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Russel Lawrence Barsh

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THE BIA REORGANIZATION FOLLIES OF 1978: A LESSON IN BUREAUCRATIC SELF-DEFENSE

*Russel Lawrence Barsh**

Every time an administrative agency's ineffectiveness rises to public attention these days, it seems, Congress rewards it with more budget. Caught between public pressure to solve social problems and Civil Service regulations that frustrate payroll cuts, it is far easier for legislators to spend more on an agency than to abolish it and start over again on new principles. That is not the only reason for agency survival, however.

The agencies themselves have evolved an effective ideological defense against legislative attack. Agency failure always is attributed to program implementation, rather than program concept or purpose. Someone else has gotten in the way, *e.g.*, Congress (inadequate delegations of power, insufficient appropriations), past presidents (bad political appointments), "bad apples" within the agency itself (now conveniently retired), or even the victims of the failure, the agency's intended beneficiaries, who are accused of uncooperativeness, frustration, and ignorance.¹ This is the "devil" theory of failure. The agency is the innocent victim of circumstance and bad intentions, "just trying to do its job."

There also is what might be called the "whoops!" theory of failure in the liturgy of bureaucratic self-defense. Failure is the result of a few unwitting errors in management, some carelessness, poor public relations, and misunderstanding ("breakdown in communication"). No harm was intended, and everyone has learned their lesson. The program now can proceed without further problems or delay.

Consistent with this logic, agency success readily is attainable by the application of more money, greater power, subsidizing more training for middle- and upper-level managers and increasing their share of agency payroll, increasing the agency's knowledge of its clientele by doing more studies of them and giving them more "input" (*i.e.*, more opportunities to complain), replacing past presidents' pet labels or slogans with new ones,

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* Associate Professor of Business, Government & Society, University of Washington Graduate School of Business Administration. An earlier draft of part II of this article was submitted by the author as public comment on the report of the Bureau of Indian Affairs Reorganization Task Force.

1. Pennsylvania Congressman Kelly, 61 CONG. REC. 4660 (1921).

and devoting a greater proportion of agency time and cost on internal data-collection and paperwork. In other words, the worse an organization does, the faster it gets bigger. Embedded in all this is the extraordinary assumption that any approach to a given social problem can succeed at *some cost*. Once an approach has been chosen and an organization formed to implement it, funding is increased until the problem goes away.

I. *The BIA Survival Success Story*

The Bureau Is a Regulatory Agency

Congress has abdicated its functions and powers for many years to a bureau. The result has been just what a great writer on constitutional government said must always follow bureaucracy. "A bureaucracy," says he, "is sure to think that its duty is to augment official power, official business, or official numbers, rather than to leave free the energies of mankind." That is an exact statement of the attitude of the Indian Bureau, which is the embodiment of bureaucracy, a despotic, arbitrary domain which has been permitted to exist and flourish in this land of the free.²

The Bureau of Indian Affairs is one of the nation's oldest regulatory agencies. Established in 1824,³ the Bureau now is the largest subdivision of the Department of the Interior with nearly 15,000 employees and a billion-dollar budget, responsible, in principle, for serving and protecting the interests of more than 500,000 members of organized Indian tribes and Alaskan Native communities. Since 1900, the Bureau's budget has increased tenfold, after adjusting for inflation, while Indians remain the nation's poorest minority.⁴ Simply abolishing the Bureau and distributing its annual budget as cash would increase Indians' per capita income by one-third.⁵

2. W. RYAN, *BLAMING THE VICTIM* (1976). See also F. PIVEN & CLOWARD, *REGULATING THE POOR. THE FUNCTIONS OF SOCIAL WELFARE* (1971).

3. AMERICAN INDIAN POLICY REVIEW COMMISSION, *FINAL REPORT* 238-41 (1977) [hereinafter cited as *FINAL REPORT*], discusses the Bureau's early history in detail. Originally in the War Department, the Bureau was transferred to the Department of the Interior in 1849.

4. Figure 2; LEVITAN & JOHNSTON, *INDIAN GIVING. FEDERAL PROGRAMS FOR NATIVE AMERICANS* 11 (1975); A. SORKIN, *AMERICAN INDIANS AND FEDERAL AID* 8 (1971).

5. OFFICE OF MANAGEMENT, *THE BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1980. APPENDIX* 597 (1979).

Most Bureau services duplicate general federal social programs such as low-income housing, subsidized education, and grants for economic and community development.⁶ It is questionable whether separate administration is beneficial. Bureau overhead is relatively high.⁷ At least 15% of the Bureau's budget is absorbed by administration, and another 70% pays for the "expert" personal services of BIA staff to advise and regulate tribal staff; less than 15% reaches tribes as cash (Figure 1).⁸ Although each reservation Indian today attracts roughly \$250 of federal direct funding through the Bureau to his tribal government, he also attracts about \$380 of direct federal "grants in aid" to the neighboring state government, which may not serve him fully.⁹

BIA services therefore tend to be costly and contribute relatively little to local government operation. BIA services also tend to be more centrally planned. Most federal aid to states consists of "formula grants" allocated automatically on the basis of objectively estimated need, e.g., population, income levels, problem rates.¹⁰ Aid to tribes usually is on a "project" or competitive basis, affording the granting agency greater discretion over the use of funds and subjecting tribal grantees to greater risk of discontinuation.¹¹ BIA area directors frequently have been accused

6. Temporary sharing of Indian programs with other federal agencies during the Roosevelt Administration resulted in some permanent transfers, notably the Indian Health Service to DHEW in 1955. President Johnson's "Great Society" expansion of federal direct services programs led to the formation of "Indian desks" in most funding agencies. FINAL REPORT, *supra* note 3, at 245-56. See also, *Hearing, Federal Domestic Assistance Programs, Senate Select Comm. on Indian Affairs, 95th Cong., 1st Sess. (1977)* [hereinafter cited as *Hearing, Assistance Programs*].

7. General Accounting Office, "More Effective Controls Over Bureau of Indian Affairs Administrative Costs Are Needed" (Feb. 15, 1978) [hereinafter cited as GAO]. Since most reservations are net importers of goods and services, they enjoy relatively little recirculation of federal subsidy dollars. A dollar of federal aid to state residents has more impact on the state than a dollar of federal aid to tribal members has on their reservation. Kent & Johnson, "Flows of Funds on the Yankton Sioux Indian Reservation," Ninth District Federal Reserve Bank Economic Information Series (1976). This means BIA programs must be *more efficient* to bring about the same results as non-Indian services.

8. GAO, *supra* note 7; FINAL REPORT, *supra* note 3, at 232, 266-67. About 15% of the total budget is distributed as state aid, but this is not comparable to the 15% pass-through in BIA programs because so much of the national budget pays for defense and debt service.

9. *Hearing, Assistance Programs, supra* note 6, OFFICE OF MANAGEMENT & BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1980. SPECIAL ANALYSES 212 (1979).

10. *Hearings, Assistance Programs, supra* note 6, at 20-25.

11. Many formula programs were designed with state governments in mind and have requirements that only a very large governmental unit can fulfill. *Id.* at 45; *Hearings,*

