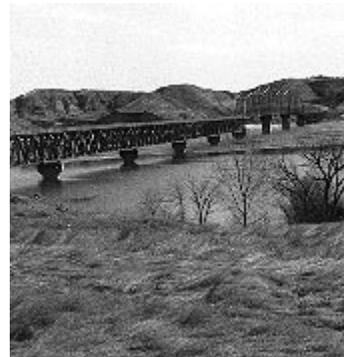


Native American Sovereignty and Telecommunications Policy 4

Sovereignty is the ability of a group of people (e.g., a tribe, village, town, or state) to control its own affairs, culture, and communities; sovereignty is essential to self-governance. In the colonial era, what is now the United States was home to hundreds of indigenous groups with a variety of forms of self-government, organized primarily at the tribal or village level. Over the last 200 years, indigenous groups struggled to maintain their sovereignty. The established framework of federal Indian law recognizes tribal sovereignty, a federal trust responsibility for those tribal resources and powers ceded to or taken by the United States, and a commitment to tribal self-determination or self-control over programs and services vital to tribal well-being. Federal Indian policy, as reflected in presidential statements and agency directives, applies this framework to the 550 federally recognized Indian tribes—including about 220 Alaska Native tribal or village governments (Indian, Aleut, or Eskimo). Federal policy on Native Hawaiians is more ambiguous. However, the historical parallels between Native Hawaiians, American Indians, and Alaska Natives are significant and provide a basis for including Native Hawaiians within this framework.

The Federal Communications Commission (FCC) has the primary federal responsibility for regulation of telecommunications. The FCC does not have an Indian policy. So far as the Office of Technology Assessment can determine, the FCC has not applied the major principles of Indian law to federal telecommunications policy. Nor has the FCC applied federal Indian policy as enunciated by every President from Nixon through Clinton and by several federal agencies. The reality is that the current federal (and state) telecommunications policy regime has developed without



consideration of Indian law and without a tribal telecommunications policy, and therefore has effectively, if unintentionally, eroded and limited the sovereignty of tribes in this area. A basic question is the extent of tribal authority over telecommunications on tribal lands (e.g., physical infrastructure) and in the air over tribal lands (e.g., frequency spectrum). Principles of Indian law and policy can be applied to telecommunications. However, “[f]ederal telecommunications policy and regulation have developed continuously since 1934. Indian telecommunications policy cannot be written overnight; it must evolve.”¹

HISTORICAL CONTEXT: AMERICAN INDIANS AND ALASKA NATIVES

A fundamental issue is the sovereignty of Native Americans over their own affairs, cultures, livelihoods, lifestyles, and destinies. When Europeans first discovered and settled in North America, what is now the 48 contiguous states was the home of hundreds of indigenous Indian tribes—each with its own form of self-governance and with control over hunting, fishing, water, land, and other resources vital to survival. Likewise, when the Russians, Europeans, and Euro-Americans explored subarctic and arctic North America, what is now Alaska was the home of many indigenous Native (Aleut, Eskimo, and Indian) tribes. Similarly, when European explorers first discovered and settled in Hawaii, these islands were populated by indigenous peoples with their own form of self-governance.

The history of the United States is, in part, a struggle of indigenous peoples and governments trying to maintain their sovereignty in the face of population pressures and expanding national and state governments. The experience of American Indians, Alaska Natives, and Native Hawaiians is similar in that all had preexisting forms of government, typically at the tribal or village level; and all

had significant control over their own land, resources, and cultural practices. Their experience varied, however, as the United States expanded westward and southward.

The most immediate conflict was with Indian tribes in the contiguous 48 states. Initially, the United States treated the tribes as independent sovereign entities, under United States protectorate, but having the full rights and powers of separate nations. U.S.-Indian treaties of this era largely stipulated terms and conditions of trade, commerce, travel, and military alliance, as would be typical of relationships between sovereign nations. In the early 1800s, however, U.S. policy changed, formalized in the Indian Removal Act of 1830, to one of removing eastern Indians to areas generally west of the Mississippi River in order to accommodate the westward movement of settlers from the east coast. Tribes were treated as so-called domestic dependent nations, and the United States assumed a trust relationship with Indians in exchange for Indian land. Treaties of this period generally provided monetary and other compensation to Indians and guarantees against the taking of remaining Indian lands. In the mid to late 1800s, U.S. policy shifted again under pressure from settlers, immigrants, and fortune seekers moving into the Great Plains, Rocky Mountains, Pacific Northwest, and California. During this time, the United States moved many Indians onto reservations, and forced or coerced tribes to agree to reservation treaties in return for health, education, and financial support. From the late 1870s to early 1930s, U.S. policy encouraged assimilation of Indians into the majority society.²

The Indian Reorganization Act of 1934 marked the next change in U.S. policy, which once again emphasized Indian self-government and a renewed attention to the U.S. trust relationship with Indians and treatment of tribes as quasi-sovereign entities. This policy lasted until the early 1950s,

¹James A. Casey, Esq., Fletcher, Heald & Hildreth, Rosslyn, Virginia, personal communication, Apr. 27, 1995.

²See, e.g., Alice B. Kehoe, *North American Indians: A Comprehensive Account* (Englewood Cliffs, NJ: Prentice Hall, 1992); and Vine Deloria, Jr., *American Indian Policy in the Twentieth Century* (Norman, OK: University of Oklahoma Press, 1985).

when efforts were made to terminate tribes and U.S.-tribal relationships and encourage Indians to relocate to urban areas.³

The modern era of U.S. policy began in the mid- 1960s with renewed emphasis on Indian and tribal self-determination and on government-to-government relationships between tribes and the United States, and reaffirmation of the U.S. trust responsibilities. Key milestones in modern U.S. Indian policy include the Indian Civil Rights Act of 1968, Indian Self-Determination and Education Act of 1975, Indian Child Welfare Act of 1978, and Indian Religious Freedom Act of 1978.⁴ These acts, collectively, were intended to help restore Indian rights as indigenous peoples, including the right to establish and maintain their own forms of self-government.

From 1776 through 1870, the United States negotiated, and the U.S. Senate ratified, 370 treaties with Indian tribes.⁵ The federal government currently recognizes about 330 tribes; state governments recognize about another 60; and perhaps 100 tribes are petitioning for federal recognition.⁶ Recognition brings with it acknowledgment of a formal government-to-government relationship, eligibility for various federal services, and opportunity to establish a trust for land and resources. Tribes vary widely in their populations, geographic size, cultural traditions, economic and natural resources, definition and conditions of membership, and form of government. Most tribes have several hundred to a few thousand members; only a few have more than 10,000 members (e.g., the Navajo Nation, Oglala Sioux, and San Carlos Apache).⁷

The federal government also recognizes 220 Native villages in Alaska. The Alaska Native history differs from the American Indians in that



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Top: Standard government-issue sign at the western boundary of the Turtle Mountain Indian Reservation, state highway 5, North Dakota Bottom: On the other side of the highway, a welcome sign designed and built by the Turtle Mountain Band of Chippewa Indians

most Alaskan indigenous peoples did not sign treaties with the United States, and many have remained on their traditional lands until the present time. The large, remote expanses of Alaskan wilderness helped to buffer pressures from settlers. The interests or conditions of Alaska Natives

³Ibid.

