic Ocean and on the west by the Pacific Ocean, and is, as a consequence, a maritime nation having to deal with other nations on sharing the sea's bounty. Bolivia, on the other hand, is entirely landlocked and must negotiate with other nations for access to vital transportation lines. Each sovereign nation has its own unique set of choices to make in shaping its foreign policy, choices which are influenced by some factors over which they have varying amounts of control. Likewise, the external relations of Indian tribes are made up of those aspects of their "foreign" relations over which they have little or no control and those over which they have great control. While Indian tribes do not engage in what are known as international relationships, e.g., the Navajo Nation does not maintain an embassy in London, tribes do on a daily basis shape and implement their own foreign policy.

Like every other nation on earth Indian nations co-exist within a cluster of sovereigns. Like other nations they are affected by the presence and activities of other sovereigns, namely the United States government and the individual states of the Union. What distinguishes Indian tribes is the high degree to which they are affected by the presence and activities of these other sovereigns. The relationships with these sovereigns is so close that nearly everything a tribe does adjusts its relationship to the United States or its neighboring state(s). Even when a tribe does something as internal as adopt an ordinance regulating domestic relations between its members who live on the reservation, it affects its "foreign" relations. By exercising its power of self government in a just and fair manner it strengthens its sovereignty, and by strengthening its sovereignty it lessens the risk of having its powers infringed upon by a state or federal government.

Nations and states tend to extend the reach of their authority. Wittingly or unwittingly both the federal government and the individual states tend to insert themselves into the Indian world: the state encroaches upon reservation affairs and the federal government attempts to dominate them, treating the tribe as little more than a lowly federal government organization. To be an effective, self-governing government in the face of these forces, a tribe must strongly assert its tribal existence and independence. For this reason every tribal action involves foreign policy.

To better understand the effect of tribal actions on its foreign policy and of a tribe's foreign policy on its actions, a proper understanding must be had of the framework of tribal government, the areas of power and authority over which the tribe is free to make and execute its own choices.

## II UNIQUE POSITION OF INDIAN TRIBES.

**A. Constitution--Art. I, Sec. 8, cl. 3--Indian Commerce Clause.** Indian tribes are not creatures of the federal government. It did not bring them into being and it does not sustain their existence. They existed before it did and have their own inherent governmental existence. Neither do tribes derive power from *state* governments since they possess sovereignty independent of the state. The federal government and the individual states, however, did agree on which would have the authority to deal with Indian tribes in the Northwest Ordinance, enacted by the Continental Congress. In the Northwest Ordinance the states conceded to the federal government all political relations with Indian tribes. The Northwest Ordinance reflected the belief that the federal government was in a better position to treat and otherwise deal with Indian tribes and to protect them from the greed and aggression of the states. The same policy was incorporated into the U.S. Constitution.

The United States Supreme Court has held that the U.S. Constitution, Article I, Section 8, clause 3, also known as the Indian Commerce Clause, is one of the two sources of the federal authority in Indian affairs:

> The Federal Government's power over Indians is derived from Art. I, § 8, cl. 3, of the United States Constitution ... and from the necessity of giving uniform protection to a dependent people.[347]

This provision of the U.S. Constitution authorizes Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Chief Justice John Marshall held[348] that the laws of the State of Georgia did not apply within the Cherokee Reservation in Georgia and that:

> The whole intercourse between the United States and this nation is, by our Constitution and laws vested in the government of the United States.[349]

**B. Tripartite Relationship.** Most Indians enjoy triple citizenship: they are citizens (members) of their tribes, of the states in which they reside and of the United States. This citizenship reflects the essential political fact of tribal governments: That three classes of sovereignties --federal, state and tribal-- exist within the borders of the United States. The distinctions between these sovereigns, and the relationships which exist among them, permeate Federal Indian and tribal law.

**1. Federal Government.** The federal government has legal authority and power to deal with and legislate concerning Indian tribes. This power, particularly that of the U.S. Congress, has been described as "plenary" and as a virtually unqualified power to manage the affairs of the Indian tribes.[350] The relationship has also been described as that of

a guardian to its ward.[351] But these heavy-handed and paternalistic descriptions can never be allowed to cause either the United States or Indian leaders to lose sight of the fact that the true nature of the relationship is that of government to government. True, the federal government has the power to dishonor its treaties,[352] and true, it has trust duties toward tribes as "weak and defenseless people[s]". However, Indian tribes are, above all else in their relations with the United States, sovereign governments. The "plenary" power may be used to destroy an Indian tribe and the trust obligation may hold the United States to fiduciary standards when it administers Indian property, but these powers and duties would not exist if it were not for the essential facts that Indian tribes are distinct political and territorial governments.