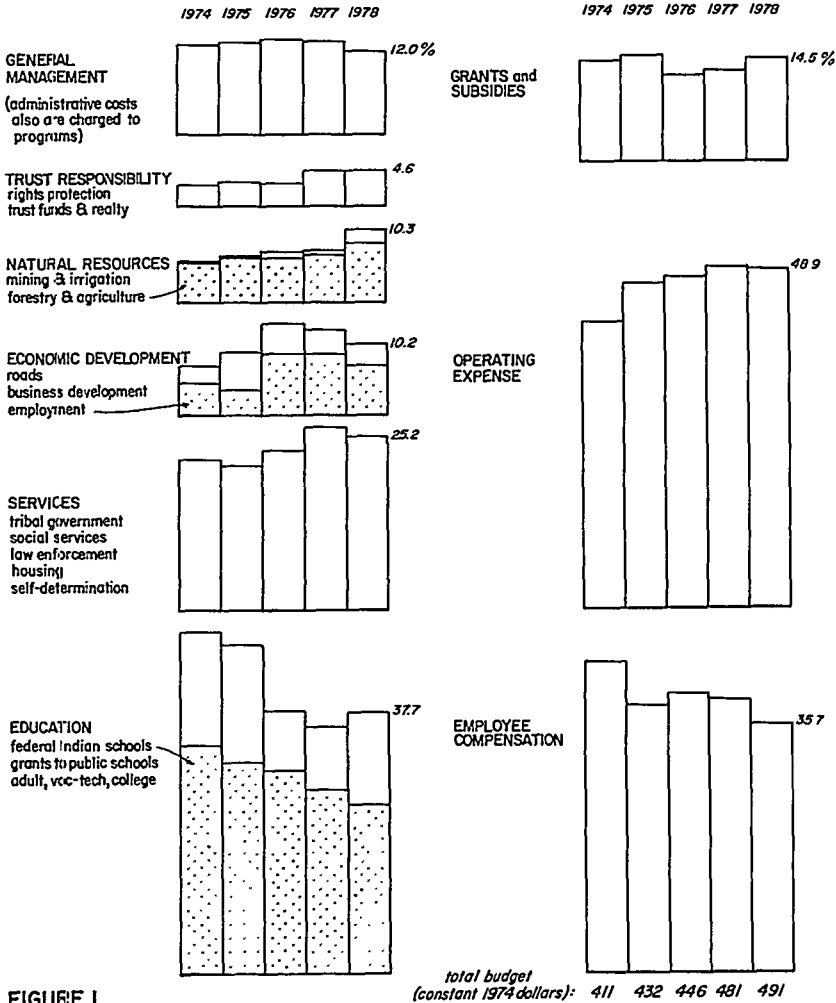


FIGURE 1.

**BUREAU OF INDIAN AFFAIRS BUDGET
PERCENT OF TOTAL BY FUNCTION AND OBJECT**

Source: Office of Management and Budget, *The Budget of the United States Government, Appendix*, for fiscal years 1974 to 1978.

of manipulating intertribal competition for discretionary funds to reward cooperation toward agency survival and to punish non-cooperation.¹²

Unfortunately, tribes cannot bypass the Bureau completely by seeking aid from other federal agencies. Tribes are statutorily ineligible for many "federal domestic assistance programs" (FDAP), and apply for even fewer out of ignorance or because of inability to comply with conditions drafted with state governments in mind.¹³ Tribal governments therefore frequently equate their own survival with the survival of the Bureau.

The Trust Doctrine

In exchange for services, the Bureau exercises a supervisory and virtually colonial control of reservation government and resources. The euphemism for this relationship is "trust responsibility." Since the end of the last century, tribal lands have been held by the United States "in trust for" individual Indians and their tribal governments.¹⁴ Originally this was a legal fiction invented by the courts to reconcile historical Indian occupancy with congressional assertions of power to regulate and confiscate Indian lands without Indian consent.¹⁵ Later it was used to explain why state laws did not extend to Indian country: they had been preempted by the exercise of federal trusteeship.¹⁶ Today, the trusteeship tail wags the whole dog of tribal-federal relations.

Bureau of Indian Affairs Organization, Senate Select Comm. on Indian Affairs, 95th Cong., 1st Sess. (1978), at 45 [hereinafter cited as Hearing, BIA].

12. *Hearing, BIA, supra* note 11, at 94. The area director's "bundle of carrots and sticks seems endless. If a tribe is cooperative, special funds are found to meet special tribal projects. . . . [I]f not, approval of tribal actions are often delayed or have to be changed. Attorney contracts are nit-picked and funds for needed programs never seem to be available." *Id.* at 97, 114; *Hearings, Nomination of the Assistant Secretary of the Interior for Indian Affairs, Senate Select Comm. on Indian Affairs, 95th Cong., 1st Sess. (1977), at 35; Hearings, Bureau of Indian Affairs Reorganization, Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. (1978), at 133.* A special "IMPL" account financed by taxes and fees on trust lands resource development has served as a slush fund for this purpose. *See Memorandum, Deputy Assistant Secretary/Indian Affairs to Area Directors, "Bureau Policy on the Expenditure of Indian Monies, Proceeds of Labor Funds," Aug. 16, 1978.*

13. AIPRC FINAL REPORT, *supra* note 3, at 256-60; *Hearing, Assistance Programs, supra* note 6.

14. Statutory authority for the trust status of lands acquired for tribes after 1934 is found in 25 U.S.C. § 465; there is no specific statutory basis for holding earlier acquired or original unceded tribal lands in trust.

15. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-56 (1903).

16. *United States v. Rickert*, 188 U.S. 432 (1903).

To preserve its "preemptive" right to acquire tribal lands, with or without tribal consent,¹⁷ Congress since 1790 has prohibited the lease or sale of Indian lands without executive approval.¹⁸ In the 1830s this grew into a more general requirement of federal approval to trade with or to settle among Indians,¹⁹ and by 1871 a rule rendering any contract or agreement with an Indian or Indian tribes voidable by the United States.²⁰ Courts long have been aware that Congress lacks express constitutional authority to regulate tribes' internal affairs,²¹ but nevertheless have implied such a power from need. "From their very weakness and helplessness," the Supreme Court concluded in 1886, "there arises a duty of protection, and with it the power."²² Federal expansionist policies having left tribes "an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence[, o]f necessity, the United States assumed the duty of furnishing that protection, and with it authority to do all that was required to perform that obligation. . . ."²³

This may have struck a rational chord in the days of Sitting Bull, but today the average educational level of reservation Indians lags only a couple of grades behind rural whites,²⁴ and it is not unusual for tribal officers and entrepreneurs to be better educated than the Bureau employees charged with their protection.²⁵ Recent years understandably have seen reformulation of the trust concept. Trusteeship increasingly is explained as an implicit bargain struck in the "course of dealings" historically between tribes and the United States, although contained expressly in no treaty.²⁶

17. *United States v. S.F. Pac. R.R.*, 314 U.S. 339, 347 (1941).

18. 1 Stat. 137, 138, 25 U.S.C. § 177.

19. Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. §§ 180, 261-64.

20. Act of Mar. 3, 1871, § 3, 16 Stat. 570, 25 U.S.C. § 81. Today this may apply only where the Indian or tribal party is dissatisfied with the bargain. *Brown v. United States*, 486 F.2d 658 (8th Cir. 1973) (tribal attorney contract not automatically void for lack of federal approval).

21. *Worcester v. Georgia*, 31 U.S. 515, 532-34 (1832).

22. *United States v. Kagama*, 118 U.S. 375, 384 (1886). The development of tribes' status in constitutional law is reviewed in detail in R. BARSH & J. HENDERSON, *THE ROAD. INDIAN TRIBES AND POLITICAL LIBERTY* (1980) [hereinafter cited as BARSH & HENDERSON].

23. *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).

24. LEVITAN & JOHNSTON, *supra* note 4, at 35-37.

25. An informal survey of Portland area credit, realty, and supervisory staff four years ago found only one employee in twenty had any formal business, economic, or technical education beyond a bachelor's degree.

26. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). See generally AIPRC, *TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP* (1976). The current philosophy of the Department of the Interior is summarized in Memorandum, Interior Dep't

The Interior Department considers trusteeship "part of the consideration" due from the United States for tribal land cessions.²⁷ However, there also is a growing tendency for the Supreme Court to consider trusteeship a "welfare" doctrine, *i.e.*, limited to the *period or extent* of Indians' supposed helplessness or need.²⁸

Conflicts of Interest

Trust responsibility is a two-edged sword. In theory, the United States is accountable to Indians for losses due to mismanagement under the same standards that apply to private trustees.²⁹ For example, the Bureau may be compelled to invest tribal trust funds at the highest available rate of interest.³⁰ On the other hand, Congress has broken treaties with impunity behind the shield of Indians' supposed best interest.³¹ What Congress deems best for Indians ordinarily is immune from judicial scrutiny.³² Even in the

Solicitor Leo Krulitz to Assistant Attorney General James Moorman, "U.S. v. Maine," Nov. 21, 1978, especially at 10.

27. Memorandum, Krulitz to Moorman, *supra* note 26, at 3. "I am saying that the United States of America has to live up to a contract with them just like you have to live up to a contract with your banker." Address of Interior Dep't Solicitor Leo Krulitz to the Affiliated Tribes of Northwest Indians, Apr. 6, 1979, Pocatello, Idaho.