⁴Ibid.

⁵Jack Utter, *American Indians: Answers to Today's Questions* (Lake Ann, MI: National Woodlands Publishing Co. 1993), esp. pp. 49-50.

⁶Arlene Hirschfelder and Martha Kreip de Montano, *The Native American Almanac: A Portrait of Native America Today* (New York, NY: Prentice Hall, 1993), see esp. pp. 237-272, appendix I, "Native American Tribes by State."

⁷Veronica E. Tiller (ed.), *Discover Indian Reservations USA* (Denver, CO: Council of Energy Resource Tribes, 1992).



Top: The “Eskimo Building” houses Alaska Native companies and the U.S. Postal Service office in Kotzebue, Alaska. Note the mailbox at the right. **Bottom:** Communication lifelines for remote Eskimo villages include the U.S. Postal Service via airplane and telecommunications via satellite.

received little attention for over a century, from the time of Russian explorations, to the 1867 sale of Alaska to the United States and the establishment of the Territory of Alaska in 1912, to Alaska statehood in 1958. The formal recognition of Alaska Native villages as governing entities resulted from pressures to: 1) establish Native territories within State of Alaska public lands, 2) resolve disputes over land-title claims that were blocking oil-field development, and 3) respond to a nascent Native rights movement represented by the Alaska Federation of Natives. The Federation

played a key role in negotiations leading to enactment of the Alaska Native Claims Settlement Act of 1971. The act settled land claims in return for monetary compensation and the establishment of 12 regional Native corporations and about 200 individual Native village governments.⁸

The current Native corporation and village structure includes:

- Ahtna, Inc. (with two Athabascan Native villages);
- Aleut Corp. (with 13 Aleut Native villages);
- Annette Island Reserve (including the Tsimshian Tribe and Metlakatla Indian Community Council);
- Arctic Slope Regional Corp. (with five Eskimo Native villages);
- Bering Straits Native Corp. (with 16 Eskimo villages);
- Bristol Bay Native Corp. (with 24 Eskimo and Aleut villages);
- Calista Corp. (44 Eskimo and Athabascan villages);
- Chugach Natives, Inc. (four Aleut and Athabascan villages);
- Cook Inlet Region, Inc. (three Athabascan villages);
- Doyon, Ltd. (32 Athabascan and Eskimo villages);
- Koniag, Inc. (seven Aleut villages);
- NANA Regional Corp. (10 Eskimo villages); and
- Sealaska Corp. (11 Tlingit and Haida villages).

Alaska villages always have been and continue to be very small—a few hundred to a few thousand persons. The majority of the approximately 80,000 Alaska Natives (Eskimos, Aleuts, and Indians) live in these rural villages. In contrast, about 35 percent of the roughly 1.9 million Indians in the contiguous 48 states live on Native land (reservations, rancherias, and pueblos); about 15 percent live in rural areas near Native

⁸Kehoe, *North American Indians*, op. cit., footnote 2, esp. ch. 9, pp. 480-563, “The Arctic and Subarctic.”

⁹Hirschfelder and Kreipe de Montano, op. cit., footnote 6, pp. 238-240.

land; and the remaining 50 percent live in metropolitan areas.¹⁰ The vast majority of 225,000 Native Hawaiians "do not live in separately identified Native communities; only a few thousand live - on Native lands, although many more live in small, rural towns on the various Hawaiian Islands.

HISTORICAL CONTEXT: NATIVE HAWAIIANS

Unlike tribal reservations and Alaska Native villages, Native Hawaiians do not have tribal lands or tribal governments. Those with 50 percent or more Hawaiian blood can apply to live on Hawaiian homelands. Native Hawaiians live throughout the Hawaiian Islands. Those Hawaiian communities with significant Native populations are not recognized or organized as self-governing Native communities per se, and do not have a status equivalent to Indian reservations or Alaska Native villages. Most Native Hawaiians live in cities and towns organized under Hawaii's state and county governments. Also, Native Hawaiian groups, unlike many Indian tribes, do not have treaty relationships with the United States that underpin the formalized federal trust responsibility for Indians. And federal Indian policy, as enunciated by Presidents Nixon through Clinton and by several federal agencies, does not explicitly include Native Hawaiians. These policies are largely framed in terms of federally recognized tribes (including Alaska Native tribes and villages).¹²

A deeper analysis indicates, however, that the many parallels between Native Hawaiian and American Indian history provide a basis for defining a form of federal trust responsibility for Native Hawaiians as well. Historical accounts document the exploitation and manipulation of Native Hawaiians by European and American business and military interests since the time of Captain James



Top: Pololu Valley and Kohala Mountains meet the sea on the Big Island, Hawaii, typical of scenic, remote areas of the Hawaiian Islands. **Bottom:** The Kohala Mission School, like most small rural schools in Hawaii, is located on a coastal road along which run telephone, cable TV and electrical power lines—thus opening up at least the possibility of enhanced educational telecommunications applications.

¹⁰ U.S. Bureau of the Census, 1990, cited in *ibid.*, pp. 36-43.

¹¹ Defined as any individual who is a descendent of indigenous peoples who, prior to 1778, lived in the area that is now the State of Hawaii.

¹² *Ibid.*

Cook's arrival on Hawaiian shores in 1778.¹³ The 1893 annexation of Hawaii as a U.S. territory, ratified in 1898, was accomplished through coercion, misrepresentation, and without the willing consent of Native Hawaiians.¹⁴ U.S. President Grover Cleveland concluded that there was U.S. complicity in the illegal overthrow of the Native Hawaiian government, but he was unable to change the course of events.¹⁵

Recognition of a federal responsibility for Native Hawaiians was reflected in the congressional joint resolution of 1898 and was amplified in the 1900 legislation formally establishing the territorial government of Hawaii. The 1898 resolution ceded absolute title for Hawaiian public lands to the United States, but provided that all revenue or proceeds from such land, except as may be used by the United States for civil or military purpose or by local governments, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."¹⁶ In 1921, Congress enacted the Hawaiian Homes Commission Act. This act authorized that about 188,000 acres of public land under the commission's jurisdiction be leased to Native Hawaiians for 99 years at a nominal fee. Native Hawaiian advocates are critical of both the intent and implementation of this act, which, nonetheless, reflected some measure of congressional concern and responsibility for the deteriorating socioeconomic conditions of Native Hawaiians.¹⁷

The federal interest in and responsibility for Native Hawaiians was further reinforced in 1959 when Hawaii was admitted as a state, under the Admissions Act. This act returned most ceded lands to the state, but requires the state to hold all ceded lands:¹⁸

1. as a public trust for the support of public schools and other public educational institutions,
2. for the betterment of the conditions of Native Hawaiians,
3. for the development of farm and home ownership on as widespread a basis as possible,
4. for the making of public improvements, and
5. for the provision of lands for public use.

