

American Indian Law Review

Volume 18 | Number 2

1-1-1993

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Recommended Citation

Sandra L. Nowack, *So That You Will Hear Us: A Native American Leaders' Forum*, 18 AM. INDIAN L. REV. 551 (2018), <https://digitalcommons.law.ou.edu/air/vol18/iss2/8>

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SPECIAL FEATURES

SO THAT YOU WILL HEAR US: A NATIVE AMERICAN LEADERS' FORUM

Compiled by Sandra Lee Nowack

On July 15, 1993, in a confirmation statement before the Senate Committee on Indian Affairs, Assistant Secretary Ada E. Deer shared her hopes for a "progressive federal/tribal partnership" during her tenure with the Bureau of Indian Affairs. In this feature, the *American Indian Law Review* presents a written forum in which Native American leaders communicate with Assistant Secretary Deer, and with the Native American legal community. The forum serves as a voice — a shared voice of Indian leaders, expressing *their* views of the crucial issues facing the Bureau of Indian Affairs today.

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Contributors to this forum include tribal leaders, academicians, judges, and activists. Statements were made in written and telephone interview form. Other than through standard editing practices, every effort has been made to retain each author's individual emphasis. This feature does not include an analysis of the leaders' ultimate message; the voices are heard most clearly in their original form. - *Ed.*

I. CONFIRMATION STATEMENT OF ADA E. DEER BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS, JULY 15, 1993¹

Mr. Chairman, Mr. Vice-Chairman, and other distinguished members of the Senate Committee on Indian Affairs, my name is Ada Elizabeth Deer, and I am proud to say I am an enrolled member of the Menominee Indian Tribe of Wisconsin. I would like to thank you for your time and courtesies shown me during our recent interviews and for the opportunity to appear before you today. I am honored that President Clinton and Secretary Babbitt have nominated me as the first woman to be Assistant Secretary for Indian Affairs. In this process I will have gone from designee to nominee to trustee — but always a Menominee. I embrace this administration's theme of change. I have dedicated my life to being an agent of change, as a Menominee, as a social worker and as a human being.

I come before you with rich and diverse experiences, including extensive travel in Indian country. I also have been enriched by many wonderful friends, some of whom I would like to acknowledge, for they have helped shape the person I am today. The late Foil Niche, former BIA Commissioner, enlarged my vision and inspired me to work for the Bureau. The late Whitney Young, former executive director of the National Urban League, whose work and deeds truly exemplified what it meant to be a good social worker. Former HEW Secretary John Gardner lent me a deeper and richer understanding of what it means to be a public servant and what leadership embodies. And most importantly, LaDonna Harris, founder of Americans for Indian Opportunity, taught me that every challenge is an opportunity and that "No Indian problem exists. There is, instead, a basic human problem that involves Indians." Their collective wit, vision, and conviction reinforced in me that one person can make a difference!

Personally, you should know that forty years ago my tribe, the Menominee, was terminated. Twenty years ago we were restored. And today I come before you as a true survivor of Indian policy.

I was born on the Menominee Indian Reservation in Wisconsin, a land of dense forests, a winding wild river, and streams and lakes that nourish the land, animals, and the people. I am an extension of this environment that has fostered my growth and enriched my vision. An appreciation and reverence for the land is *fundamental* to being Indian.

Our family of seven lived in a log cabin on the banks of the Wolf River. We had no running water or electricity. Yet, while all of the statistics said we were poor, I never felt poor in spirit. My mother, Constance Wood Deer, was the single greatest influence on my life. She instilled in me rich values which have shaped my lifetime commitment to service.

1. Ada E. Deer, Statement Before the Senate Committee on Indian Affairs (July 15, 1993) (transcript on file with the *American Indian Law Review*).

She was born into a main line family in Philadelphia. She was a nonconformist from the beginning. Her father was a minister and had hand-picked a minister's son for her to marry. But my mother, instead, chose nursing school. Her first nursing job was in Appalachia and her next job was as a BIA nurse on the Rosebud Sioux Reservation in South Dakota. She rejected the Bureau's policies and procedures, and approached nursing with a deep appreciation for the culture and values of the people. At Rosebud, she wore moccasins, learned to ride horseback, and even spoke some Lakota. I still run into people from Rosebud who knew of her.

Later my mother was transferred to Menominee, where she met and married my father, Joe Deer. He is nearly a full-blood Menominee Indian with, as we say, just a squirt of French blood. I loved my family and, as the oldest child, cared for my siblings — Joe, Robert, Ferial and Connie. It was a labor of love in every way, especially considering the admirable people they have now become. All the while, my mother's idealism and dedication to social justice was infused in me.

My mother was a fierce crusader for Indian rights. She read Indian history and law and brooked no compromises. Many a tribal leader and lawyer would grow more than a little apprehensive upon her approach. Many would think, "Here comes Connie Deer and it looks like she has something on her mind." I am told that there are people who have said the same thing about her oldest daughter.

In time, I graduated from the University of Wisconsin, where I received a wonderful education and which was supported by a tribal scholarship. I then attended Columbia University and received a master's of social work. I was drawn to social work for it embodies many Indian values and it is dedicated to social justice and the elimination of discrimination. My mother often told me, "Ada, you were put on this earth, not for your own pleasure, but to help others."

Over time, my involvements grew. I became a founding director of Americans for Indian Opportunity and the American Indian Graduate Program. I was also appointed by the Senate to the American Indian Policy Review Commission. I was a client, a staff member, a board member, board chair, and finally, chair of the National Support Committee of the Native American Rights Fund. Over the years, I have also worked for many other Indian causes.

My interests and involvements are far ranging, essentially devoted to enhancing the human condition. I also have served on the boards of the Girl Scouts, Common Cause, Independent Sector, National Association of Social Work, and other organizations. Later, I was appointed by both Presidents Carter and Reagan to the President's Commission on White House Fellowships.

One of the most compelling times in my life, however, involved the termination and restoration of my tribe. Pardon my brief historical account, but an understanding of history is critical to understanding Indian policy.

The leaders of my tribe had signed the Wolf River Treaty of 1854 guaranteeing the Menominees 250,000 acres of land — *and sovereignty over that land* —

*forever.*² This was not a gift. Under decisions from Chief Justice John Marshall through the current Supreme Court, the Menominees, like other tribes, owned their land and much more *before* the treaty era. We ceded most of our aboriginal land held by us for thousands of years, and in the treaties reserved — thus the term "reservation" — a small part of it. Our tribal leaders were sophisticated people. They insisted upon land, sovereignty, and federal trust protection from the onrushing settlers. In that time of crisis, one of the greatest collisions of cultures in the history of the world, our leaders relied upon those promises. By the end of the treaty making, in 1871, tribes held 140 million acres. But the non-Indians marching West wanted more, and so the General Allotment Act of 1887 was passed.³ Indian land was opened for homesteading on a wholesale basis, and by the 1930s the tribal land base had dwindled to 50 million acres.

The next assault on our land and sovereignty was the termination policy of the 1950s. Termination was a misguided and now-discredited experiment that targeted several tribes, including mine. This policy completely abrogated the federal trust relationship. State jurisdiction was imposed on tribal members and land. My tribe literally went from being prosperous to being Wisconsin's newest, smallest, and poorest county. Many terminated tribes saw their land sold off. My tribe's land was held by a state-chartered tribal corporation. The Termination Act stripped us of our treaty-guaranteed exemption from taxation, and our tribal leaders were forced to begin to sell off ancestral tribal land to pay the taxes.⁴

By the 1960s, my people were in despair. Poverty had sunk to new depths and we faced the loss of our land, tribal identity, and culture. My own personal choice was clear. I had to leave law school, return to the reservation, and create a coalition of tribal leaders to reverse termination. The 1950s and 1960s were the low point for Indian people in our history on this continent.