28. For instance, the Supreme Court recently limited Indian treaty fishing rights to the number of fish Indian fishermen need to maintain a "moderate living." *Washington v. Washington State Comm. Pass. Fishing Vessel Assoc.*, 99 S.Ct. 3055, 3075 (1979), reviewed in BARSH, *THE WASHINGTON FISHING RIGHTS CONTROVERSY: AN ECONOMIC CRITIQUE* 123-26 (rev. ed. 1979). There also has been some suggestion of limiting the United States' obligations to its purpose in accepting the trust, *i.e.*, assimilation. *See, e.g.*, *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943) ("to prepare the Indians to take their place as independent, qualified members of the modern body politic"); *Williams v. Lee*, 358 U.S. 217, 220-21 (1958) ("Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society").

29. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

30. *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973). This duty does include zealous advocacy on disputed points of law. *United States v. Mason*, 411 U.S. 391 (1973) (Interior Department not obligated, as trustee, to contest jurisdiction of Oklahoma to tax reservation decedents' estates).

31. *Viz.* the facts in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), or, more recently, *DeCoteau v. District Ct.*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), all dealing with nineteenth-century laws allotting reservations and permitting non-Indian homesteading. As recently as twenty years ago, virtually a whole reservation was condemned to erect a hydroelectric dam. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *Seneca Nation v. United States*, 338 F.2d 55 (2d Cir. 1964); *Seneca Nation v. Bruckner*, 262 F.2d 27 (D.C. Cir. 1958).

32. Federal management and disposition of tribal property may be subject to the fifth amendment limitation on uncompensated takings. *E.g.*, *Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *Choate v. Trapp*, 224 U.S. 665, 678 (1912). The quality or quantity of federal ser-

equal protection area, "as long as . . . special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indian, such legislative judgments will not be disturbed."³³ In other words, Congress may discriminate for or against Indians, if it can offer some policy rationalization.

Federal trusteeship entails conflicts of interest at every administrative level.³⁴ To begin with, "the BIA is like any institution; it tends to defend its past decisions."³⁵ BIA officers and solicitors consequently are caught between loyalty to their agency and protecting Indian rights. The Secretary of the Interior often must reconcile disputes between the Bureau, advocating Indian interests, and other Interior subagencies, representing non-Indian interests, and the President must address trust issues in disputes between Interior and other Cabinet departments.³⁶ To make matters worse, Interior Department solicitors often are assigned simultaneously to BIA and other agencies, such as the Bureau of Mines and Bureau of Reclamation.³⁷ Under the circumstances, it is ironic that Civil Service conflict-of-interest regulations barred Indian employees of the Bureau from many forms of field service until 1976.³⁸

vices has not been held actionable. *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194 (Ct. Cl. 1969), *cert. denied*, 400 U.S. 819 (1970); *National Indian Youth Council v. Bruce*, 485 F.2d 97 (10th Cir. 1973). This does not immunize BIA administrative actions from judicial review on due process issues, *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), or to depart arbitrarily from congressional policy, *Morton v. Ruiz*, 415 U.S. 199 (1974). *See also* Memorandum, Krulitz to Moorman, *supra* note 26, at 6.

33. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

34. *See generally* A STUDY OF ADMINISTRATIVE CONFLICTS OF INTEREST IN THE PROTECTION OF INDIAN NATURAL RESOURCES, SUBCOMM. ON ADMINISTRATIVE PRACTICES AND PROCEDURES, SENATE JUDICIARY COMM. (Comm. Print 1971); *Hearing, BIA, supra* note 11, at 54-56 (comments of former Associate Solicitor Reid Chambers). This problem was identified by President Nixon in his 1970 message on Indian affairs, 116 CONG. REC. 23132.

35. *Hearing, BIA, supra* note 11, at 81.

36. *Id.* at 8: "When I was Associate Solicitor" for BIA, Reid Chambers told the Senate Select Committee on Indian Affairs in 1978, "when they wanted to run over the Indians I was not at those conferences."

37. *Id.* at 57. For a decade tribes have urged creation of a separate legal office to represent them and BIA in trust litigation. *Id.* at 34-35, 40, 44-45, 50-60, 98, 102; *Hearings, Indian Trust Counsel Authority, Subcomm. on Indian Affairs, Senate Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess. (1973); *Hearing, BIA, supra*, at 100-101.

38. Even now, exemptions are authorized only on a case-by-case basis. *Hearing, BIA, supra* note 11, at 156. It has been BIA policy not to appoint as area director a member of one of the tribes served by that office, on a conflict of interest theory, regardless of the tribes' wishes. *E.g., id.* at 21-23, 138-39. This was challenged successfully

Courts have held that Indians, as beneficiaries of the federal trust, must be given an opportunity to be heard before federal action is taken to impair their property rights, but Indians have no substantive right to prevail.³⁹ The Interior Department itself rationalizes that Congress always can confiscate Indian rights in the exercise of its war, commerce, and eminent domain powers. Congress is limited by trusteeship only when it is acting as trustee.⁴⁰ This means Congress can circumvent trust responsibility whenever it wishes. Expansive interpretations of trust responsibility mean little when the Supreme Court can characterize tribes' essential political rights as "of a unique and limited character . . . exist[ing] only at the sufferance of Congress," tribes' trustee, and "subject to complete defeasance."⁴¹

In pursuit of a balanced federal budget, the Carter Administration tested the scope of trust responsibility in 1978. A Justice Department brief in *White v. Califano* demoted trusteeship to a "metaphor" involving only "moral responsibility," insufficient to support an Indian's claim for federally subsidized health care.⁴² The Justice Department also warned Congress against hinting in the preamble of the Indian Child Welfare Act that new federal child welfare services to tribes imply legally enforceable financial commitments.⁴³ These challenges prompted the Interior Department to work out an agreement with the Justice Department "to spell out, clearly and carefully, our joint understanding

in *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979), relying on the special Indian career service provisions of the Indian Reorganization Act, Act of June 18, 1934, ch. 576, § 12, 48 Stat. 986, 25 U.S.C. § 472.

39. *Pyramid Lake Paiute Tribe v. Morton*, 354 U.S. 252 (1972) (Secretary of Interior may not authorize Bureau of Reclamation project to divert tribe's water without considering tribe's interests); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966) (Bureau of Mines may not assume tribal lessee's mining rights without consulting tribe). See also Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

40. Memorandum, Krulitz to Moorman, *supra* note 26, at 6. As a result of this paradox, perhaps, the United States is more often the defendant in trusteeship litigation than the plaintiff. *Hearing, BIA, supra* note 11, at 54.

41. *United States v. Wheeler*, 435 U.S. 313 (1978). "Unlike tribal property rights the extent of tribal sovereignty is wholly within the discretion of Congress." Krulitz Address to ATNWI, *supra* note 27.

42. Brief for the Federal Appellants, 581 F.2d 697 (8th Cir. 1978), at 31-32.

43. H. REP. 95-1386 (1978), at 38 n.4, 40. The Indian Child Welfare Act is Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. §§ 1901 *et seq.* See also Interior Secretary Andrus' comments about Attorney General Bell in *Hearing, Nomination of the Assistant Secretary of the Interior, supra* note 12, at 16.

of what that relationship is.”⁴⁴ According to the agreement, trust responsibility is “legally enforceable . . . [and] subject to the same strict standards imposed on any other fiduciary . . . care, loyalty, and faithful execution,” but only in the management and conservation of tribal lands. Political liberties, services, and self-government are outside of trust protection.

There is reason to suspect that the net effect of trust responsibility is negative. Trust imposes an additional layer of regulation on reservation business transactions, taxing all reservation economic enterprises with uncertainty, risk, and regulatory compliance costs greater than the costs borne by off-reservation competitors.⁴⁵ The regulatory tax is greater for Indian-owned businesses than non-Indian-owned businesses on the same reservations. The result is a characteristic reservation economic pattern: heavy imports from off-reservation producers, Indian-owned businesses chiefly of a marginal nature (*i.e.*, little fixed capital, high turnover, reliance on tax or regulatory loopholes for competitive advantages), reservation retail trade dominated by non-Indians, and very low Indian wages. Low reservation wages and low prices for the sale of reservation resources compensate businesses for the higher costs of reservation investment.