Most importantly, the act states that use of these lands—and proceeds and income therefrom—shall be only for the five purposes, "and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States."¹⁹ A 1978 Hawaiian constitutional convention amended the state constitution to establish a State Office of Hawaiian Affairs to administer public land trust funds for the betterment of Native Hawaiians and carry out various other functions on behalf of all Hawaiians.²⁰

Since statehood, Congress has enacted or amended several statutes that establish a federal responsibility for various social, health, educational, and training programs serving Native Ha-

¹³See, e.g., Michael Dougherty, *To Steal a Kingdom: Probing Hawaiian History* (Waimanalo, HI: Island Style Press, 1992); and Richard A. Wisniewski, *The Rise and Fall of the Hawaiian Kingdom* (Honolulu, HI: Pacific Basin Enterprises, 1979).

¹⁴*Ibid.*; and Joyce Ahuna-Kaai'ai (ed.), *He Alo A He Alo—Face To Face: Hawaiian Voices on Sovereignty* (Honolulu, HI: American Friends Service Committee, 1993).

¹⁵Michael Kioni Dudley and Keoni Kealoha Agard, *A Hawaiian Nation II: A Call for Hawaiian Sovereignty* (Honolulu, HI: Na Kane O Ka Malo Press, 1990).

¹⁶Melody Kapilialoha MacKenzie (ed.), *Native Hawaiian Rights Handbook* (Honolulu, HI: Native Hawaiian Legal Corp., 1991), p. 15.

¹⁷*Ibid.*

¹⁸Admissions Act of Mar. 18, 1959, Public Law 86-3.

¹⁹*Ibid.*

²⁰Hawaii State Constitution, Article XII, Sections 4-6. Also see MacKenzie, *op. cit.*, footnote 16, pp. 19-20. Note that for purposes of the Native Hawaiian Homes Act and the Admissions Act, and therefore the Hawaiian Constitution, *Native Hawaiian* is defined as someone with 50 percent or more Hawaiian blood. Hawaiian is defined as someone with any quantum of Hawaiian blood.

waiians. In some cases, Congress has granted broad authority to departmental heads to provide funding to Native Hawaiians or organizations directly representing Native Hawaiians; in other instances, Congress has specified a funding amount or stipulated a percentage budget set-aside for Native Hawaiians.²¹ In enacting the Native Hawaiian Health Care Act of 1988, for example, Congress established a clear federal role and responsibility for helping improve the overall health conditions of Native Hawaiians, and a commitment to the heavy involvement of Native Hawaiians in developing their own health care plan and a network of community health clinics.²² In 1993, Congress enacted a joint resolution that apologized to Native Hawaiians for the U.S. role in the illegal 1883 overthrow of the Kingdom of Hawaii.²³

In sum, there are significant historical and policy parallels between Native Hawaiians and American Indians and Alaska Natives.²⁴ The federal responsibility for the overall well-being and economic livelihood of Native Hawaiians could be reasonably construed to extend to the realm of telecommunications—as a key part of the infrastructure needed to deliver health and educational services to Native Americans and provide them with training and career opportunities.²⁵ The exercise of a federal responsibility for Native Hawaiian telecommunications would differ because there are, at present, no formally recognized or constituted Native Hawaiian governments similar

to Indian tribes and Alaska Native villages. This might change in the future, however, as the Native Hawaiian sovereignty movement matures.²⁶ Native Hawaiian activists are asserting Native rights in such areas as land, water, fishing, trail and shoreline access, adoption, and religion.²⁷

Native Hawaiian organizations and advocacy groups are increasingly aware that telecommunications and computer technologies offer significant leverage for improving the well-being and independence of Native Hawaiians—whether within the current state and county forms of government or some alternative. The State of Hawaii provides a variety of telecommunications services to all Hawaiians, including Native Hawaiians. Examples of these services include: 1) Hawaii Interactive Television System (HITS), a two-way videoconferencing and distance-learning network connecting the University of Hawaii campuses at Manoa and Hilo, three community colleges (Maui, Kauai, and Kapiolani), and the public television station KHET; 2) Hawaii Wide Area Integrated Information Access Network (HAWAIIAN), a digital microwave system that can carry data, voice, radio, and compressed digital video signals between various educational and government locations on the islands of Kauai, Oahu, Lanai, Maui, and the Big Island; and 3) Hawaii FYI, a videotext service that provides access to educational and government information, operated by the Hawaiian Information Network Corporation (Hawaii Inc.)—a public corporation es-

²¹MacKenzie, *op. cit.*, footnote 16, pp. 294-303.

²²Public Law 100-690.

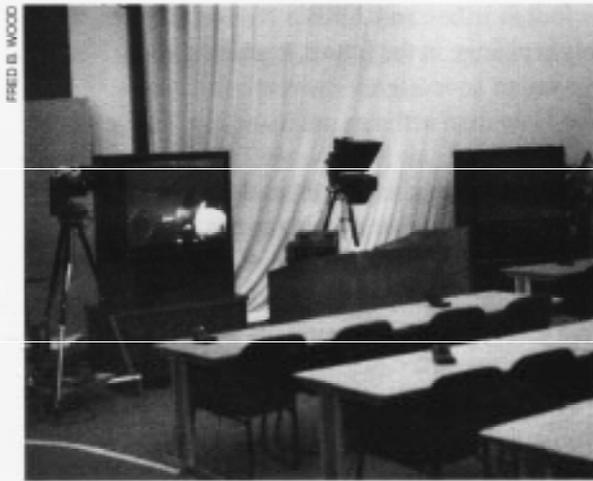
²³S.J. Res. 19, a joint resolution to acknowledge the 100th anniversary of the Jan. 17, 1893, overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, 103d Congress, 1st session, enacted as Public Law 103-150, Nov. 23, 1993, and accompanying report, U.S. Congress, Senate, Committee on Indian Affairs, Senate Rep. 103-126, Aug. 6, 1993; reprinted in Richard J. Scudder (ed.), *The Apology to Native Hawaiians* (Kapolei, HI: Ka'imi Pono Press, 1994).

²⁴Also see, e.g., Linda S. Parker, *Native American Estate: The Struggle Over Indian and Hawaiian Lands* (Honolulu, HI: University of Hawaii Press, 1989).

²⁵The definition of *Native Hawaiian* for determining program eligibility is complicated because of the integration of Native Hawaiians into the general population and differing views on blood quantum or other standards that should apply.

²⁶See Dudley and Agard, *op. cit.*, footnote 15.

²⁷See MacKenzie, *op. cit.*, footnote 16.