At Menominee, we collectively discovered the kind of determination that human beings only find in times of impending destruction. Against all odds, we invented a new policy — restoration. Finally, after grueling work by more people than I could ever possibly thank, our coalition pushed the Menominee Restoration Act through Congress.⁵ This legislation is a vivid reminder of how great a government can be when it is large enough to admit and rectify its mistakes. It is also indicative of my tribe's spirit, tenacity, and ability to hold other sovereign entities accountable.

2. Treaty of Wolf River, May 12, 1854, U.S.-Menominees, 10 Stat. 1064.

3. General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (codified at 18 U.S.C. § 1152 (1988) & 25 U.S.C. §§ 331-358 (1988 & Supp. III 1991)).

4. Menominee Termination Act, Pub. L. No. 83-399, 68 Stat. 250 (1954) (codified at U.S.C. § 891-902 (1988)).

5. Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1975) (codified at 25 U.S.C. § 903-903f (1988)).

We have regained a sacred vision. Our vision is bright and clear throughout all of our homelands, whether at a First Salmon Ceremony in the Pacific Northwest, at a secret ritual deep in a Pueblo Kiva, or at a Sun Dance in Sioux country.

My vision for the Bureau of Indian Affairs is to create a progressive federal/tribal partnership. First and foremost, the *heart* of Indian policy must be strong, effective tribal sovereignty. There is no reason for me or for any of you to be reluctant to support the permanency of tribal sovereignty any more than we would be reluctant to support the permanency of federal or state sovereignty. There are three kinds of sovereignty recognized in the United States Constitution — tribal, state, and federal. It is our moral obligation to ensure that these rights are supported vigorously. The role of the federal government should be to support and to implement tribally inspired solutions to tribally defined problems. The days of federal paternalism are over.

As Secretary Babbitt stated before this Committee,

[T]ribal sovereignty; the notion of the government-to-government relationship; recognizing that the best way to work in Indian country is to recognize the special responsibility of the Federal Government; and to acknowledge that the participation of the States, while important, must always be drawn through and coordinated with the dominant historic legal and constitutional trust relationship between tribes themselves and the Federal Government.⁶

This pledge by Secretary Babbitt shall be a guiding principle in my administration.

If our new partnership is to be effective, Indian policy must be coordinated closely between the Bureau of Indian Affairs, the Department of the Interior, other Cabinet Departments and the White House. To this end, Secretary Babbitt has reached an agreement with the White House Domestic Policy Council that it will assume an active role in coordinating administration policy initiatives to benefit American Indian people. If confirmed, I will work diligently to ensure that the Council has the full policy input of my office and that of Indian tribes.

I enthusiastically endorse greater self-determination for Indian tribes and the protection of treaty rights. Like many people in Indian country and in Congress, I am excited about the Department of the Interior's Self-Governance Demonstration Project.⁷ It is designed to empower tribes by allocating federal resources

6. Statement of Interior Secretary Bruce Babbitt at Confirmation Hearings Before the Senate Committee on Indian Affairs 6 (July 15, 1993) (transcript available from Public Information Office, U.S. Dept't of the Interior, Washington, D.C.) [hereinafter Statement of Secretary Babbitt].

7. See Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (amending 25 U.S.C. §§ 450-450n (1982)), amended by Tribal Self-Governance Demonstration Project Act, Pub. L. No. 102-184, 105 Stat. 1278 (amending 25 U.S.C. §§ 450-450n (1988 &

and responsibilities to those tribal governments willing to assume them.

As Secretary Babbitt has noted, "We must accelerate the trend toward self-governance so that we can reshape our role from paternal guardians to active engaged partners."⁸ I note, too, that not every Indian tribe will seek self-governance compacts and the Department must respect and honor its commitments to those tribal governments choosing different courses. If confirmed, one of my highest priorities will be the publishing of the regulations implementing the 1988 Public Law 93-638 amendments. These regulations, now in draft form, must undergo a careful review to determine how to promote tribal self-determination in the contracting of federal programs.

No discussion of my goals for Indian affairs would be complete without noting the critical area of Native American religious freedom. *I wholeheartedly* endorse the process in which the Department of the Interior will convene working groups composed of Interior officials and Native American representatives, so that we can *jointly discuss common approaches* to S. 1021, the Native American Free Exercise of Religion Act.⁹

If confirmed, I look forward to *forging partnerships* with tribes across the country and intend to visit Indian people where they live. One of my first visits shall be to Pine Ridge, for it is one of the poorest areas in the country. *Collectively*, we have a responsibility to reverse these devastating socioeconomic conditions that plague the Oglala Sioux and many other tribes. This task is daunting, though one we cannot afford to ignore.

There are many important areas I have not discussed with you today. These include education, health, housing, Indian child welfare protection, natural resource protection, trust funds, gaming, and economic development, to name just a few. These are all important to me, and I look forward to working with each of you on these matters, should you confirm me.

Although Indians now constitute 90% of the employees in the Bureau of Indian Affairs, we must remember that the Bureau was created by non-Indians. It has not been a pro-active Indian institution. *I want to activate and to mobilize people in the Bureau so that they can be creative and forward-looking.* I want the Indian values of sharing, caring and respect incorporated into their day-to-day work. I want to help the BIA to be a *full partner* in the effort to fulfill the Indian agenda developed in Indian country. The best way we can do this is for the tribes to decide what needs to be done and for the tribes to do it on their own terms, with our enthusiastic and constructive support.

The constellation of history is aligned in favor of Indian people. President Clinton ran for office on a platform that expressly supported tribal sovereignty. This committee, under the *vision and diligence* of Senator Inouye and Senator McCain and with the active support of each of you, has been the most

Supp. III 1991)).

8. Statement of Secretary Babbitt, *supra* note 6, at 6.

9. S. 1021, 103d Cong., 1st Sess, 139 CONG. REC. 6457 (1993).

productive legislative body for justice for Indians in the history of this nation. Secretary Babbitt is the most committed and knowledgeable person on Indian issues ever to hold this critical office; his intellect, character, and commitment to public service are rare and compelling. He means it when he says that fulfilling the Indian trust relationship is his highest obligation. These times are notable, too, by the increasing number of women and the new approach toward policy at all levels of government.

So hope, healing, commitment, and change are in the skies all around us and, if I am confirmed, they will be the hallmark of my administration. The time is right for a partnership to fulfill long-held promises and to address long-overdue injustices.

We think most of all about the future of our young people. On this summer's night tens of thousands of girls and boys across Indian country will go to sleep. Some in my Wisconsin homeland will hear the vibrant sounds I heard many years ago in the cabin where I grew up. Others will hear the wind in the Douglas fir trees at Warm Springs, the surging current of the great Missouri at Fort Peck, or the song of the canyon wren calling out from a redrock monument at Navajo. There is no reason why they cannot grow up to live in prosperity, in good health, with excellent educations, in clean environments, and immersed in their rich traditions.