Policy Cycles and BIA Growth

Congress has by no means accepted the costs and failures of Indian administration without protest. About once every thirty years there is a legislative move to end the Bureau. In 1887 the General Allotment Act ordered the subdivision of reservations into small individual Indian landholdings.⁴⁶ The Act’s sponsors supposed this would free Indians from dependence on federal subsidies and make it possible to dismantle the Bureau of Indian Affairs.⁴⁷ The Bureau argued that, for the Indians’ protection, it hold the individual land patents “in trust” until the Indian owners were capable of managing their own affairs—presumed to be twenty years. Administering trust property and pro-

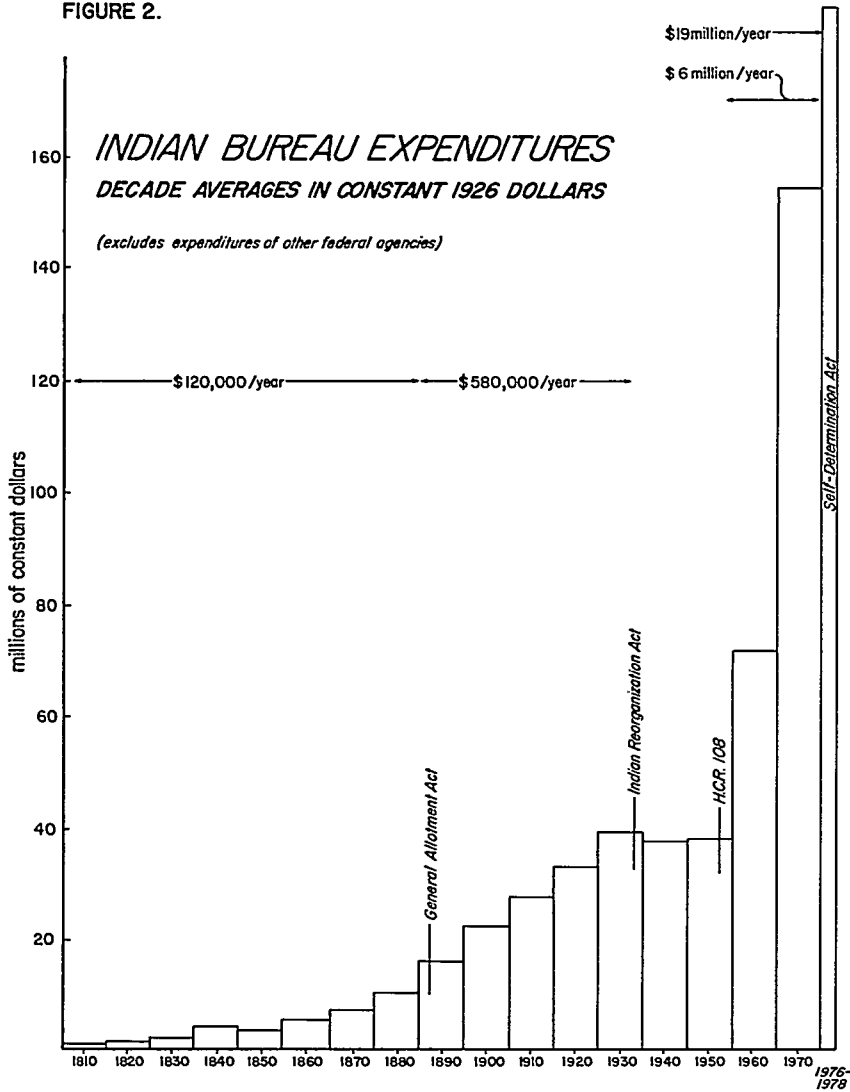
44. Krulitz Address to ATNWI, *supra* note 27.

45. This model of reservation economic structure is developed in Barsh & Henderson, *Tribal Administration of Natural Resource Development*, 52 N.D. L. REV. 307, 319-22 (1975); Trosper, *American Indian Relative Ranching Efficiency*, 68 AM. ECONOMIC REV. 503 (1978); Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth*, 54 WASH. L. REV. 531, 555-58 (1979).

46. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

47. BARSH & HENDERSON, *supra* note 22, at 63-67.

FIGURE 2.



Sources: Bureau of the Census, *Historical Statistics of the United States 1789-1945* (1949), at 299-301, 233; Bureau of the Census, *Historical Statistics of the United States From Colonial Times to 1970* (1975); Bureau of the Census, *Statistical Abstract of the United States*, for the years 1970 to 1978; Department of the Treasury, *Combined Statement of Receipts, Expenditures, and Balances of the United States Government*, for the years 1945 to 1978.

viding agricultural assistance to allottees justified additional staff and expenses, of course, and kept the Bureau busy for more than forty years.⁴⁸ During the "allotment period," the Bureau's budget grew at an annual rate five times faster than it had during the "treaty period" that preceded it (Figure 2).

Before allotment, the Bureau's budget consisted of appropriations to fulfill specific treaty commitments plus a small amount for general administration.⁴⁹ The General Allotment Act was the first major national Indian program with a wholly legislative basis and a single central budget. In 1921 Congress further consolidated Indian affairs funding by merging all treaty appropriations and legislative authority into one general, annual appropriation. The Snyder Act⁵⁰ left to the Bureau the task of distributing the national Indian budget among tribes and programs. This simplified the role of Congress but reduced congressional control of the Bureau.

By 1934, Congress had branded allotment a complete failure, castigating the Bureau both for conceiving it and for implementing it badly.⁵¹ The agency responded by proposing a new policy to undo allotment and reverse its effects. The Indian Reorganization Act⁵² suspended further allotment, re-recognized the boundaries and governments of allotted tribes, and provided capital for the reacquisition of lost lands. Naturally, the Bureau was designated to supervise the process and to assist reorganized tribal governments. This added a new layer of permanent administration to the agency, while all staff and activities established by the General Allotment Act were continued for the benefit of the remaining allottees.

Government belt-tightening during World War II led several congressional committees to investigate the Bureau's political influence over reorganized tribes and the failure of reorganization to bring about significant economic change.⁵³ The agency confessed guilt, but again advocated its own brand of reform. One

48. See 61 CONG. REC. 4660-61 (1921) for a contemporary critique, and OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* (1972), for more details of the administration of allotments.

49. Discussed in 43 CONG. GLOBE 1811-12, 1821-25 (1871).

50. Act of Nov. 2, 1921, ch. 115, 42 Stat. 208, 25 U.S.C. § 13, *as amended by* Pub. L. 94-482, § 410, 90 Stat. 2233.

51. 61 CONG. REC. 4660-61, 4664 (1921); BARSH & HENDERSON, *supra* note 22, at 96-106.

52. Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. §§ 461, 462, 465, 476.

53. BARSH & HENDERSON, *supra* note 22, at 117-25.

by one, tribes would be “terminated,” *i.e.*, politically dissolved without their consent. This was to be a slow, “programmed” process during which, of course, the Bureau would continue to administer old services and begin to provide new, more costly services to ease Indians through the transition to state jurisdiction.⁵⁴ Congress adopted this scheme in 1953⁵⁵ and Bureau field activity at once increased. A network of regional “Area Offices” was established⁵⁶ and annual budget increases accelerated to ten times their allotment-era levels (Figure 2). Within fifteen years, termination had ground to a halt and was abandoned.⁵⁷

For nearly a century, congressional frustration with Indian administration simply resulted in reorganization and temporary redirection of the Bureau. Laws designed to end the “Indian problem” and disband the Bureau always contained provisions for transitional programs and services requiring increased staff, budget, and responsibilities. Congress’ cyclical policy swings from tribal extinction to tribal preservation actually have reflected a consistent legislative effort to unload a bureaucratic organization that simply grows, ratchetwise, with each attempt. Because Congress has been so anxious to abolish the Bureau, the Bureau tends to be rewarded, budgetarily, for coming up with new plans to do away with itself—and with tribes in the process. The Bureau’s budget history makes it clear that termination policies always pay off better than policies favoring tribal survival (Figures 2 and 3).