**2. State Governments.** "Congress has ... acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."[353] The U.S. Supreme Court[354] has also held, at times with more and at times with less conviction, that the states have no authority over "Indian affairs" on reservations. The hard part is to define what constitute "Indian affairs". Recognizing limitations on state authority is merely a negative way of recognizing that tribes are independent, sovereign authorities who have political and territorial jurisdiction within their Reservations.

Since Indian tribes possess the authority to regulate Indian affairs on their reservations and since the states lack this authority, it is illegal for a state to assume control in these matters. If it does so, it "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[355] The U.S. Congress, however, believes it may deliver over a portion of its plenary authority in Indian affairs to state governments. If it does so, as it did when it enacted Public Law 83-280 conferring civil and criminal jurisdiction over Indian reservations in some states, it must do so in clear terms. If Congress does not expressly grant power over Indian affairs to a state, the state does not possess the power.

There is no general rule governing state regulation of *non-Indian* conduct on Indian reservations. When it asserts authority over the conduct of non-Indians engaging in activities on Indian reservations, it must justify doing so on the basis of a legitimate governmental interest. Every intrusion by a state into reservation affairs must be analyzed in light of the geographic and demographic situation of the tribe, its economy and resources, and the relevant treaties and statutes. As the Supreme Court said,[356] there are some cases in which a state has simply no justification for attempting to regulate non-Indians on the reservation because it lacks the *requisite interest* to do so.

## III. The Legal Structure of an Indian Tribe.

**A. Treaties.** A treaty (or Executive Order) is a source document which plays a profound role in the *external* structure of an Indian tribe. Treaties between tribes and the United States recognize the political existence of the tribe and a government to government relationship (as well as other relationships) between the tribe and the United States. Thus, they play an important role in combating state incursions onto the reservation. In addition to expressly establishing the geographical territory of a tribe, treaties also implicitly protect important tribal resources such as hunting, fishing and water rights.[357]

Treaties with Indian tribes have the same dignity as treaties with foreign nations. They are the supreme laws of the land and as such supersede inconsistent state statutes and constitutional provisions.

Each treaty is a unique document which situates the tribe which signed it differently from all other tribes. Since its overall intent is to establish a territory for the survival of a tribe, a treaty interacts dynamically with the history, geography and resources of the reservation. From the chemistry of these interactions come tribal rights, including rights not explicitly stated in the text of the treaty. Although courts finally distill these rights in many cases, the process begins with and is strongly influenced by the perception of the tribal governing body of its own powers enlightened by a thorough understanding of its own treaty.

Unfortunately, although treaties are the supreme law of the land, there appears to be yet something more supreme – the power of Congress to abrogate. The Supreme Court[358] legally sanctioned the breach of treaty rights by Congress. The protection of treaty rights is not merely a judicial battle, but every bit as much a legislative one. In the passing of a statute Congress may impair a treaty provision. We presume that the courts will not allow Congress to abrogate a treaty accidentally. The Supreme Court says that "[t]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[359] Nonetheless, one can never be certain when the courts will protect a treaty right from injury by an act of Congress and when it will not. Tribes have learned from painful experience that they cannot rely upon the courts to protect their rights in every case. The price of treaty protections is eternal vigilance.

**B. The Indian Reorganization Act (1934).**[360] The Indian Reorganization Act (IRA) was enacted in 1934 during the era when it was the policy of the federal government to promote tribal self-government. This period was a lull between the assimilation era of the late 1800's and the termination era, adopted by Congress in the 1950's. The IRA authorized Indian tribes to organize governments on the basis of constitutions or corporate charters. The IRA was designed to encourage tribes to govern themselves. It did not give to tribes the right to self government, since they already possessed that right as an inherent attribute of their sovereignty.

**C. Constitution and By-Laws.** Tribal constitutions are not the source of tribal power. They are, however, the source of a tribal council's power. By means of its constitution the tribe confers, from all the powers it possesses, certain of those powers upon its

leadership. The leadership must always look to the constitution as its "charter", the document which authorizes it to act.