In this new administration, *if we work together*, I am confident that we can eliminate the barriers of the past and work with the tribes to embrace the challenges of the twenty-first century.

In closing, know that *I bring a strong sense of history, vision, maturity, and compassion to the tasks before me.*

Thank you very much.

II. COMMENTS OF PETERSON ZAH, PRESIDENT OF THE NAVAJO NATION¹⁰

I first want to inform you that last week I traveled to Washington, D.C. to testify before the U.S. Senate Committee on Indian Affairs in favor of Ada Deer as nominee for Assistant Secretary of the Interior for Indian Affairs. Ada is the first Native American to be nominated to a high post in the Clinton Administration. Her position is also one of the most important in terms of Indian affairs. I was joined by other tribal leaders in saying that she should first turn the BIA upside down and shake it so that ineffective programs and personnel can fall out. . . . A complete overhaul is needed to make the BIA perform its role as trustee for the sovereign Indian nations. We believe she will be a strong advocate and is fully qualified for the position.

Also last week, I led a group of sixteen tribal leaders to a meeting in the

10. Peterson Zah, President of the Navajo Nation, State of the Navajo Nation Address at the 1993 Summer Session of the Navajo Nation Council 1-2 (June 15, 1993) (on file with the *American Indian Law Review*).

White House with President Clinton's staff. We met with Loretta Avent, Special Assistant to the President for Intergovernmental Affairs. The purpose of the meeting was to begin open communications between the United States and Indian nations. In my opening remarks, I stressed the need for economic development on Indian lands and that the administration should support our proposal for employment and investment tax credits. . . . In these discussions, we stated clearly that recognizing and advocating for tribal sovereignty should not be limited solely to the BIA, but should extend to all federal agencies. We did not sign our treaties with the BIA; we signed them with the United States.

III. COMMENTS OF EDWARD K. THOMAS, PRESIDENT, TLINGIT & HAIDA TRIBES OF ALASKA¹¹

A. *Status of Alaska Tribes*

Assistant Secretary Deer must initiate action to overturn an opinion issued by Department of Interior (DOI) Solicitor Thomas L. Sansonetti, during the last days of the Bush administration.¹² This opinion was requested by the governor of Alaska, Walter Hickel (R), in an effort to diminish the ability of Alaska Natives to manage fish and game resources within their tribal jurisdiction; to diminish their ability to control nonmembers' activities on Native lands; and to diminish their ability to protect their lands by placing part of these lands under federal trust status.¹³

It appears that this opinion was given for political reasons rather than as a tool for the DOI to carry out its responsibilities. If this opinion was to be useful to the Bush administration, it should have been given in the early days of the administration rather than at the end — after the election. Historically, the DOI has been recognized as the protector and guardian of Indian and Alaska Native rights. Yet, in this instance the DOI Secretary and Solicitor have gone to great lengths to diminish and undermine the sacred and sovereign rights of tribes in Alaska. In similar cases, the Supreme Court has ruled that the unilateral extinguishment of tribal rights and powers is not the prerogative of a single

11. Written Statement of Edward K. Thomas, President of the Tlingit & Haida Indian Tribes of Alaska (July 20, 1993) (on file with the *American Indian Law Review*). President Thomas has served as the chief executive officer of the Tlingit and Haida Indian Tribes since October 1984. He has been active in Indian education in the State of Alaska, where he served as Indian Education Director for the Ketchikan Gateway Borough School District from 1975-84. President Thomas is a delegate to the National Congress of American Indians and to the Alaska Federation of Natives. He is a former member of the Alaska Department of Education's Study Group on Native Achievement, and of the National Advisory Council on Indian Education.

12. Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers, Op. Solic. Dep't Interior, No. M-36975 (Jan. 11, 1993) [hereinafter Solicitor's Opinion] (unpublished) (on file with the *American Indian Law Review*).

13. See Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1629a (1988 & Supp. IV 1992)).

branch of the federal government. Due process of law and rule-making were totally ignored in this case. If the Tribes in this country cannot count on the DOI/BIA to defend tribal rights, *who can we count on?*

Sansonetti suggests that he has "consulted with the Governor and Attorney General of Alaska; numerous Native leaders in Alaska and the contiguous 48 states, as well as their counsel; the Alaska congressional delegation and other congressional leaders; and the members of the Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives . . ."¹⁴

The State of Alaska has never passed statutes crystallizing their relationship with the federally recognized tribes in Alaska *notwithstanding* the numerous federal laws that recognize our tribes. Therefore, I see no reason *why* the DOI solicitor consulted with the state officials on this issue. Sansonetti also supports many of his arguments by citing decisions made in state courts on tribal rights. How can a state, which *does not have statutes on tribal rights and powers, adjudicate such rights and powers?* State courts have historically dealt with state law issues, and federal courts have normally had jurisdiction over federal law issues. Indian/Alaska Native issues are *federal jurisdiction issues!*

Native leaders in Alaska, and their counsel, have unanimously objected to the issuance of this opinion, yet the opinion was issued. I, personally, have suggested that if an opinion was going to be issued, no matter what, it needed to be done with the total involvement of those affected, and in consultation with Native American lawyers and firms that were considered experts in the area of Indian Law, and with the Senate Select Committee on Indian Affairs — not just with a select number of members of Congress who were interested in diminishing rights of tribal governments. I have no idea which tribal leaders in the "contiguous 48 states" were consulted with, the benefit of such consultation, or the results of such consultation.¹⁵

The opinion does not articulate the method of consultation used with the Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives. Nor have I seen the advice given to Mr. Sansonetti on this issue recorded in the minutes of the Commission meetings. I do know that Governor Hickel (R), upon his election, removed *all of the Commission member appointed by former Governor Cowper (D)*. I do know that in hearings held throughout the state, *after the opinion was rendered*, the Commission was asking respondents to share with the Commission the importance of tribal sovereignty. I find it difficult to determine the value Mr. Sansonetti puts on consultation with a commission that has not yet determined the value of tribal sovereignty for itself. Further, it is not clear what influence the heavy-handed practices used by Governor Hickel, in the removal and appointment of commission members, may have on commission members who may otherwise oppose his own personal negative convictions on tribal rights. The governor made it clear early on in his

14. Solicitor's Opinion, *supra* note 12, at 3.

15. *Id.*

administration that he would not have people on boards and commissions who were in opposition to his convictions and policies.

Some tribal leaders who are not from Alaska, and some policy makers in Washington, D.C., perceive this as being strictly an "Alaska" issue. History has shown us that policies that diminish tribal rights are *not limited to state boundaries*. Federal policy changes affecting one tribe most always have the same affect on similar tribes in other states. Most of the tribes in Alaska are recognized under the Indian Reorganization Act (IRA).¹⁶ Will this policy eventually spill over and affect all other tribes recognized under the IRA? We do not know this. However, time-and-again this is how tribal rights are lost.

B. Subsistence

Assistant Secretary Deer needs to make sure that Native hunting, fishing, and gathering rights are preserved under federal laws. The Marine Mammals Protection Act,¹⁷ The Magnuson Act,¹⁸ Section VIII of ANILCA¹⁹, and other acts which sanction Native rights, must continue to have language in them authorizing only Native use of resources for subsistence purposes. Nowhere else in the United States does such a large population have such dependence on natural resources for survival. Nor is there another group of people in the United States with such a high unemployment rate as in our rural villages.