“Self-determination” and the Policy Review Commission

In 1975, Congress adopted a “new direction” in Indian affairs, heralded by both political parties as the cure for Bureau domination of tribal affairs.⁵⁸ The Indian Self-Determination and Education Assistance Act⁵⁹ promised to “transfer” Bureau programs contractually to individual tribes. Contracts must be renewed annually in the discretion of the Bureau, however, and the Bureau reserves power to regulate all aspects of service delivery policy ex-

54. *Id.*

55. H.R.C. 108, 99 CONG. REC. 9968 (1953).

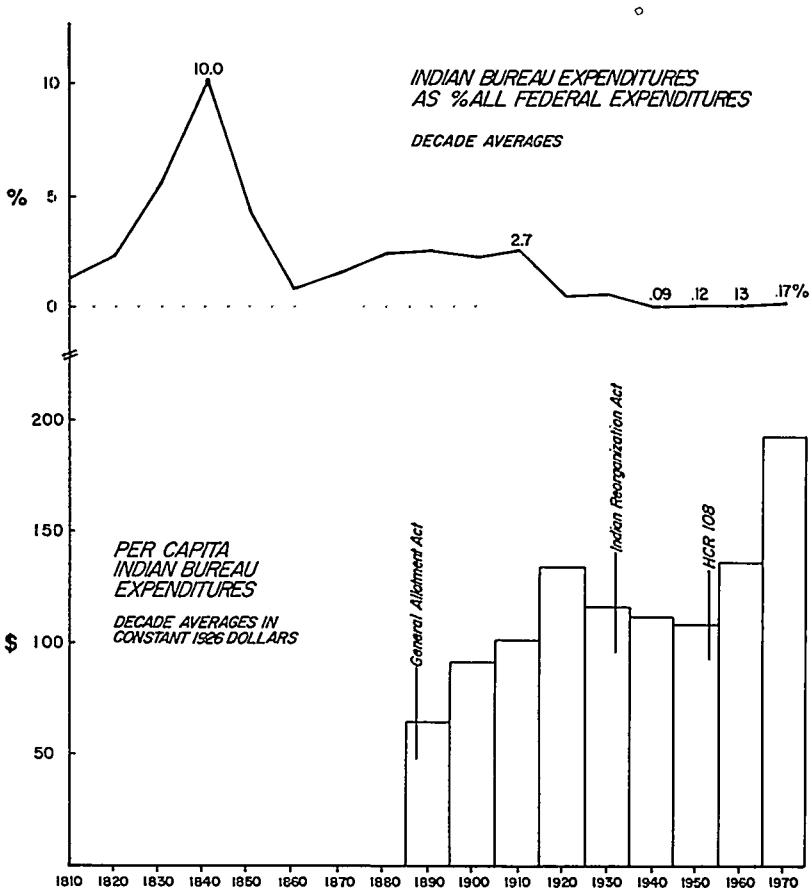
56. AIPRC, FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS (1976), at 57-58; *Hearing, Status of the Bureau of Indian Affairs Reorganization, Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. (1978), at 259.

57. Message of President Nixon, 116 CONG. REC. 23132 (1970).

58. Barsh & Trosper, *Title I of the Indian Self-Determination and Education Assistance Act of 1975*, 3 AM. INDIAN L. REV. 361 (1975).

59. Pub. L. 93-638, 88 Stat. 2203 (1975), 25 U.S.C. § 450.

FIGURE 3.



Sources: Computed from data presented in Figure 2 and from population and national budget outlay data in Bureau of the Census, *Historical Statistics of the United States From Colonial Times to 1970 (1975)*; and Bureau of the Census, *Statistical Abstract of the United States*, for the years 1970 to 1975.

cept employment.⁶⁰ Contractor tribes become legally responsible for service quality while Congress and the BIA retain complete control of funding, a dangerous separation of power and liability.⁶¹ Moreover, although proponents of self-determination predicted substantial Bureau staff reductions, the agency actually created two new staff offices to supervise contracting and provide transition services.⁶² Annual BIA budgetary growth again accelerated, without any increase in the proportion of the budget reaching tribes as cash (Figure 1). The General Accounting Office concluded in 1978 that the self-determination program had done little as yet to free tribes from the Bureau.⁶³

In the initial heady idealism of self-determination, Congress established an American Indian Policy Review Commission (AIPRC) composed of congressmen and tribal representatives.⁶⁴ Among other things, the Commission was charged with reviewing "Federal administration and structure of Indian affairs."⁶⁵ A team of ten corporate executives was assembled to study BIA operations in the field, evaluating "key decision points," information systems, personnel management, and organization.⁶⁶ They found a "notable absence of managerial and organizational capacity."⁶⁷ Internal and external communication was poor, decisions were being "made on a day-to-day basis with little long-range planning," employee and program evaluation standards were "nonexistent," and employee morale was poor.⁶⁸ Not-

60. Barsh & Trosper, *supra* note 58.

61. In the words of Acoma Pueblo Governor Stanley Paytiamo, "OK, get in your own canoe and you can paddle it the way you want to. But the paddles have holes in them and the canoe is remote control." *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 25.

62. *Hearing, Nomination of the Assistant Secretary of the Interior, supra* note 12, at 33; *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 206.

63. GAO, "The Indian Self-Determination Act—Many Obstacles Remain" (Mar. 1, 1978).

64. Pub. L. 93-580, 88 Stat. 910 (1975). For background on the work of the AIPRC, see *Hearing, BIA, supra* note 11, at 10-12.

65. Pub. L. 93-580, § 4, 88 Stat. 910 (1975).

66. AIPRC, BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY iii, 1-3 (1976).

67. *Id.*, 6; AIPRC, FINAL REPORT, *supra* note 3, at 268; *Hearing, BIA, supra* note 11, at 12.

68. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 66, at 6-7. "Presently, performance standards are primarily informal and subjective. They are based upon (1) doing what the budget justification says, (2) adjusting to current problems and demands so long as the individual doesn't stray too far from overall program objectives, (3) handling demands so as to 'keep the wheels greased' as best as one can, (4) answering the mail, and (5) spending the total budget allocation. If these criteria are met, perfor-

withstanding the Bureau's official commitment to self-determination, "Indian input and proximity to decisions is minimal while bureau response time is excessive."⁶⁹

The Bureau recently had established a "band analysis" budget process in which tribes were asked individually to give priority to their programs at 96%, 106% and 116% of the prior year's outlay.⁷⁰ This did offer tribes some opportunity to participate in budget distribution, but left primary control in BIA area directors. The band process was short-range (annual) and incremental, making it of little value in planning or management, and it included only about half of the Bureau's budget.⁷¹ Financial management also suffered from "inadequate and unreliable" information, disorganized reporting, and lack of performance standards.⁷² Instead of forecasting manpower needs from program data, the Bureau arbitrarily fixed position "ceilings" for each function.⁷³ The Bureau's operations manual (BIAM) had grown to a ten-foot-long shelf of "antiquated" and "unfathomable" directives, resulting in confusion over responsibilities and "many employees spend[ing] excessive time generating or reacting to rumors."⁷⁴

mance is satisfactory." *Hearing, Status of Bureau of Indian Affairs Reorganization, supra* note 56, at 224.

69. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 66, at 8.

70. *Id.* at 13-15. Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, requires that tribes be "advised" of all appropriations estimates before the President's budget goes to Congress. This has not always been observed. Haas, "Ten Years of Tribal Government Under I.R.A.," Indian Service Tribal Relations Pamphlet No. 1 (1947), at 11.

71. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 66, at 15-18. See also AIPRC, FINAL REPORT, *supra* note 3, at 269-70, 280-81; FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, *supra* note 56, at 12-14, 47-48; *Hearing, BIA, supra* note 11, at 4-5, 15, 36, 95, 98. Tribes complained of having as little as two days to formulate their priorities, BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* at 17; being unable to plan more than one year at a time, *Hearing, BIA, supra* 26, 36, 39, 49; too much paperwork, *id.* at 42; getting what they want only when they go to Congress directly for special budget add-ons, *id.* at 46; and inequities, BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* at 13-15, FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, *supra* at 48, 60; *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 41-42, 90.

72. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 35.