Top: University of Hawaii at Hilo videoconferencing room—a standard set-up for the Hawaii Interactive Television System, a distance learning network connecting the University of Hawaii campuses and community colleges. **Bottom:** Split screen capability allows videoconferencing participants to view the instructor and students at one or more island locations.

established to develop the Hawaiian information industry.²⁸ Notwithstanding these noteworthy programs, grassroots Native Hawaiian groups are concerned that “Native Hawaiian peoples are in danger of being left behind in the telecommunications age.”²⁹

INDIAN LAW AND TELECOMMUNICATIONS³⁰

Central principles of federal Indian law and policy (as evidenced by statutes, treaties, executive policy, and judicial opinions) include the federal trust responsibility, tribal sovereignty, and tribal self-determination.³¹

These principles evolved over centuries, and have been clarified and strengthened in recent decades in ways that Indians hope will preclude a return to earlier federal policies that at times supported the: 1) removal of Indians from tribal lands through treaties that were broken or unilaterally abrogated by the United States; 2) outright taking of Indian lands through fraud, deceit, and military force; 3) assimilation of Indians into mainstream American life by changing or suppressing Native customs, dress, language, religion, and culture; 4) forced removal of Indian children from their tribal communities to remote boarding schools; and 5) termination of the federally recognized status of tribes as a way to reduce federal responsibility, move land out of trust status, further integrate Indians into American society, and relocate Indians from reservations to major cities and metropolitan areas.³²

²⁸ David Lassner, University of Hawaii at Manoa, “Educational Telecommunications in Hawaii,” memo dated April 1994.

²⁹ Jim Hunt, Honokaa High School, Honokaa, HI, “Native Hawaiian Telecommunications Network,” n.d.

³⁰ This section is based on research and analysis conducted for OTA by Karen Funk and Sandra Ferguson, Esq., Hobbs, Straus, Dean & Walker, Washington, DC.

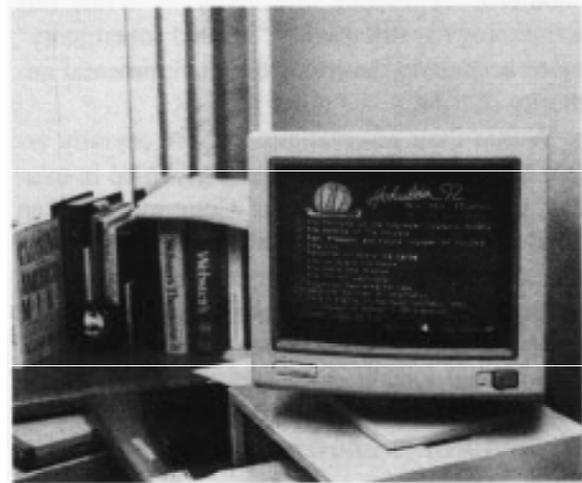
³¹ See, e.g., Francis Paul Prucha (ed.), *Documents of United States Indian Policy* (Lincoln, NE: University of Nebraska Press, 1990); DeLona, op. cit., footnote 2; Fremont J. Lyden and Lyman H. Legters (eds.), *Native Americans and Public Policy* (Pittsburgh, PA: University of Pittsburgh press, 1992); Stephen Comely, *The Return of the Native: American Indian Political Resurgence* (New York, NY: Oxford University Press, 1988); Hirschfelder and Kreipe de Montano, op. cit., footnote 6.

³² See Utter, *American Indians*, op. cit., footnote 5, esp. pp. 241-262, “A Summary History of United States Indian Policy”; and generally Kehoe, *North American Indians*, op. cit., footnote 2; Donald L. Parman, *Indians and the American West in the Twentieth Century* (Bloomington, IN: Indiana University Press, 1994); and Carl Waldman, *Atlas of the North American Indian* (New York, NY: Facts on File, 1985).

The essence of the federal trust responsibility is to ensure the survival of Indian communities. Under the trust responsibility, Indians possess rights as a group, in addition to rights as individuals. The unique status of Indian tribes is based on the historical relationship between tribes and the federal government.³³ The federal trust responsibility includes serving as trustee of tribal lands and natural and financial resources, and providing services necessary to the health and welfare of Indian tribes.³⁴

A continuing challenge is updating the scope and definition of the trust responsibility to reflect modern life. In original treaties, for example, the federal government often promised to provide teachers, doctors, and annuities (in the form of food and supplies) to tribes in return for cession of tribal lands.³⁵ If the trust responsibility is to have meaning, it must keep pace with changing social and economic realities. This adjustment has been made in areas such as health, education, and land and resource management as tribes and the relevant federal agencies have gained experience as partners in the government-to-government relationship.³⁶ Including telecommunications within the trust responsibility would seem a logical next step because ensuring adequate telecommunications services and infrastructure is important to the well-being and survival of tribes.

Tribal sovereignty is, likewise, along-standing principle of Indian law. The concept of tribal sovereignty dates back to legal precedents established by the European colonists in their relations with tribes. European nations entered into at least



Top: The Hawaii Information Network Corporation operates Hawaii FYI, a computer service that provides public access to educational and government information. **Bottom:** In partnership with the Polynesian Voyaging Society and others, Hawaii FYI provided reformation on the voyage of the seagoing canoe Hokulea and background materials on voyaging traditions, canoe-building, navigation, and the like.

³³ *Morton v. Mancari*, 417 U.S. 535 (1974). See generally Sharon O'Brien, *American Indian Tribal Governments* (Norman, OK: University of Oklahoma Press, 1989).

³⁴ See Frank Pommersheim, "Tribal-State Relations: Hope for the Future," *South Dakota Law Review*, Vol. 36, 1991, pp. 239,245.

³⁵ *Ibid.*

³⁶ See generally Dean B. Suagee, "Self-determination for Indigenous Peoples at the Dawn of the Solar Age," *University of Michigan Journal of Law*, vol. 25, 1992, pp. 701-712.

175 treaties with Indian tribes before 1776, and, as noted earlier, the U.S. government negotiated and ratified 370 Indian treaties. The U.S. Constitution placed Indian tribes on a par with foreign nations in granting Congress the power to regulate commerce.³⁷

The basic governmental power of tribes is not delegated by Congress; rather it is inherent and can only be abrogated if Congress expresses a clear intent to do so. Tribes possess “inherent powers of limited sovereignty which ha[ve] never been extinguished.”³⁸ Indian tribes are distinct from both states and foreign nations. An early seminal Supreme Court case described tribes as “domestic dependent sovereigns.”³⁹ While this terminology is still used,⁴⁰ “limited sovereignty” more accurately describes the governmental authority of tribes.

Within their reservations, tribes generally retain all powers other than those given up in treaties, taken away by an act of Congress, or taken away through implied divestiture.⁴¹ Tribes have the authority to govern their own internal affairs and to exercise civil regulatory jurisdiction within reservation boundaries. In sum, tribes have jurisdiction over a wide range of activities on Indian lands, although the federal government frequently has concurrent jurisdiction. Thus, it would appear

that tribes could legally assert authority over telecommunications on Indian lands.