The Native people in rural Alaska depend more on a subsistence economy than they do on a cash economy. This does not mean that the cash economy is not important; it simply means that the cash economy is very limited and that Native lifestyles are centered around subsistence.

C. Bureau of Indian Affairs Funding

Alaska has the highest cost of doing business and the highest unemployment rate in the country. Yet Alaska Native people rank eleventh in per capita funding from the BIA. This makes for a situation in which tribal contracts and compacts with the BIA are survival in nature and do little to actually assist needy tribal members. Often times tribes have to raise private funding just to make ends meet, while other non-Native governments (state and borough) are able to get what they need to deal with their priority needs. Non-Native contractors who construct buildings, roads, and marine facilities, or who provide services to other federal agencies, continue to show profits. At the same time,

16. Indian Reorganization Act, 25 U.S.C. § 461 (1988).

17. Marine Mammals Protection Act of 1972, 16 U.S.C. §§ 1361-1406 (1988 & Supp. IV 1992).

18. Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1827g (1988 & Supp. III 1991).

19. Alaska National Interest Land Conservation Act, 16 U.S.C. § 3120 (1988 & Supp. IV 1992).

Native contractors have to sue the BIA to get indirect costs that their own Inspector General has determined is rightfully ours. More time is spent by tribal governments fighting with the BIA for what the BIA has determined we are eligible for, than is spent finding innovative ways to deal with serious human problems. This must change if tribes are ever going to gain true self-determination.

IV. COMMENTS OF LARRY ECHOHAWK, IDAHO STATE ATTORNEY GENERAL²⁰

Mr. EchoHawk raised issues of jurisdictional ambiguities, economic development, water rights negotiations, and support for tribal enforcement of environmental regulations. He encourages Assistant Secretary Deer to:

A. Reduce Jurisdictional Ambiguities and Support Inter-Agency Cooperation

"Too many times there's a lack of cooperation between tribal, state, and federal agencies. . . . As Attorney General, I'm the state's chief law enforcement officer. Law enforcement issues, then, are the issues which receive my special attention—I am particularly aware of issues of domestic violence. Residents of the Fort Hall Reservation have concerns regarding inter-agency cooperation, for example, in Indian Child Welfare cases. Specifically I'm aware of problems with child abuse cases. Tribes have complained of a lack of federal commitment to law enforcement in those kinds of cases, and there's the perception that the U.S. Attorney General's Office doesn't do a good job of prosecuting them.

"Generally, I hope that Assistant Secretary Deer and U.S. Attorney General Janet Reno work together. I'd like to see the BIA police do the best they can to have effective law enforcement on reservations, and to make an extra effort to cooperate with state and county officials.

"And we need to include the state governments in that challenge. Federal funds often flow through state governments, and state governments are not always aware of tribal efforts."

Mr. EchoHawk believes that proposed amendments to the Indian Gaming Regulatory Act (IGRA) may help alleviate some tensions between tribes and state agencies.²¹ "Gaming is an issue that's taken up regularly by the National Association of Attorneys General. . . .²² I support some amendment to clear up

20. Telephone Interview with Larry EchoHawk, Attorney General, State of Idaho (Aug. 10, 1993). Larry EchoHawk, Pawnee, is the first Native American to hold the office of Idaho Attorney General. He is a former state legislator, county prosecutor, and tribal attorney. Mr. EchoHawk serves as the Vice President of the National Association of Attorneys General and is on the executive committee of the Conference of Western Attorneys General.

21. Indian Gaming Regulatory Act of 1988 (IGRA), 18 U.S.C. § 1166, 25 U.S.C. §§ 2701-2721 (1988 & Supp. III 1991).

22. National Association of Attorneys General (NAAG), 444 N. Capitol St. NW,

the ambiguities in the IGRA. Far too many cases are going to court. When Congress passed the Act in 1988, they didn't provide enough specifics. The resulting legal battles put a strain on relationships. I hope Congress takes action soon to help clear up those issues."

B. Provide Leadership in Tribal Economic Development

Tribal economic development is another area of concern cited by Mr. EchoHawk.

"That has got to be a top priority — to provide leadership to the reservations which, in some cases, have unemployment figures that exceed 60% We get alarmed in the State of Idaho when state unemployment approaches 10%. There are reservations in the state where the rate of unemployment is five to six times that, and we don't get alarmed. . . . You do see bright spots around the country where there are more acceptable levels of employment, but where that is not the case, you see a whole plethora of social ills. It's a cycle with problems of unemployment. You see its detrimental effects in drug and alcohol abuse, child abuse and the statistics on suicide among young Native Americans."

C. Encourage Water Rights Negotiation

Mr. EchoHawk encourages the Assistant Secretary to take an active leadership role in the areas of environmental regulations and water rights negotiations.

"I would hope she'll do everything she can to continue resolution of water rights issues through negotiation. This has the potential to be very expensive if we have to litigate." In 1991, Mr. EchoHawk was involved in a successful negotiation venture involving the Shallee River, the United States government, the State of Idaho and the Shoshone-Bannock Indian tribes. The negotiation process took five years, but Mr. EchoHawk believes it was productive. "I hope there will be a sustained effort from the Department of Interior to regulate natural resources through negotiation, rather than to attempt to resolve them all in court."

D. Support Tribal Enforcement of Environmental Regulations

Mr. EchoHawk points out, "Tribes are asserting more authority in regulating environmental issues . . . air, water and hazardous waste, and I encourage tribes to do that." While Mr. EchoHawk recognizes that the BIA would not be the only federal agency involved with these issues, he encourages Assistant Secretary Deer to assume a leadership position. "It's always a delicate area, but it is important. She'll need to make sure that regulatory agencies work with the tribes. And she'll need to make sure that tribes have the support and resources

Washington, D.C. 20001. Christine Milliken serves as Executive Director.

they need to do that job effectively and adequately."

E. Agency Reorganization

Mr. EchoHawk agrees with other leaders who have suggested that the bureaucracy within the Bureau of Indian Affairs should be streamlined. "There seems to be a huge federal bureaucracy, and it's not a benefit to tribes. With more direct funding to reservations, there would be a better chance of touching the lives of Indians than there is in running it through a channel of bureaucracy."

V. COMMENTS OF MR. NATHAN HART, EXECUTIVE DIRECTOR, OKLAHOMA INDIAN AFFAIRS COMMISSION²³

We need improvement in state and tribal relations, and we need help from the BIA and federal agencies. I'd like Ada Deer to consider what might be done to help resolve some of the jurisdictional issues that come up between states and the tribes from time to time, particularly as it relates to overall tribal development. In the past we've had law enforcement and taxation questions, which we're starting to resolve now. The gaming questions that are arising will need to be a priority for Assistant Secretary Deer — whether the solution is something that arises through the Department of the Interior or through congressional action.

There have been a number of task forces that looked at the jurisdictional issue and it may have been a brief topic before the BIA Reorganization Task Force. I think the solution can be found in giving the tribes more flexibility and greater control in their dealings with state government, and in more clearly defining those relationships.

The potential obstacles Ada Deer may find exist because policies will vary from state to state. Some states have excellent relationships with tribes, in other states we need a lot of improvement. Specifically here in Oklahoma, there are always questions regarding what type of authority governments or legislatures have to enter into compacts with the tribes. I saw those ambiguities create problems in law enforcement, taxation, and now in gaming. Some of these issues need to be clarified, perhaps even congressionally. I have real concerns, specifically, on the Indian gaming regulations. If we open gaming legislation to amendments, there will probably be a large lobbying force from other states which are anti-gaming. We then run the risk of perhaps slipping ground a little bit more.