73. AIPRC, FINAL REPORT, *supra* note 3, at 278; FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, *supra* note 56, at 12-14; *Hearing, BIA, supra* note 11, at 32, 93. A revision of the BIAM was begun in 1968 but never completed. *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 326. Many area directors had complicated things by issuing "bootleg" memoranda, and the breakdown in organization and distribution of new parts had reached the point that the Bureau was "unable to provide a complete manual . . . upon request." *Id.* at 326-27.

Job classification was “chaotic” and supervisors often “autocratic,” AIPRC investigators reported.⁷⁵ Spans of control throughout the Bureau were too broad, tangling administrative and functional responsibilities to the point that actual program costs could not be determined reliably.⁷⁶ Employee incompetence was attributed to Civil Service protection and to improper administration of Indian preference,⁷⁷ established in 1934 to put the BIA “predominantly in the hands of educated, competent Indians.”⁷⁸ Positions often remained vacant when there were no Indian applicants, or were filled by hiring Indians below classification, practices aggravated by the absence of effective recruitment or job-specific training.⁷⁹ Although Indians for twenty years had occupied roughly 60 percent of all Bureau positions, most Indian employees remained GS-7 or lower.⁸⁰ The Bureau had sacrificed effectiveness by absorbing just enough Indians in lower ranks to create an appearance of legitimacy.

The AIPRC’s Bureau management study made 23 specific recommendations to improve the delivery of Indian services, in-

74. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 35, 41-42; AIPRC FINAL REPORT, *supra* note 3, at 268, 271-72.

75. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 34, 38; AIPRC FINAL REPORT, *supra* note 3, at 270.

76. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 42, 49-53; *Hearing, BIA, supra* note 11, at 24, 40.

77. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 34; FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, *supra* note 56, at 56-57; *Hearing, BIA, supra* note 11, at 6, 21, 36, 93. According to All-Indian Pueblo Council President Delfin Lovato, Civil Service protection “perpetuates mediocrity.” *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 16. To make matters worse, BIA is one of the federal government’s most unionized agencies, with 75% union representation. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* at 33.

78. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 32-34, referring to Section 12 of the Indian Reorganization Act, 25 U.S.C. § 472. *See also* AIPRC FINAL REPORT, *supra* note 3, 277-78, Indian preference applied only to initial hires, not promotion, until 1972. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* at 33. The constitutionality of Indian preference was challenged without success in *Morton v. Mancari*, 417 U.S. 535 (1974), and in *Freeman v. Morton*, 499 F.2d 494 (D.C. Cir. 1974).

79. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 34-35, 39; AIPRC FINAL REPORT, *supra* note 3, at 270-71.

80. AIPRC FINAL REPORT, *supra* note 3, at 276, *Hearing, Reduction in Force in the BIA, Subcomm. on Indian Affairs, Senate Comm. on Interior & Insular Affairs*, 93d Cong., 2d Sess. (1974), at 220-27. “Statistics indicate that some 70 percent of the BIA employees are Indian, but make no mistake about it, non-Indians run the Bureau of Indian Affairs.” *Hearing, BIA, supra* note 11, at 93.

crease tribal participation, and reduce administrative overhead.⁸¹ Formal tribal input at the needs-assessment stage, improved data bases, zero-base budgeting, and performance-related accounting would improve financial management; more "realistic" job classification, clarification of minimum job standards, active recruitment of Indians, job-specific training, and improved two-way communication at all organization levels would improve staff efficiency.⁸² Last, the management study proposed a "matrix" reorganization, separating administrative and functional activities.⁸³ Better use of personnel would make it possible to eliminate one-fourth of the Bureau's workforce, the study predicted, an annual net saving of \$120 million.⁸⁴

The full Commission went much farther in its final report, challenging the basic role of the Bureau as a "surrogate local government." "It is frustrating to the Indian people to be singled out as being unable to administer governmental functions in a rational, intelligent, and lawful manner when the contrary is, as a matter of course, presumed for the other [state and local] governments."⁸⁵ Bureau "consultation" policies gave tribes no real influence over programs, nor had the Bureau ever demonstrated the scientific and technical expertise to meet tribes' apparent needs.⁸⁶

To resolve these deeper problems, the Commission recommended creation of a separate, Cabinet-level agency integrating all federal Indian programs, with its own legal department and a special Indian career service.⁸⁷ To change the Bureau "from a

81. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 57; AIPRC FINAL REPORT, *supra* note 3, at 273-74.

82. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 21-30, 35-39, 43-46; AIPRC, TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP (1976), at 3-8; AIPRC, FINAL REPORT, *supra* note 3, at 261-63, 289.

83. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 49-53; *Hearing, BIA*, *supra* note 11, at 13.

84. BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 9, 31, 36-37, 42; *Hearing, BIA*, *supra* note 11, at 33.

85. AIPRC, FINAL REPORT, *supra* note 3, at 232-33. "The State governments do not have to go elsewhere to another country or another State to find their leadership." Sandia Pueblo Governor Frank Paisano, in *Hearing, Bureau of Indian Affairs Reorganization*, *supra* note 12, at 87.

86. AIPRC, FINAL REPORT, *supra* note 3, at 261; FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, *supra* note 56, at 50-55; *Hearing, BIA*, *supra* note 11, at 36, 41, 48, 52. BIA resource management has been the object of special criticism. MANAGEMENT OF INDIAN NATURAL RESOURCES, SENATE COMM. ON INTERIOR & INSULAR AFFAIRS (Comm. Print 1976).

87. AIPRC, FINAL REPORT, *supra* note 3, at 287-89; TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP (1976), at 3-8. A separate Cabinet-level department

management to a service agency," area offices would be converted to regional technical services centers, abolishing their line authority.⁸⁸ "Legislation establishing tribal governments as equal to State governments in Federal domestic assistance programs" would free tribes further from BIA domination by making them eligible for direct formula funding.⁸⁹ The Commission proposed entrusting the implementation of its recommendations to a special oversight unit in the Office of Management and Budget, free from BIA influence; elevating the Commissioner of Indian Affairs to Assistant Secretary of the Interior; and creating, to guarantee tribal participation, a presidentially appointed Indian "Board of Regents" for the Bureau.⁹⁰

Reorganization Fever

South Dakota Senator James Abourezk, chairman of the American Indian Policy Review Commission, became chairman of the newly organized Senate Select Committee on Indian Affairs in 1977.⁹¹ While the administration moved to appoint an Assistant Secretary of the Interior for Indian Affairs, Abourezk sought a congressional mandate for implementation of the AIPRC's Bureau management recommendations.⁹² In July, he convened oversight hearings to ascertain the Bureau's response to reorganization and to apply pressure for action.⁹³

was proposed first by the National Congress of American Indians in 1971. FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, *supra* note 56, at 61; AIPRC FINAL REPORT, *supra* note 3, at 285-86. Creation of a separate Indian rights legal unit by legislation failed in 1973. *Hearings, Indian Trust Council Authority, Subcomm. on Indian Affairs, Senate Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess. (1973). *See also Hearing, BIA, supra* note 11, at 34-35, 40, 44-45, 54-63; *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 3-6.

88. AIPRC FINAL REPORT, *supra* note 3, at 298-99; BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 8. According to some witnesses, area offices are a "bottleneck" to Bureau approval of local action. FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, *supra* note 56, at 49, 58-59.

89. AIPRC FINAL REPORT, *supra* note 3, at 257-59, 296. Tribes could use formula grants to hire their own technical consultants, bypassing the Bureau, an option more supportive of self-determination but "often overlooked." *Id.* at 261; *Hearing, BIA, supra* note 3, at 8, 23, 36, 53.

90. AIPRC FINAL REPORT, *supra* note 3, at 298-99; FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, *supra* note 56, at 61, 63; BUREAU OF INDIAN AFFAIRS MANAGEMENT STUDY, *supra* note 36, at 9.

91. S.R. 4, 95th Cong., 1st Sess. (1977) established the Select Committee for a term of two years. The AIPRC FINAL REPORT, *supra* note 3, at 293-96, 299, recommended that the Select Committee be given permanent status.

92. S.R. 135, 95th Cong., 1st Sess. (1977).

93. *Hearing, BIA, supra* note 11, at 1-3, 12-13.