Self-determination is an inherent part of sovereignty, and has become a cornerstone of federal Indian policy reflected in statutes and presidential statements. Congress has enacted legislation to assist the tribes in their efforts to achieve economic and governmental self-determination. The Indian Reorganization Act of 1934 was intended to strengthen tribal governments. And the Indian Self-Determination and Education Assistance Act of 1975, as amended, provided tribes with the right to take over programs administered by the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) by entering into self-determination contracts or self-governance compacts.⁴² The Self-Determination Act applies not only to federally recognized tribes in the contiguous 48 states, but to Alaska Native villages (Indian, Eskimo, and Aleut) or regional or village corporations defined in or established under the Alaska Native Claims Settlement Act of 1971.⁴³ There are currently 330 federally recognized tribes in the contiguous 48 states and 220 federally recognized Native villages in Alaska (including both villages and regional organizations).⁴⁴

Telecommunications is not a primary or major function of the BIA and IHS. As these agencies

³⁷U.S. Constitution, Article I, section 8, Sept. 17, 1787.

³⁸See David H. Getches, Charles F. Wilkinson, and R. Williams, *Federal Indian Law*, 3rd Ed. (St. Paul, MN: West Publishing, 1993). Also see *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978).

³⁹See Pommershein, op. cit., footnote 34, p. 244 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1931)).

⁴⁰*Oklahoma Tax Commission v. Citizen Band Potawatami Indian Tribe*, 11 S.Ct. 905, 909 (1991).

⁴¹*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201-11 (1978). According to the Court in *Oliphant*, tribes had been implicitly divested of their inherent sovereignty to exercise criminal jurisdiction over non-Indians.

⁴²25 U.S.C. Subsec. 13a, 450-450n, 455-458e; 42 U.S.C. Sec. 2004b (1988).

⁴³Alaska Native Claims Settlement Act of 1971, U.S. Stat. 85:688 et seq. The act was intended to resolve long-standing land claims by Native groups. The act allowed Native Americans to retain ownership of about 44 million acres of land, and compensated them for lands previously taken or given up under terms of the act. Federal and state buyout funds were used to capitalize Native regional and village corporations.

⁴⁴The U.S. Department of the Interior’s list of federally recognized tribes includes 220 tribes in Alaska. For Alaska, use of the term *tribe* is somewhat misleading because of the inclusion of Alaska Native villages and regional organizations recognized as governing bodies, as well as American Indian tribes indigenous to Alaska. On occasion, the OTA has used the term *village* because the vast majority of federally recognized tribes in Alaska are actually Alaska Native villages. By the 1930s, the legal status of Alaska Natives had been generally equated to that of American Indians. See Felix S. Cohen, U.S. Department of the Interior, *Handbook of Federal Indian Law* (Washington, DC: U.S. Government Printing Office, 1941, reprinted by William S. Hein Co., 1988), esp. pp. 404-406.



Top: The Confederated Salish and Kootenai Tribes maintain a modern tribal headquarters complex on the Flathead Indian Reservation in Pablo, Montana. **Bottom:** Salish-Kootenai Tribal College building in the foreground; Mission Mountains in the background. The college brings computers and telecommunications to students from this scenic reservation located in northwestern Montana.

get more involved in distance learning, telemedicine, geographic information systems, and other telecommunications-related activities, however, tribes could seek self-determination in this area as well. The principle of tribal self-determination also could be extended to other federal agencies that have major telecommunications responsibilities.

In sum, telecommunications could be included within the basic framework of federal trust responsibility, tribal sovereignty, and tribal self-determination. The historical context and evolution of federal Indian law and policy provide a strong conceptual basis for doing so.

FEDERAL INDIAN POLICY POTENTIALLY APPLICABLE TO TELECOMMUNICATIONS*

There are no current presidential or agencywide policies that specifically address Indian telecommunications. However, presidential and agency policies do provide a framework that could be applied. Presidential policy applies to all federally recognized tribes and Alaska Native villages; some agency policies extend to Native Hawaiian groups and state-recognized tribes as well.

■ Presidential Policies

On July 8, 1970, President Nixon issued a policy that reaffirmed the unique status of Indian tribes and the tribal-federal relationship based on “solemn obligations entered into by the United States Government.” President Nixon stated that:⁴⁵

We must assure the Indian that he can assume control of his life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of federal control without being cut off from federal concern and support.

⁴⁵This section is based on research analysis prepared for OTA by Karen Funk and Sandra Ferguson, Esq., Hobbs, Straus, Dean & Walker, Washington, DC.

⁴⁶President Richard Nixon, Statement to the Congress of the United States, The White House, July 9, 1970.

President Nixon proposed legislation to allow tribes to contract with federal agencies to administer programs, and to provide federal funding for Indian educational programs directly to tribes to administer. These initiatives resulted in the landmark Indian Self-Determination and Education Assistance Act of 1975 noted earlier.

In 1983, President Reagan issued his Indian policy statement, which declared:⁴⁷

Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination. In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members.

In 1991, President Bush reaffirmed the Reagan policy as the cornerstone of the Bush position on Indian affairs, and stated that:⁴⁸

This government-to-government relationship is the result of sovereign and independent tribal governments being incorporated into the fabric of our Nation, of Indian tribes becoming what our courts have come to refer as quasi-sovereign domestic dependent nations. Over the years this relationship has flourished, grown, and evolved into a vibrant partnership in which 500 tribal governments stand shoulder to shoulder with other governmental units that form our Republic.

In 1994, President Clinton articulated his Indian policy in a meeting with tribal leaders:⁴⁹

Today I re-affirm our commitment to self-determination for tribal governments. Today I pledge to fulfill the trust obligations of the federal government. Today I vote to honor and respect tribal sovereignty based upon our unique historical relationship.

President Clinton also issued a memorandum to the heads of all executive departments and agencies directing them to: 1) ensure that each department or agency is operating in a manner consistent with government-to-government relationships with tribes, 2) consult with tribal governments before taking action that will affect Indian tribes, 3) evaluate departmental or agency programs regarding impact on tribes, and 4) remove any procedural impediments to working directly and effectively with tribes on matters that affect trust property or tribal government rights.⁵⁰

Some federal departments and agencies have issued Indian policy statements, but not those agencies or agency units that have primary responsibility for telecommunications. Presidential policy is, *prima facie*, applicable.

■ Federal Agency Policies

Several federal agencies have issued formal Indian policy statements that could serve as examples for agencies with major telecommunications responsibilities. Agency policy statements uniformly recognize the unique status of tribal governments and support tribal self-determination.

⁴⁷President Ronald Reagan, Statement by the President on Indian Policy, The White House, Jan. 24, 1983.

⁴⁸President George Bush, Indian Policy Statement, The White House, June 14, 1991.

⁴⁹President Bill Clinton, Indian Policy Statement, The White House, Apr. 29, 1994.

⁵⁰President Bill Clinton, "Government-to-Government Relations with Native American Tribal Governments," Memorandum of Apr. 29, 1994, *Federal Register*, vol. 59, No. 85, May 4, 1994, pp. 22951-22952.