23. Telephone Statement of Nathan L. Hart, Executive Director of the Oklahoma Indian Affairs Commission (July 28, 1993). Nathan Hart, Cheyenne, serves on executive boards for a number of nonprofit agencies which promote retention of Indian culture, including the American Indian Cultural Society, Cheyenne Cultural Center, and the Jacobson Foundation. He is a board member of the Governors' Interstate Indian Council.

Moving out beyond what I'm directly involved with here at the Oklahoma Indian Affairs Commission, we need to look at the federal trust responsibility in general. One example of a problem area is evident in the management of the tribal resources, whether we talk about timber, minerals, or even trust funds that tribes already have. In specific instances the Bureau has not exercised its fiduciary responsibility to the tribes. I know that within the last three years or more the issue has been given some attention by the Bureau. They've looked into redesigning the main structure of the funds, actually auditing those funds. But I would like to see the Bureau become more proactive in these areas — in the past I think they've moved in response to Congress, rather than at the Bureau's own initiative

The Bureau, through the Task Force on Reorganization, has taken steps internally to look at its own structure, to see what changes might be made to improve the quality of services that are being directed toward the tribes. Tribal leaders need to do the same thing — take a look at tribal internal structure. In some cases tribal constitutions and legislatures were developed in the 1930s. It may be appropriate for tribes to examine their internal structures so that they, too, may be more effective.

Tribes need to develop their legal infrastructure to allow them to progress into economic development with a little more ease. Looking at the issues of tribal economic pursuits, from the private sector's standpoint, the lack of legal infrastructure is a major problem. The private sector may not be familiar with how tribal governments operate. That's something that could be resolved through code development, through court development, and through improvements in law enforcement. In all of these areas, some tribes have really progressed well, other tribes may be lacking a bit.

We need to remember that state governments share in the responsibility of improving their relationships with the tribes — the burden cannot lie solely with Ada Deer. This isn't just about the Bureau's response to the tribes; it's the state leaders' responsibility to work to resolve these issues.

VI. COMMENTS OF ARVO Q. MIKKANEN, TRIBAL JUDGE²⁴

The biggest problem for tribal courts from the point of view of a judge is the inadequate funding for court operation . . . because of inadequate funding by federal and tribal governments, when compared with other state or federal court

24. Written Statement of the Honorable Arvo Q. Mikkanen (July 20, 1993) (on file with the *American Indian Law Review*). The Hon. Arvo Mikkanen, Kiowa and Comanche, is a magistrate in the Court of Indian Appeals for the Anadarko Area Tribes and is a judge for the Sac & Fox Nation. Mr. Mikkanen is President of the Oklahoma Indian Bar Association and is an adjunct professor of law at Oklahoma City University, where he is also the Associate Director of the Native American Legal Assistance Clinic. He is an associate with Andrews Davis Legg Bixler Milsten & Price, an Oklahoma City law firm.

systems. In many cases, we don't have adequate treatment centers or jail facilities; we don't have adequate law libraries and legal research materials. There are insufficient funds, and therefore, there are very few full-time judges. And where funds are available, it's usually inadequate to attract qualified personnel to work as court judges and clerks. An example is evident in the case of Courts of Indian Offenses, or CFR courts. CFR judges, who may handle 300 to 600 cases a year, are compensated with a salary of only a little more than \$4000 per year. It's very difficult to motivate an attorney to work for that type of a salary.

A lot of court clerks are not adequately compensated either — particularly where many of the tribal courts are only able to maintain one clerk, who acts as a receptionist, file clerk, court reporter, financial officer, cashier, stenographer, and docketing clerk, while answering all telephone inquiries to the court. In Oklahoma, another problem has been inadequate police staffing — although that has improved somewhat in the last few years.

Tribes need funding for well-trained and professional public defenders. That fact provides evidence of another general problem — that of demands made upon tribal courts by Congress. Quite frequently Congress, in various court proposals, has required that tribes provide parties certain guarantees, contained in the U.S. Bill of Rights, which are not applicable to tribes under the U.S. Constitution. For example, with regard to public defenders, Congress requires that tribes follow the model of state and federal courts and provide equal protection, due process, and jury trials. But they offer no funding to implement such programs of public defenders who can assist parties in asserting such rights. Tribes are then put in the position where they are expected to provide services, without adequate financial support.

The limited resources available to tribal and CFR judges ultimately affects the timeliness of case resolution. A serious need exists for law clerks and/or regional research centers to assist judges in conducting legal research and preparing opinions. A resource center which would be available to tribal court judges, consisting of a central office of two to three attorneys, could help judges research and resolve complicated legal issues as they arise. Federal trial judges have two law clerks and appellate judges have three. However, in the tribal courts, we're left in a position without any law clerks. Because the budgets are so limited, we're paid for only one day a week, in which we might have ten to thirty hearings, arraignments, or trials set. That doesn't leave a lot of time for performance of judicial duties, drafting opinions, or conducting extensive research. Often, then, cases are based on first impressions. Moreover, nearly 75% of the civil cases do not have any attorneys involved. The judges, then, cannot rely on the research skills of the two attorneys to advise them of the relevant statutes and case law.

Inadequate staffing and equipment is also a problem. Equipment is very important, due to the distances of tribal courts from one another and from practitioners who may be spread across the whole state. Computers, fax

machines, word processors, and recording equipment are critical to an efficient operation. This is particularly true because our judges, prosecutors, and public defenders are part-time, and are not physically at court every day to conduct business. Technology can assist a court clerk in transmitting orders or opinions, or in getting notices, subpoenas, or warrants out to litigants. Usually the duties of court reporter, bailiff, administrator, and typist all fall on one person, the court clerk, who also has to answer the telephone and accept papers for filing. It is very difficult to provide the necessary services without sufficient staffing and equipment.

In the recommendations of the Indian Policy Review Commission from the 1970s, legislators asked for a study of what is needed.²⁵ Funding problems were a priority. The Indian Tribal Justice Act, which recently passed the Congress and the Senate, is again asking for a study of what is needed.²⁶ It's painfully *obvious* to everyone that there are very serious needs for funding, facilities, and staffing of many tribal courts.

While training has been a priority for some tribes, those tribes with newly established tribal courts need infrastructure and an adequate foundation first, before prioritizing training. Over the past three years a number of bills were introduced in Congress to address these needs. The biggest obstacle to increasing tribal and CFR court resources was obviously the budget deficit; however, since the problem is so great, it is hoped that these funding needs will be prioritized.

There are other unique difficulties within the Bureau of Indian Affairs-administered Courts of Indian Offenses. There are very old and outdated provisions that govern the operation of the court and provide for criminal offenses. These provisions are in dire need of revision. Many of the provisions of 25 C.F.R. § 11 were written in the 1930s and have never been updated to face issues present in the 1990s.²⁷ It is very difficult as a judge to deal with a criminal code that has penalties for failing to dip sheep, but which does not have penalties for drug distribution. As a result, there is no way to stop drug trafficking unless the offender violates one of the other offenses which are contained in the code.