Tribal and AIPRC witnesses emphasized reform of area offices, accusing area directors of "buffering" policy changes, log-jamming decisions in paperwork and in nailbiting over authority, and using their hiring and budgetary powers to play tribes off against one another.⁹⁴ Because of area inefficiency, the Bureau had become "one of those odd institutions where the totality is less than the sum of its parts."⁹⁵ Skilled at bureaucratic "survival management," witnesses predicted, area directors would defeat any attempt to reform the Bureau by marshalling the support of local politicians, other federal agencies, and, under coercion of ransoming programs, the tribes themselves.⁹⁶ "They treat all administrations with equal disdain."⁹⁷ There was general agreement that areas' line authority must be abolished.⁹⁸

Witnesses were not optimistic for basic change. "[D]ynamic new leadership" was needed, presumably from the new assistant secretary.⁹⁹ "[I]t doesn't make any difference how you restructure BIA . . . as long as you have the same individuals with the same mentalities and the same ideas . . . nothing will change."¹⁰⁰ More witnesses warned that new, idealistic BIA employees would be burdened by the same old regulations and organization and would either "yield" or quit in frustration.¹⁰¹

The Select Committee was disarmed, at first, by the Interior Department's apparent enthusiasm for reform. Undersecretary of the Interior James Joseph told the Select Committee that AIPRC criticism "dovetail[ed]" with his department's concerns, and that dieting the Bureau down to a technical assistance agency would be consistent with President Carter's overall administrative reorganization plan.¹⁰² The new assistant secretary nominee, For-

94. *Id.* at 91, 94, 97, 100-101. Tribes complained that incompetent area directors had been reassigned to other area offices in lieu of discipline, calling it "musical chairs." *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 98-99.

95. *Hearing, BIA, supra* note 11, at 61.

96. *Id.* at 97-98, 100-101, 103.

97. *Id.* at 98, 101. Of the Bureau's relationship to Congress, witnesses complained that "when the Bureau gets done writing the regulations" for new federal Indian legislation, "it is almost unrecognizable." *Id.* at 37.

98. *Id.* at 13, 30, 34-35, 41, 48, 51, 53.

99. *Id.* at 2-3, 34-35, 62-63. See also *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 5-6.

100. *Hearing, BIA, supra* note 11, at 35.

101. *Id.* at 43, 93.

102. *Id.* at 106-107, 111, 131, 149. The same month the AIPRC management study was released (September 1976), the Bureau completed an internal "Personnel Management Action Plan" which, while considerably narrower in scope, arrived at many of the

rest Gerard, was committed to change and would oversee the process personally, "remov[ing]" resisters.¹⁰³ Because modification of area structure would necessitate "detailed planning," an internal BIA task force would be assembled to work with the assistant secretary.¹⁰⁴

Conceding "band analysis" had been an "imperfect process," the department promised a new, consolidated zero-base budget system with formal tribal participation, as well as modernized data processing and an updated operations manual.¹⁰⁵ The department also would make a greater effort to recruit qualified Indians through intern programs and a job skills bank, and would explain Indian preference more fully to non-Indian employees.¹⁰⁶ A manpower forecasting specialist already had been hired; job-specific training, better job classification, and regular personnel evaluations soon would be implemented.¹⁰⁷ National training and technical assistance facilities would be consolidated, just as the AIPRC had suggested.¹⁰⁸

On more fundamental issues, however, Undersecretary Joseph and the Department waffled. A "matrix" organization was out of the question, and so was the idea of an independent Indian affairs legal unit.¹⁰⁹ Although tribes would be encouraged to buy more technical services outside of the government, Interior would not agree to lay off admittedly poor BIA technical staff.¹¹⁰ Area

same conclusions. *Id.* at 162-285. The Action Plan was to have been finalized by December 1977, *id.* at 162-63, but by early 1978 was bogged down in administrative delays, *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 324. Interestingly, the Action Plan's author, Paul Lorentzen, described himself as "often discouraged" while writing it by BIA employees' cynicism about organizational change. *Hearing, BIA, supra* note 11, at 163.

103. *Hearing, BIA, supra* note 11, at 115.

104. *Id.* at 108, 112-13.

105. *Id.* at 107, 119, 137-38, 140-41, 144-47, 160-61. The Department did not assume all of the blame, however; tribes' noninvolvement in budgeting also was attributed to high turnover among tribal officers and "apathy and mistrust." *Id.* at 144-46, 148.

106. *Id.* at 131-32, 148-50. The proposed "Indian Intake Program," essentially an entry-level internship for Indians, and the skills bank both originated in AIPRC recommendations. AIPRC FINAL REPORT, *supra* note 3, at 261-62, 296-97.

107. *Hearings, BIA, supra* note 11, at 134-36, 148, 150-53. How job-specific the Department's proposed courses were may be debated. They included "upward mobility," "promotion," and "career development." Obviously, Interior felt BIA employees should be working on their own futures, not the tribes'.

108. *Id.* at 141-42; AIPRC FINAL REPORT, *supra* note 3, at 262-64, 289, 296-97.

109. *Id.* at 117, 121-22, 142. See also *Hearing, Nomination of the Assistant Secretary of the Interior, supra* note 12, at 14-16, 26-27.

110. *Hearing, BIA, supra* note 11, at 136.

offices would retain control of budget formulation, and Bureau-wide management performance standards would not be developed.¹¹¹ Leaving each area to work out its own objectives and standards would be more consistent with tribal diversity and with self-determination, the Department argued, ignoring the fact that tribes themselves had demanded this change.¹¹² A clue to the Department's true agenda was its admission that reorganization already had been used to justify increased fiscal year 1979 budget requests, although it would not commit to an implementation timetable and warned that predicted savings from management changes had been unrealistic.¹¹³ Carefully limited, reorganization was beginning to look like a good excuse for BIA growth.

Bureaucratic mobilization of defenses continued a month later, during Senate confirmation hearings for assistant secretary nominee Forrest Gerard. Gerard pledged to implement the AIPRC report, which he praised, and to bring about "fundamental reform" in the Bureau to strengthen tribal government and federal services.¹¹⁴ He was careful to dismiss tribes' criticisms of the Bureau, however. "Although some criticism is surely warranted, the Bureau has not always been able to respond fully to all demands because of inadequate staffing, structure and resources."¹¹⁵ A few employees were incompetent or not "imbued" with the right attitudes, but that was bound to happen in any large organization.¹¹⁶ Some reduction in force was likely, but certainly not to the degree the AIPRC had anticipated.¹¹⁷

The Indian Self-Determination Act had been "designed . . . to transfer power from the Bureau to the Indian tribes," Senator Abourezk observed, but the Bureau had been "increasing its personnel rather than decreasing it . . . using Public law 93-638 as an excuse for the increase."¹¹⁸ He warned Gerard "to work yourself

111. *Id.* at 115-17, 158-60.

112. *Id.*, and sources at note 88, *supra*.

113. *Id.* at 118, 144-45, 148, 150, 152, 158.

114. *Hearing, Nomination of the Assistant Secretary of the Interior, supra* note 12, at 18, 20-21, 24, 26, 28. Gerard declared his "belie[ff] in and support" of tribal sovereignty and tribal jurisdiction over reservation non-Indians. *Id.* at 44-45.

115. *Id.* at 18.

116. *Id.* at 27, 29.

117. *Id.* at 27, 29, 64.

118. *Id.* at 33, 43. Although he agreed that the Indian Self-Determination Act had not been implemented fast enough, *id.* at 19, Gerard would not commit himself as to whether the Act had been used to justify payroll growth. This was somewhat disingenuous on his part, for he had been a principal draftsman of that legislation. *Id.* at 2, 4, 5, 33-34.

out of a job rather than . . . into a perpetual job.”¹¹⁹ The purpose of the new assistant secretaryship had been to begin reducing the Bureau’s domination of tribal affairs, and the first step in that direction should be the immediate elimination of area office line authority.