The Departments of the Interior, Energy, Agriculture, Commerce, and Justice, as well as the Environmental Protection Agency (EPA), have comprehensive formal policies on agency-tribal relationships.⁵¹ Some other agencies have subject-specific policies, for example, the National Park Service's policy to protect and preserve culturally-sensitive or sacred sites on Indian lands.⁵²

EPA's policy is illustrative of a comprehensive approach that could be applied to telecommunications. EPA issued its first guidance on Indian policy in 1984.⁵³ The initial policy recognized tribal governments as sovereign entities with primary responsibility for setting and enforcing environmental standards on Indian reservations, and the need for EPA to support tribal efforts to develop their own environmental regulatory programs.⁵⁴ The policy also acknowledged federal responsibility for environmental enforcement on Indian lands in the absence of tribal programs.

EPA further refined and enhanced its Indian policy in 1991 and 1994.⁵⁵

The thrust of EPA's policy is to strengthen the ability of tribal governments to develop and administer environmental programs themselves and to work as partners, to the extent necessary, with state and federal environmental regulatory agencies. This approach would seem directly applicable to telecommunications.

Key elements of EPA's approach to tribal relationships include:

1. *Issuance of a clear policy that explicitly recognizes tribal sovereignty and commits the agency to further the ability of tribal governments to exercise self-determination.*
2. *Agency advocacy for legislative and regulatory changes that support the Indian policy.*

After the 1984 EPA policy was issued, and with EPA's and tribal support, Congress enacted amendments to treat tribes as states for certain

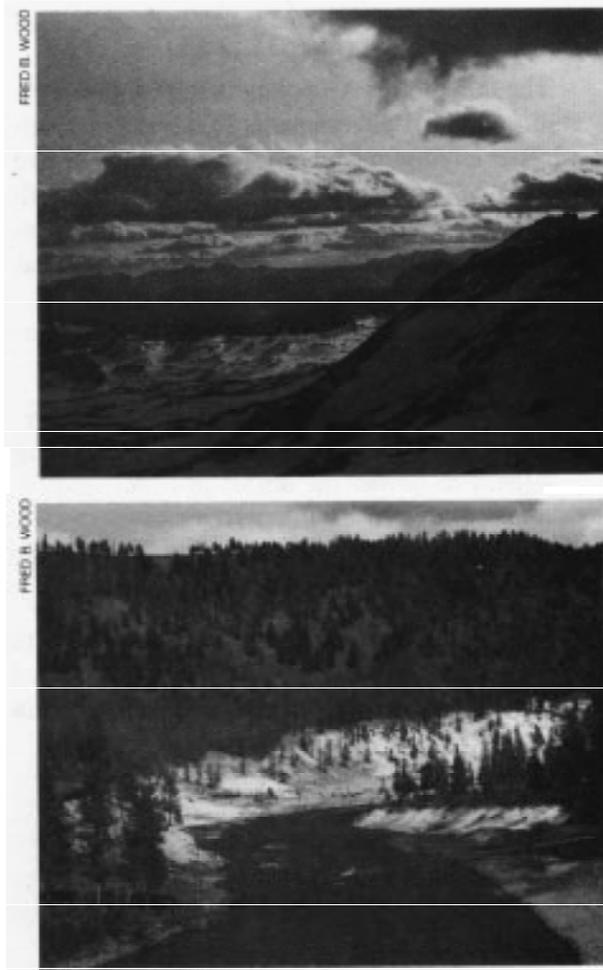
⁵¹See, U.S. Department of the Interior, Memorandum from Ada E. Deer, Assistant Secretary for Indian Affairs to the Assistant Secretary for Fish and Wildlife and Parks, "Indian Fish and Wildlife Policy," June 23, 1994; U.S. Department of Energy, "American Indian Policy," July/August 1994; U.S. Department of Agriculture, Departmental Regulation No. 1020-6, "Policies on American Indians and Alaska Natives," Oct. 22, 1992; U.S. Department of Commerce, "American Indian and Alaska Native Policy of the U.S. Department of Commerce," Mar. 30, 1995; U.S. Department of Justice, Office of the Attorney General, "Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes," June 1, 1995; U.S. Environmental Protection Agency, Memorandum from Carol M. Browner, Administrator, to all employees on "EPA Indian Policy," Mar. 14, 1994.

⁵²See the National Historic Preservation Act of 1966 as amended in 1980 and 1992 regarding the role of Indian tribes. The act, as amended, permits tribes, at their option, to assume any or all of the responsibilities normally carried out by state historic preservation officers, and to enter into contracts or cooperative agreements to administer federal historic preservation responsibilities on Indian lands. A tribe must have an historic preservation plan approved by the Secretary of the Interior in order to assume these responsibilities.

⁵³U.S. Environmental Protection Agency, Memorandum from Alvin L. Alm, Deputy Administrator, "Indian Policy Implementation Guidance," Nov. 8, 1984.

⁵⁴*Ibid.*

⁵⁵U.S. Environmental Protection Agency, Memorandum from William K. Reilly, Administrator, "EPA/State/Tribal Relations," July 10, 1991, and Memorandum from Carol W. Browner, *op. cit.*, footnote 51.



Top: View of Yellowstone National Park from the northeast; Washburn Mountain Range in the distance. The National Park Service has responsibility for protecting Native American ceremonial, sacred, and burial sites on parklands. **Bottom:** View of Yellowstone River looking southeast near Tower Junction, Wyoming. The Shoshoni and Crow Indians once lived and hunted in much of what is now northwestern Wyoming and Yellowstone National Park.

purposes under the Safe Drinking Water Act; the Comprehensive Environmental Response, Compensation, and Liability Act (also known as CERCLA or Superfund); the Clean Water Act; and the Clean Air Act.⁵⁶ EPA streamlined

the process by which tribes apply for funding and technical assistance.

3. *Provision of funding and technical assistance to tribal governments.*

EPA provides funding to tribes under general EPA authority as well as specific statutes. The Indian Environmental General Assistance Act of 1992⁵⁷ provides funding to tribes and tribal consortia for the planning and development of tribal environmental management capabilities. The Indian Regulatory Enhancement Act of 1990⁵⁸ authorizes the Administration for Native Americans (in the Department of Health and Human Services) to provide grants to tribal governments for the development of tribal environmental programs. EPA also provides a wide range of informational and technical assistance to tribal governments.

4. *Ongoing communications with tribal governments.*

EPA has committed itself to listening and learning about tribal environmental needs, providing environmental information and education for tribal officials and members, and involving tribal governments in EPA's planning and policymaking. EPA has established a Tribal Operations Committee comprised of tribal representatives and EPA managers to help ensure tribal input on decisions that may affect tribes. The Committee includes 18 tribal representatives and at least one EPA representative from each EPA region that includes federally recognized tribes.