In addition, the civil jurisdiction of the Court is very limited. In CFR courts, defendants who are non-tribal members cannot be sued unless they agree or stipulate to the jurisdiction of the court. We have seen numerous cases where nonmembers or non-Indians purportedly have committed wrongs against Indians, but there is no method to sue them in CFR courts unless they agree to stipulate to jurisdiction, per 25 C.F.R. § 11.22.²⁸ If nonmembers or non-Indians do not

25. See AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG. 1ST SESS., FINAL REPORT (Comm. Print 1977) [hereinafter AMERICAN INDIAN POLICY REVIEW COMM'N].

26. Indian Tribal Justice Act, H.R. 1268, 103d Cong. 1st Sess. (1993).

27. 25 C.F.R. §§ 11-11.306 (1993).

28. *Id.* § 11.22.

stipulate, with no state or federal courts having authority, they may go unpunished for serious wrongs.

Tribes, too, need to develop their own internal laws, codes, ordinances and regulations. In some cases, tribes have simply adopted state laws which may be difficult to apply to tribal situations if they are not adaptable. For example, we might have a statute that requires the Secretary of State to provide certain information. If the tribe doesn't have the office of Secretary of State, it is then unclear how to proceed.

VII. COMMENTS OF JAMES W. ZION, SOLICITOR TO THE COURTS OF THE NAVAJO NATION²⁹

My personal observation of relations between the Bureau of Indian Affairs (BIA) and Indian nation justice systems is that the Bureau has little understanding of self-determination policy or of the trust responsibility of the United States to assure justice in Indian country.³⁰ The three major areas of conflict are: (1) interference in court operations; (2) failure to support court functions and implement judgments; and (3) neglect in providing funding and other support.

The first Navajo Court of Indian Offenses (a CFR court) was created in 1892, and lasted until it was replaced by the Courts of the Navajo Nation in 1959.³¹ History shows that the Navajo judges of that court were successful in rejecting direct interference by BIA agency superintendents. After the Navajo Nation courts became independent in 1959, there were several instances of BIA interference with court judgments. On occasion, a BIA official would attempt to "dishonor" a court judgment, trying to tell judges their own law, or that they do not have jurisdiction over a case.³² On occasion, BIA officials refuse to acknowledge a Navajo Nation court judgment, forgetting that the BIA lost

29. Written Statement of James W. Zion, Solicitor to the Courts of the Navajo Nation (July 20 1993) (on file with the *American Indian Law Review*). Mr. Zion has worked with tribal justice systems since 1975. He is the author of *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1985).

30. See President Richard Nixon's Special Message on Indian Affairs, 1 PUB. PAPERS 564-67, 575-76 (1970); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (1988).

31. See 61 COMM'R OF INDIAN AFFAIRS, ANNUAL REPORT TO THE SECRETARY OF THE INTERIOR 209 (1892); DAVID ABERLE, THE PEYOTE RELIGION AMONG THE NAVAHO 34 (1982); see also Navajo Nation Council Res. CO-69-58 (Oct. 16, 1958) (codified at NAVAJO TRIB. CODE tit. 7 § 204(a) (Supp. 1984-85)); Navajo Nation Council Res. CJA-5-59 (Jan. 9, 1959) (codified at NAVAJO TRIB. CODE tit. 7 § 204(a) (Supp. 1984-85)).

32. See, e.g., *In re Estate of Descheeny*, 4 Navajo Rptr. 145 (Window Rock Dist. Ct. 1983) (holding rejection of a probate decree as being beyond statute of limitations); *Begay v. Keedah*, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6061, 6063 (Navajo 1991) (holding that a Department of the Interior field solicitor incorrectly interpreted the Navajo common law of grazing permit trusts).

control once the Navajo Nation formed its own justice system.³³

A major example of interference is a 1991 incident in which the director of the BIA Navajo Area Office sent an *ex parte* "order" to Chief Justice Tom Tso, telling him that the Navajo Nation courts must not take action in a case involving a large Arizona corporation.³⁴ The courts had no prior notice of an intent to enter a purported order restricting their jurisdiction and had no opportunity to be heard. The order interfered with an ongoing case where the Window Rock District Court had jurisdiction. In 1993, the heads of BIA social services and judicial services branches issued a corrective action memorandum which attempted to impose limitations on tribal court child placements, despite their clear authority over children's cases. In 1993, an Interior Department field solicitor made an *ex parte* contact with a Navajo Nation district judge, without notice to the parties, to advise that the court had no jurisdiction over a land case.³⁵ The judge invited the parties and the BIA to address the jurisdictional issues in briefs and offered the area solicitor an opportunity to raise his objection in open court through an *amicus curiae* brief. The Bureau declined to appear.

This area of conflict demonstrates an ongoing pattern of paternalistic control by the BIA, ignoring the fact that it surrendered any control over tribal courts through its own regulations.³⁶

The second area of conflict, which Assistant Secretary Ada Deer should address, is that while the BIA and Indian Health Service (IHS) have a duty to assist the legal process in their areas of operation, they fail to do so. Their duties include appearing as witnesses, producing relevant records, and carrying out tribal court judgments and decrees. Most often, BIA officials and IHS personnel refuse to appear to offer testimony on the ground that they must secure the approval of a U.S. Attorney to go into court. Their testimony is often vital in child welfare and mental commitment cases. While the old 1935 "Law and Order" regulations require federal officials to cooperate with Indian courts, tribal courts do not receive the same cooperation when they become independent of Bureau control.³⁷ Tribal courts have limited resources to evaluate social problems and few treatment alternatives for people who need treatment or counseling. The U.S. government has social service programs but fails to cooperate with tribal courts to provide them. Likewise, while Indians are citizens of states, state governments refuse to provide services pursuant to a tribal court order.

33. See 25 C.F.R. § 11.1(d) (1993).

34. See Op. Solic. Navajo Nation Judicial Branch, No. 91-01 (July 15, 1991) (regarding the authority of the Secretary of the Interior, by the Navajo Area Office, Bureau of Indian Affairs, to review a matter which is subject to the jurisdiction of the courts of the Navajo Nation).

35. See *In re Estate of Badonei*, No. CH-CV-246-85 (Chinle Dist. Ct. July 31, 1993).

36. 25 C.F.R. § 11.1(d) (1993); *Benally v. Navajo Area Director*, 9 Interior Board of Indian Appeals (IBIA) 284, 292 (1982).

37. See 25 C.F.R. § 11 (1993).

The third area is funding. The BIA uses its priority system as an excuse for limited funding to tribal courts. Tribal courts are most often low priorities when Indian nations have many other pressing needs to address. These courts deal with severe social problems, including domestic violence, child abuse and neglect, disorderly conduct linked to alcohol abuse, alcohol-related assault, public intoxication, and driving while intoxicated. Indian courts are at the center of those problems but cannot address them without independence from federal control, federal assistance without interference, and adequate financial support for justice systems.

In 1977, the American Indian Policy Review Commission issued a report which stated that Congress must "appropriate significant additional monies for the maintenance and development of tribal justice systems . . . [and] [f]unding be direct to tribes."³⁸ To date, Congress has failed to implement that recommendation, and over the past many years, the BIA has failed to ask Congress to provide those funds.