A tribal constitution is merely one expression of tribal power. It is neither the source of that power nor the only possible form by which that power must be conferred. The U.S. Supreme Court has said tribes are free to establish their own forms of government according to their particular needs.[361] If adopted, however, a tribal constitution casts the government of the tribe into a structure and the tribal governing body may not govern outside the limits established by that structure. But the tribe never loses its power to enact new constitutions or amend old ones. The form that its government will take is the tribe's prerogative to decide. This prerogative is the prime sovereign power of an Indian tribe.

**D. Tribal Action Impact on Indian Law.** In one sense, there is a national Indian community. All tribes are members of it, all Indian country is encompassed by it and within it no Indian land is an island. The fate of any one tribe is the fate of all tribes, with almost every judicial or legislative victory advancing the cause for all and almost every setback a defeat for all. Virtually no judicial decision comes down which does not contain some attempt to formulate universal principles applicable to all Indian tribes. The preservation of each individual tribe really depends upon the continuity of Indian tribal life generally. This continuity in turn depends upon the constant preserving care of the individual tribes it protects. When a tribe launches a legal battle or seeks favorable legislation, tribes on the other side of the country almost become plaintiffs in the cause and proponents of the bill. All tribes are tied by ties that bind and accordingly owe one another cooperation and consultation. In almost all cases it will be the destiny of an entire continent of Indians which will be affected by tribal actions.

## IV. PRESERVATION OF INDIAN CULTURE AND INDIAN VALUES

**A. Law and Order Code.** The right of tribes to govern their members and territories derives from their pre-existing sovereignty. The exercise of tribal self-government is not a power delegated by Congress but is an "inherent power of a limited sovereignty which has never been extinguished."[362] Historically most tribes did not have written laws and behavior was subject only to the strictures of tribal custom. In some cases, conduct which violated tribal norms was punished by requiring the wrongdoer to repay the victim's family, by whipping or death, or by various forms of peer pressure such as ostracism, ridicule or religious sanctions.

Today most tribes have adopted written constitutions and codes. Tribal councils enact their laws and tribal courts try disputes and criminal prosecutions. The form and structure of the tribal government is a tribal decision.[363] In matters of internal self-government within tribal territory, tribal powers are exclusive and federal and state powers are inapplicable unless the tribal powers have been limited by federal treaties, agreements or statutes.

**B. Tribal Court.** It was understood when Indian reservations were established that tribal, not state, governments should control affairs within Indian country.

Tribal courts can serve as mechanisms for strengthening tribal law. If the tribal government so provides, tribal courts may have the authority to interpret the tribe's own laws and ordinances. A tribal court's interpretation should be followed by a federal court in the absence of a specific federal law which requires it to do otherwise.[364]

Tribal courts provide forums for non-Indians as well as Indians. While tribes generally lack criminal jurisdiction over non-Indians, civil disputes between non-Indians and Indians arising from transactions on the reservation or significantly involving Indians are exclusively committed to tribal jurisdiction.[365]

**C. Membership.** The second most important sovereign power of an Indian tribe, as a distinct political community, is the power to determine tribal membership.[366] The tribe may make that determination based upon tribal law, custom, intertribal agreement, or treaty with the United States. It is essential that the tribe define the terms and conditions of membership and write those standards into its tribal constitution.

**D. Indian Values: Anglo-Saxon Law for Non-Indians.** It is easier for non-Indian institutions to understand Indians if they are packaged in non-Indian cartons. Accepting Indians on their own terms, on the other hand, involves understanding, tolerance and serious effort. When an Indian tribe models its laws on Anglo-Saxon laws, it makes it easier for the tribe to live in the non-Indian world because it does not place a demand on the dominant culture to accept as it is. Understanding is easy for the dominant culture because it does not have to understand Indians. The Indians in essence have said "for your convenience we will make our laws like those of non-Indians in this case." Perhaps this is not the tribe's only motivation. It may be simply that Anglo-Saxon models are the only models available or that the tribe happens to think highly of particular non-Indian ways of doing things.

The rule should be always that the Anglo-Saxon legal structure will be scrutinized and accepted only for its value to the tribe and no further. The legal structure should then be tailored to fit the cultural form of the tribe in order to preserve tribal culture and make the legal structure more workable within a tribal setting. In this way the tribe can have the best of both worlds: A legal structure easily understood by state and federal courts and the federal government, and yet one which will be acceptable to tribal members and which will function effectively while preserving tribal cultural values.