5. *Establishment of a central agency office on Indian affairs.*

In response to a recommendation from its Tribal Operations Committee, EPA established, in 1994, a central office on tribal environmental

⁵⁶ See Safe Drinking Act, 42 U.S.C. Sec. 300j-ll(a)(l) (1988); Comprehensive Environmental Response, Compensation, and Liability Act 42 U.S.C. Sec. 9626 (1988); Clean Water Act 33 U.S.C. Sec. 1377 (1988); and Clean Air Act, 42 U.S.C. Sec. 7601(d) (1988).

⁵⁷ Public Law 102-497, 106 Stat. 3258 (1992).

⁵⁸ Public Law 101-408, 104 Stat. 883 (1990).

affairs. The office oversees implementation of presidential and agency Indian policies and carries out other informational and coordination functions. It serves as a clearinghouse on tribal environmental information and programs; coordinates agencywide tribal training, education, and technical assistance programs; facilitates communications with tribes on agency rulemaking, policymaking, and program implementation; and coordinates EPA's tribal activities with those of other federal agencies.

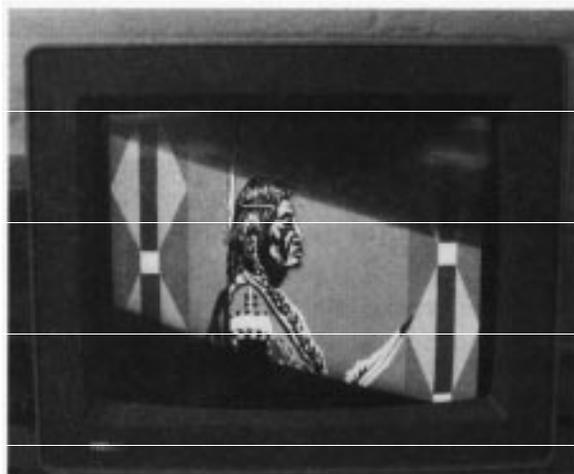
In sum, the major elements of EPA's tribal policy and its implementation appear relevant and potentially transferable to other federal agencies, including those with major telecommunications responsibilities.

FCC POLICIES ON MINORITIES⁵⁹

The Federal Communications Commission, an independent regulatory agency of the federal government, has the primary federal responsibility for regulation of telecommunications. The FCC does not have an Indian policy that explicitly recognizes and treats tribes as governmental entities. It does, however, have a minority policy that, by extending certain preferences to individuals through agency regulations, may incidentally benefit entities owned by tribes or by Indian and Alaska Native people.

■ FCC Broadcast Licensing

In 1978, the FCC adopted a policy to promote the participation of minorities in the broadcast industry, largely through the provision of minority preferences in regulations governing licensing procedures for radio and television broadcast stations.⁶⁰ In 1982, Congress codified the FCC's minority policy and directed the agency to establish rules



Top: Native American computer artwork displayed at the Little Big Horn College in Crow Agency, Montana. **Bottom:** Historical photos of Crow Indian chiefs. Computers and telecommunications can help reproduce and disseminate Indian history to younger generations.

and procedures that give significant preference to minority applicants for licenses or construction permits. The intent was to increase the diversification of broadcasting ownership.⁶¹

The policy appears to have had little effect on Native American broadcasting ownership. Na-

⁵⁹ This section is based on research and analysis conducted for OTA by Karen Funk and Sandra Ferguson, Esq., Hobbs, Straus, Dean & Walker, Washington, DC.

⁶⁰ Federal Communications Commission, "Statement of Policy on Minority Ownership of Broadcasting Facilities," 68 FCC 2d 979, 980, n. 8 (1978), and "Commission Policy Regarding Advancement of Minority Ownership in Broadcasting," 92 FCC 2d 849,850 n. 1 (1982).

⁶¹ Communication Act Amendments of 1982, 47 USC Sec. 309(i)(3)(A) (1982).

tionwide, there are an estimated eight Native-owned low-power broadcast TV stations, and an estimated 26 Native-owned broadcast radio stations. More broadly, the FCC minority ownership policy is under scrutiny due to allegations of abuse or unintended consequences of minority preferences, and as part of the government-wide review of affirmative-action policies. Recently enacted legislation repeals tax incentives for minority-owned communications companies.⁶²

■ FCC Spectrum Auction Policy

In 1994, the FCC's spectrum auction policy extended preferences to minorities and certain other disadvantaged individuals and entities. These preferences are intended to assist minorities in purchasing wireless telecommunications licenses (known as Personal Communication Systems or PCS) through the FCC's competitive bidding process.⁶³ FCC rules provide preferences to so-called designated entities that include small businesses, rural telephone companies, and businesses owned by minorities or women.⁶⁴ The FCC auction of the PCS spectrum licenses reserved for designated entities was challenged in the U.S. Court of Appeals for the District of Columbia, but the complaint was withdrawn before the court could review the constitutionality and legality of the preferences provided to designated entities.

Tribally owned and operated companies seeking PCS licenses could qualify as small businesses and/or rural telephone companies as well, if the tribal governments meet the financial quali-

fications.⁶⁵ In this way, FCC policy can potentially benefit tribal governments that bid for PCS spectrum. Also, because Native Americans are included within the definition of "minority," tribally owned and operated companies are eligible for minority preferences (to the extent such preferences continue to be available).

■ FCC Cellular Spectrum Lottery

The Federal Communications Commission's PCS spectrum auction policy reflected, in part, the results of the cellular spectrum lottery. The FCC and Congress determined that the free allocation of spectrum through a lottery was inefficient, failed to take advantage of competition, and resulted in a loss of significant potential revenue to the federal government. Also, minority and small businesses, including tribally owned businesses, experienced various management and financial difficulties, thus the justification for giving preferences to "designated entities" in the PCS policy.

At the time of the cellular lottery (November 1988), the Gila River Tribe of Arizona had negotiated to purchase US West's telephone infrastructure serving the reservation. Gila River Telecommunications, Inc. (GRTI), a tribally owned telephone company, sought a cellular license and, as the only provider serving the reservation, would have been the likely licensee. However, GRTI was not yet operating. To qualify for participation in the lottery, GRTI installed telephone service to two residences on the reservation. Although GRTI was selected as the tentative

⁶²H.R. 831, Public Law 104-7, Apr. 11, 1995. See Angele A. Gilroy, *The Viacom Transaction and Beyond: The Federal Communications Commission Tax Certificate Program*, 95-319 SPR (Washington, DC: Congressional Research Service, Mar. 2, 1995); and Jack Taylor, "Health Insurance for the Self-Employed: Restoration of the Deduction and Related Revenue-Raisers," Congressional Research Service, Issue Brief IB95032, Apr. 18, 1995.

⁶³The Omnibus Reconciliation Act of 1993 added Sec. 309(j) to the Communications Act of 1934, which gave the FCC authority to use competitive bidding procedures to auction PCS frequency spectrum.