The Senate committee on Indian Affairs has been holding hearings on tribal court enhancement legislation since 1988. At one point, the BIA offered testimony to the effect that it could not support additional tribal court funding unless Indian nations agreed to amend their constitutions and laws to provide for complete tribal court independence. That heightened tribal council fears that they would lose control of their own judicial systems, and that the U.S. government would again intervene in internal affairs. In April 1993, when the BIA offered testimony to the Senate Indian Affairs Committee to resist enhanced funding, Senator John McCain (R-Ariz.) commented that the testimony was obviously written by the Office of Management and Budget (OMB). The tribal court bill Indian nation judges wanted was defeated in 1992, and while judges say, over and over, they simply want the money, Congress turns a deaf ear.³⁹

The thrust of federal court support and legislation is a top-down model; it assumes that the BIA will respond to congressional direction, but it does not. A prime example is what happened with the Indian Child Protection and Family Violence Act of 1990.⁴⁰ Congress authorized \$30 million for tribal programs to combat family violence and the mistreatment of children.⁴¹ When the issue of appropriations went to the OMB, it blocked an Interior Department appropriations request on the pretext that there must be a study to assess the extent of violence in Indian country.⁴² When the BIA found monies for the program

38. AMERICAN INDIAN POLICY REVIEW COMM'N, *supra* note 25, at 167.

39. Indian Tribal Courts Act, S. 1752, 102nd Cong., 2nd Sess., 138 CONG. REC. S11,765-01 (1992).

40. Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630, 104 Stat. 4545 (1990) (codified at 25 U.S.C. §§ 3201-3211 (Supp. III 1991)).

41. *Id.* § 3210(i).

42. Information provided by the Navajo Nation's Washington, D.C., office after contacts with BIA officials.

from other sources, the monies were not spent for tribal programs, and the Bureau eventually recaptured them to make up for shortages in other BIA programs.⁴³

Indian nation judges have gone to Washington many times since 1988 to ask for funding and attention to their justice systems. Their voices were drowned out by the lobbying of private law firms and bickering among staff lawyers on Capitol Hill. Throughout the debate, Congress forgot that it has a trust responsibility to assure justice in Indian country and that America's contemporary Indian affairs policy is one of self-determination.⁴⁴ In 1982, the National Minority Advisory Council on Criminal Justice advised the U.S. Justice Department on the extent of crime against Indians and the pressing need to address it.⁴⁵

VIII. COMMENTS OF BILL MEANS, EXECUTIVE DIRECTOR, AMERICAN INDIAN OPPORTUNITY INDUSTRIALIZATION CENTER⁴⁶

I'll talk about three major problems that Assistant Secretary Deer will have to address:

- (1) The BIA's own problems of its own bulging bureaucracy;
- (2) Land issues;

(3) The BIA's inability to account for Indian monies. That's a problem which seems to be addressed in every article on the BIA. They've lost track of some accounts, of natural resources being developed by tribes, or money awarded to tribes by courts of claim or program monies.

A. *Indian Lands*

Beginning with the land issue, the BIA has pretty much acted like a real-estate broker, in my mind, for multinational corporations and for agribusiness. I believe the Bureau has been shameful as a trustee of our lands. We have lost more land through the BIA than through any other source, especially through the last fifty years. That's happened primarily because Indian tribes haven't had

43. *Id.*

44. See FRANCIS P. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834*, at 188-212 (1962).

45. NATIONAL MINORITY ADVISORY COUNCIL ON CRIM. JUST., *THE INEQUALITY OF JUSTICE: A REPORT ON CRIME AND THE ADMINISTRATION OF JUSTICE IN THE MINORITY COMMUNITIES* 123-64 (1982).

46. Telephone Statement of Bill Means, Executive Director, American Indian Opportunity Industrialization Center. Mr. Means, Oglala Lakota, is an enrolled member of the Oglala Sioux Tribe from Pine Ridge, S.D. He is a Vietnam veteran and a veteran of Wounded Knee in 1973. He is on the national council of the American Indian Movement and serves as president of the International Indian Treaty Council.

The American Indian OIC is a comprehensive job training program for Native Americans which has served the Minneapolis community for the past 14 years.

the ability to control use of their own lands. It's always been under the BIA in most cases — in almost every case, until recently. Through the Indian Self-Determination Act we've seen that diminish.⁴⁷ However, the land claims authorized by 28 U.S.C. § 2415 give us another example of a situation in which the Bureau helped in getting the money, and, as a result, hundreds of thousands of acres of land were taken through taxation. Taxation is just one of the areas which were found to be illegal. Another example of a modern-day "land grab" exists in the form of the White Earth Reservation Land Settlement Act.⁴⁸ If you go back further in history, you'll see many areas where they've been remiss.

B. Gaming and Economic Development

A total of 90% of the Bureau's attempts at economic development have failed through the 1960s and 1970s. Now comes gaming, started by tribal initiative. We're starting to employ thousands of people and have unobligated funds for capital investment. And then the Bureau steps in as a regulatory agency and screws the whole industry up by giving state government a voice in the area of compact agreements. So I believe the Bureau, I guess in the area of land and economic development, has an all-time grade of "F".

C. Eliminate BIA Bureaucracy

In the other areas I mentioned, every study done on the BIA, even those conducted by the BIA themselves, have indicated that at least 75-80% of all funds appropriated by Congress for the BIA budget go for administrative costs. The conclusion was the same in the 1977 study by the American Indian Policy Review Commission — a study by the Senate Select Committee and then-Senator James Abourzek (D.-S.D.).⁴⁹ So the taxpayers, including the Indian taxpayer, need to know that our money is being misused. We want to do away with the deficit, and now is the prime time to do something about the bureaucracy.

I understand that Assistant Secretary Deer talked about letting the tribes decide what is best and to deal with them on a contract basis. I think the more we eliminate the BIA bureaucracy and let the funds go to tribes, schools, and other agencies, the more money there will be for everyone. There are twelve regional area offices. For decades tribal leaders have been saying that the regional offices need to be eliminated. We could make what we have go further

47. Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (amending 25 U.S.C. §§ 450-450n (1982)), amended by Tribal Self-Governance Demonstration Project Act, Pub. L. No. 102-184, 105 Stat. 1278 (amending 25 U.S.C. §§ 450-450n (1988 & Supp. III 1991)).

48. White Earth Reservation Land Settlement Act of 1985, 25 U.S.C. § 331 (1988 & Supp. III 1991).

49. AMERICAN INDIAN POLICY REVIEW COMM'N, *supra* note 25.

by eliminating the bureaucracy, by eliminating the traditional white tape. President Clinton has called for elimination of somewhere in the neighborhood of 200,000 federal jobs. The perfect place to start is the BIA.

From the perspective of Ms. Deer, I believe she's going to be a breath of fresh air for change, in what has traditionally been one of the biggest enemies of Indian people — the BIA. I believe her background gives her all the experience necessary to create these bold and much-needed changes.

Ada Deer is in the position to make changes that were never conceived possible only ten years ago, because Congress, as well as the Indian tribes, are beginning to form partnerships that could support, congressionally, the changes that need to be made in the administration of the BIA. So I think her experience with federal recognition and the Menominee Restoration Act, and her experience in the area of restoration and recognition, will keep her close to the people who are calling for change — both at the reservation level and at the congressional level.⁵⁰ In her experience these are the two bodies that she had to work with in order to be successful. I've never heard her take credit, so I believe she also knows that struggles are won by putting together coalitions of people from all walks of life.

The biggest obstacles before her will be the history and traditions of the BIA, which is manifested in ongoing policies of paternalism, neocolonialism, and creation of dependency. I think this tradition of bureaucratic mismanagement is sort of going to make people say, in the beginning, that many have tried and failed, so who does she think she is to try to change a bureaucracy? It's a bureaucracy which has become entrenched in the minds of Washington politicians as a dumping ground for Indian issues. So she's fighting a long history of the BIA's negative image.