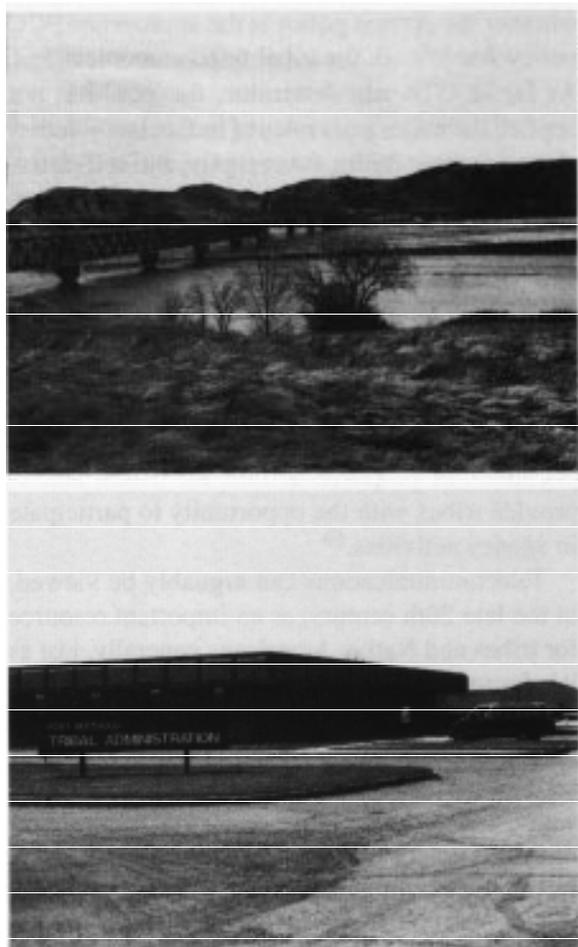
⁶⁴"Designated entities" are allowed to bid in a separate spectrum auction established especially for disadvantaged groups. FCC rules also provide the following to designated entities: bidding credits; installment payment options; and tax and investment benefits.

⁶⁵FCC rules exclude tribal assets and gross revenues, except for gaming revenues, in determining eligibility of tribally affiliated companies for "designated entity" status.

licensee, other telephone companies (including US West) challenged the selection on the grounds that GRTI was not an operating telephone company. The FCC encouraged a negotiated settlement. The final agreement gave US West a minority partnership in the cellular license in return for financing the construction.⁶⁶

The Fort Mojave Tribe of Arizona also participated in the cellular lottery and was selected as the tentative licensee for the reservation service area. A private telephone company challenged the result, and asked the FCC to deny Fort Mojave's application. At the time, the Fort Mojave Tribe was planning to set up a phone company, but did not yet own or operate a company. The tribe argued that the FCC eligibility rules were either not applicable or should be waived on the basis of tribal sovereignty and federal laws and policy that encourage tribal self-determination. The FCC ruled against the tribe, denying the request for a waiver and asserting that federal Indian policy was not determinative.⁶⁷

The Seminole Tribe of Florida tried a different strategy. The tribe had never owned or operated a telephone company and had not sought to purchase telephone infrastructure from the two non-tribally owned phone companies serving the reservation. The tribe decided to attempt to participate in the cellular lottery based on a claim of tribal jurisdiction over the reservation service area. At that point in time, the FCC had not yet ruled in the Fort Mojave case, and the FCC's views on this general topic were unknown. The local telephone companies were willing to negotiate. The FCC did not have to rule on the Seminole case because the tribe was able to negotiate minority partnerships in the cellular licenses of both established phone companies.⁶⁸



Top: State route 23 highway bridge crossing Lake Sakakawea on Fort Berthold Indian Reservation, North Dakota. View looking east from the Four Bears Casino and tribal administration complex. **Bottom:** Fort Berthold tribal administration building. The Three Affiliated Tribes (Arikara, Hidatsa, and Mandan) are using casino revenues to help make infrastructure improvements on the reservation—including computer and telecommunications upgrades.

■ Fundamental Question

FCC policies have not, to date, worked very well or consistently for tribal governments. The fundamental question for Native Americans, however, is not how well the FCC policy is working, but

⁶⁶ The Gila River discussion is based on a site visit and meeting between the OTA contractor, Hobbs, Straus, Dean & Walker, and GRTI representatives.

⁶⁷ The Fort Mojave discussion is based on an OTA contractor (Hobbs, Straus et al.) meeting with David Irwin, Esq., the attorney who handled the Fort Mojave case before the FCC. The tribe subsequently was successful in organizing and operating a tribal telephone company.

⁶⁸ The Seminole discussion is based on an OTA contractor (Hobbs, Straus, et al.) telephone interview with the tribal attorney.

whether the current policy is the appropriate FCC policy framework for tribal telecommunications. As far as OTA can determine, the FCC has not applied the major principles of Indian law—federal trust responsibility, sovereignty, and self-determination—to federal telecommunications policy. Nor has the FCC applied federal Indian policy as enunciated by every President from Nixon through Clinton and by several other federal agencies. The Clinton policy requires all federal agencies, not just those with major tribal responsibilities, to: 1) deal with tribes on a government-to-government basis; 2) carefully consider the implications of proposed actions for tribes; and 3) provide tribes with the opportunity to participate in agency activities.⁶⁹

Telecommunications can arguably be viewed, in the late 20th century, as an important resource for tribes and Native Americans generally, just as it is for many other segments of American society. Telecommunications, and especially the electromagnetic frequency spectrum, could be viewed as another natural resource along with land, forests, water, and the like. Native American telecommunications policy is in its most formative stages. A fundamental question is the extent of tribal authority over telecommunications—both on the ground (e.g., physical infrastructure) and in the air over tribal lands (e.g., frequency spectrum). Indian advocates believe that this authority is reserved for the tribes, as sovereign governments, and should be so recognized by the federal government. If the federal government wishes to assume this authority, advocates believe, then it should do so explicitly with the understanding

that telecommunications would become part of the federal trust responsibility—in this sense, viewed no differently than lands and other natural resources ceded by tribes to the U.S. government over the last 200 years in return for monetary and other compensation. This compensation could be in the form of telecommunications infrastructure and services over which, according to the principle of self-determination, tribes would have significant control. The reality is that the current federal and state telecommunications policy regime has developed in the absence of tribal telecommunications policy and therefore has, unintentionally, eroded and limited the sovereignty of tribes in this area.

Native American telecommunications activists believe strongly that tribes must find their own role in telecommunications. In the words of James A. Casey, Indian telecommunications attorney:⁷⁰

The applications of federal Indian law to the telecommunications regulatory regime must be two-sided. The tribes must lead the way. The federal government will not be able to force the tribes into this area if they do not want to go, and the tribes that want to go will have their own ideas about the meaning of the word “sovereignty.” Somewhere, the two sides will have to meet.

The main federal focus should not be, at this time, to define the tribal role, but to encourage tribes to play a role. While this approach is *ad hoc*, it is the only approach that will insure that the issues are dealt with adequately. Federal telecommunications policy and regulation has developed continuously since 1934. Indian telecommunications policy cannot be written overnight; it must evolve.

⁶⁹President Clinton, Memorandum, *op. cit.*, footnote 50.

⁷⁰Casey, *op. cit.*, footnote 1.