Another obstacle may be some of her own Indian people, who believe that the BIA *gave* sovereignty to Indian people. Or they believe Indians didn't exist until the formation of the BIA. Remember the old saying, "You can always tell an Indian leader by the amount of arrows in his back." I guess the other, shall I say, "story" about the BIA has to do with Custer, about when Custer was leaving to go wipe out the Sioux people and make them behave, and put them back on their reservations. When he left North Dakota he told the BIA not to do anything until he got back.

I believe Ada Deer could help the Indian people the most by working toward elimination of the BIA — keeping our land in trust, but doing it as counties and cities do, and using a system of block grants rather than administrators all over the country. Hopefully, then, we can get closer to a federal-Indian, government-to-government relationship, rather than a government-to-bureaucracy-to-government relationship. Assistant Secretary Deer needs to eliminate bureaucracy as much as possible during her tenure.

50. Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1975) (codified at 25 U.S.C. § 903-903f (1988)).

Indian leaders have to begin economic development from a perspective of sovereignty, and not from asking what BIA will approve. We should begin to make economic decisions based in the needs of our people, rather than whether or not it's okay with the BIA. I think as Indian leaders we have to promote and develop self-determination, rather than to continue to depend on the BIA to provide for the majority of our needs.

Hopefully, within a lifetime, or within twenty years, this nation should see one Indian nation hold a pow-wow and give the BIA back all the commodities and all their programs, and say, "Here is a star-quilt, because we appreciate what you have done. But we no longer need you. We will now operate in a government-to-government relationship." I believe it can happen within the next twenty years with people like Ada Deer in leadership roles.

IX. COMMENTS OF PHILIP S. DELORIA, DIRECTOR, AMERICAN INDIAN LAW CENTER⁵¹

(A former Deputy Assistant Secretary of Indian Affairs, Mr. Deloria was asked to offer some advice to the new Assistant Secretary. He responded with seven suggestions).

A. Make It Clear to Secretary Babbitt and His Staff That She Is Running the Bureau of Indian Affairs, Win or Lose

Despite many transitions in which the same mistakes were made, we still see the phenomenon of newly arrived secretarial staffs being captured by various factions within the Bureau and being convinced that the Bureau's problems can be easily solved by listening to one faction or another. The problems of the Bureau and the tribes are difficult enough without saddling the Assistant Secretary with some helpful "instant" Indian experts in the Secretary's office, fouling the works at every opportunity. The Secretary himself has a good background in Indian affairs. However, Assistant Secretary Deer must make it clear — even to him — that *she* has been hired to run the Bureau and that his role, and that of his office, is policy leadership and oversight, not meddling.

B. Clarify the Roles and Responsibilities of the Bureau of Indian Affairs

Because of generations of floundering by Congress, the Bureau has been put

51. Written Statement of Philip S. Deloria, Director, American Indian Law Center (Aug. 10, 1993) (on file with the *American Indian Law Review*). Mr. Deloria, Standing Rock Sioux, served as Deputy Assistant Secretary for Indian Affairs - Policy, U.S. Department of Interior in 1980 and 1981. He is the Director of American Indian Law Center, Inc., Albuquerque, N.M., an agency which conducts research, technical assistance and training with respect to legal issues confronting American Indians, with particular reference to tribal government. Mr. Deloria was the Founding Delegate and Former Secretary General of the World Council of Indigenous Peoples, an international organization composed of indigenous representatives from 19 nations.

in an impossible position, where on the one hand it is required by the policy of self-determination to defer to tribal priorities (appropriately). Yet on the other hand it is often held responsible by Congress, and sometimes the tribes, for the lack of results or for the lack of comprehensive national programs in some areas — such as support for tribal courts. The Assistant Secretary must draw the line clearly, so that she and the agency she runs are not judged in terms of jobs they haven't been given, or authorities they can't exercise.

C. Put the Agency Back Together

Over the years, because of inept leadership in the Department of Interior and the Bureau, various duties and responsibilities have been taken out of the Bureau and scattered throughout the Department. Assistant Secretary Deer should fight to put the agency back together so that she can see what she has to work with and focus the agency on achievable goals. She should send back to their original agencies all personnel who have been detailed in to perform Bureau duties (and replace Indian employees, obviously an avoidance of the Indian Preference laws). She should bring back all Bureau employees who have been detailed out. And she should replace in their original jobs all employees who have been temporarily reassigned within the Bureau. After putting everyone and every duty back in place, she should then develop her own plan for using the agency and its resources to do the job Congress has assigned.

D. Forget "I'll Do Policy and I Need Someone to Run the Bureau"

It is very easy for assistant secretaries to immerse themselves in macro-policy issues, not for the purpose of doing anything about them, but precisely because it is easy to get lost in them and never have to deal with the persistent management problems of BIA. But nothing can ever be achieved on macro-policy unless the management problems are resolved or brought under control, and the Assistant Secretary must personally oversee this process, not delegate it to subordinates. Most of the problems of the agency are management problems, pure and simple, which have been neglected over the years. If properly managed, the BIA can work with the tribes and within the federal government to address policy issues appropriately. As long as it is managed so poorly, though, BIA administration will spend all its time putting out management fires, and never gets around to the larger policy issues — other than to talk about them.

E. Be Realistic About Reorganization

The Bureau and various tribal groups now have several efforts and initiatives underway which will radically restructure the Bureau, the Bureau-tribal relationship, and the way tribes are funded. In part these efforts are generating interesting ideas, and in part they are pie-in-the-sky exercises. If they are implemented, they would have a disastrous effect on Indian tribes, on the federal

trust responsibility, and on the stability of tribal funding. Some of them have created the illusion of success because they allow some tribes a disproportionate share of the Bureau's budget, and therefore the funding gimmicks they demonstrate could not possibly be replicated without a massive federal commitment of new money.

F. Take Leadership in Government-wide Federal Indian Policy

There are still numerous federal programs in which tribal governments aren't eligible for funding on the same basis as state and local governments, and in which tribal regulatory systems are not recognized on the same basis as state systems. Assistant Secretary Deer can take leadership in identifying these oversights and encouraging federal agencies to correct them to make "federal recognition" a meaningful and uniform concept — either by revising regulations or by seeking corrective legislation. She can also help to force these agencies to create more than a token Indian program, funding five or six tribes, and buying a few Indian organizations.

G. Move a Few People Out

Most of the people in the Bureau have never been led, and thus we don't know what they are really capable of. They have never been meaningfully asked to produce. We must recognize, however, that there are a few people in key positions in the Bureau who are too deeply committed politically to various factions in Indian affairs, too convinced that Indian tribes and people are hopelessly incompetent, or too incompetent themselves, to be salvageable. The Assistant Secretary should identify these people and help them find other jobs where they would be happier and more productive. It is a cliché in Indian affairs that problems are attributable to individuals and that if a lot of people were fired, we would be better off. That is an overstatement, but it is true that a few people really should move on.

It is said that free advice is worth what was paid for. I have known Ada Deer for more than thirty years, and I am confident that she has already identified these and many other issues and is well on her way to making her own mark on the federal government. I know that she will make a unique contribution to Indian affairs during her tenure, and will fill the position of Assistant Secretary of Interior for Indian Affairs with distinction and honor.