Gerard admitted “[a]lready there has been furious politicking of the Indian community by the area directors to try to undercut and destroy this particular reorganization plan,”¹²⁰ as critics of the Bureau had predicted, but apparently he was prepared to make concessions. Area offices eventually would “change their character” and he would make an “unqualified commitment” to strip area directors within one year of their hiring and budget powers,¹²¹ but no area offices would close or lose their line authority.¹²² Although, not unselfishly, he supported the AIPRC goal of a Cabinet-level Indian agency, Gerard strongly opposed the other two major AIPRC reorganization goals, a separate Indian career service and an independent Indian affairs legal unit.¹²³

II. *The Reorganization Counterproposal*

Tactical Circumspection

The fate of the AIPRC’s reorganization proposal illustrates the defensive value of restudying an issue until you get the answer you want. Each new study of a management problem departs incrementally from the original until, confused and frustrated, critics accept defeat. In December 1977, shortly after his confirmation as the first Assistant Secretary of the Interior for Indian Affairs, Forrest Gerard appointed a task force of BIA insiders and outsiders to review the AIPRC report and draft an implementation plan.¹²⁴ Cautioning task force members to address

119. *Id.* at 31. See also Montana Senator John Melcher’s comment, *id.* at 4.

120. *Id.* at 35.

121. *Id.* at 35-36, 41-43, 54.

122. *Id.* at 35-36. Astonishingly, Gerard expressed concern that cities in which area offices currently are located would be hurt by closings, *id.* at 35-36, 64, strange talk from someone who had pledged to be an “advocate rather than an adversary” for tribes, *id.* at 22, 24.

123. *Id.* at 26-27, 48-49, 52. He also rejected the AIPRC’s recommendation that BIA service delivery performance standards be established by contracts with the tribes served. *Id.* at 65-66. At his confirmation hearings, Interior Secretary Andrus had been agreeable to formation of a Cabinet-level agency, however. *Id.* at 115.

124. The task force’s charge can be found in *Hearing, Bureau of Indian Affairs Reorganization*, *supra* note 12, at 130-41. Earl Old Person, chairman of the task force,

“fundamental,” not “cosmetic” issues, Gerard gave priority to four Bureau missions: service delivery, tribal self-determination, tribal participation, and long-range planning.¹²⁵

The task force’s March 31, 1978 report succeeded in deflecting attention from many of the Bureau’s problems. In its own defense, the task force complained that budgetary constraints had limited the scope of its work.¹²⁶ Observing almost apologetically that “it is people, not structures or systems, that will make this reorganization work,” the task force also seems to have anticipated limited Bureau implementation of its recommendations, however mild.¹²⁷

Some of these recommendations may appear “old hat” or simple-minded—obvious to those familiar with previous BIA studies or with current management and organization practice. But the most significant change resulting from the work of the Task Force will be the actual implementation for the first time of recommendations made repeatedly in the past.¹²⁸

The task force “strongly suggest[ed] that this effort not be treated as ‘just another study,’ but that it receive a major departmental commitment into carrying it forward into implementation.” This proved to be wishful thinking.

According to the task force, the Bureau’s “mission” is to “advocate” and “protect the inherent rights of Indian tribal and Alaska Native self-government.”¹²⁹ Noting the increasing frequency of conflicts among tribal, federal, and state economic policies, the task force argued that “[d]ecisions affecting the use of Indian and Native Alaskan natural resources should be made by affected tribes.”¹³⁰ Nothing in their report actually would have given tribes more control of their destinies, however, nor greater independence from national policies adverse to Indian in-

and chairman of his tribe, was a friend of Assistant Secretary Gerard, and had testified at Gerard’s confirmation hearings. *Hearing, Nomination of the Assistant Secretary of the Interior*, *supra* note 12, at 79. The task force was organized pursuant to the Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (1972), and was, according to Assistant Secretary Gerard, independent of the Bureau. *Hearing, Bureau of Indian Affairs Reorganization*, *supra* at 141.

125. *Hearing, Bureau of Indian Affairs Reorganization*, *supra* note 12, at 131.

126. 43 Fed. Reg. 16,285, 16,287, 16,296 (1978).

127. *Id.* at 16,284, referring to the Secretary’s choice of “what portions of the Report will be accepted for implementation,” and *id.* at 16,285.

128. *Id.* at 16,284.

129. *Id.*

130. *Id.* at 16,299.

terests. Instead, the task force hoped Indians' "uncertainty, anxiety, and distrust" could be mitigated by assurances of better Bureau training, planning, and communication. This hardly could have pleased the Bureau's critics. Improving BIA efficiency without a significant transfer of power would serve only to increase the agency's ability to interfere in tribal affairs.

Agency Self-Serving. Many task force recommendations were self-serving, e.g., protecting or increasing Bureau positions and promotional opportunities, augmenting the power of Bureau managers, and strengthening line authority. Besides enhancing the status and income of federal employees, these proposals would have given the Bureau greater unity to resist political pressure from tribes. From a client's perspective, a weak service agency is a problem, but a weak and disorganized regulatory agency is a blessing.

Centralizing Power. The task force proposed increasing the new assistant secretary's deputies from one to three to "match the top level jobs to the variety of types of skills and experience the Assistant Secretary is likely to need."¹³¹ This would help "establish the Assistant Secretary as the focal point for leadership in . . . Indian programs" and make him more effective as the government's "chief policy and Congressional relations officer" for Indian affairs.¹³² The assistant secretary's personal staff would need to be increased from five to seven by the addition of a legal specialist and a specialist in "executive management development" to serve as recruiter and administrator of executive training.¹³³ Staff salaries would be increased as well.

Two new national advisory committees were proposed. The Secretary of the Interior, Assistant Secretary for Indian Affairs, and Interior Department Solicitor would serve as an "Indian Trust Council," to "be the policymaking body in all matters where Interior has responsibility over Indian Trust Rights," i.e., natural resources owned by Indians.¹³⁴ At a higher level, a "Federal Indian Trust Committee" of the Vice-President, Secretary of the Interior, and Attorney General would have "wide latitude to focus on issues and policy questions which concern the national interest."

131. *Id.* at 16,293, Recommendation #1.

132. *Id.* at 16,293, 16,295.

133. *Id.* at 16,295, Recommendation #2.

134. *Id.* at 16,299, Recommendation #23.

The task force apparently assumed that the national government as a whole is solicitous of Indian rights and is prevented from protecting Indians only by a bad Bureau. However, the task force itself recognized the Bureau's frequent role as tribes' only advocate in the Capitol; only the Bureau has a selfish interest in tribes' survival. Departmental and Cabinet-level trust committees would have entrusted Indian policy to officials more commonly the targets than the supporters of Bureau advocacy. In a conflict over national energy policy and tribal economic development, tribes might prefer a decision from the Bureau, which would resist wholesale confiscation of the lands and resources it manages, than from the Secretary of the Interior or the Vice-President, both of whom are subject more directly to non-Indian political influence.

Reorganization therefore would have stripped tribes of the one real benefit they reap from the Bureau—its selfish advocacy of tribal survival. At the same time, high-level oversight committees and greater central power would have created an appearance of tighter control and accountability, "in the national interest." Everyone in Washington would have been happy. Subject to cosmetic oversight, the Bureau would be left alone again; top BIA managers would gain power and income; and non-Indian interests would have a more direct voice in the formulation of Indian trust policy.¹³⁵

The task force proposed centralizing some of the line authority of the area directors, rather than decentralizing it to agencies and tribes as the AIPRC had recommended.¹³⁶

Historically, Area Directors have developed their own organizational structures and modes of operation largely in the absence of, sometimes in spite of, leadership from the Central Office. . . . Area Directors have assumed a great deal of autonomy and discretionary latitude in decision making.¹³⁷

From a tribal point of view, decentralization, as distinguished from mere local capriciousness, can be a boon. As the task force

135. If the task force approach had been adopted, the clumsy and consistently survival-oriented bureaucratic trust policy of the Bureau would have been replaced by the four-year cycles of presidential politics.

136. 43 Fed. Reg. 16,292, 16,296 (1978). Former Associate Solicitor Reid Chambers criticized the trust council as "too much of a target" for political pressure and a mere "showpiece." *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 7-8. It also would be "another layer of bureaucracy." *Id.* at 14.

137. 43 Fed. Reg. 16,296 (1978).

itself observed, “[t]he Areas are diverse, each with widely differing (if not unique) tribal and agency needs to serve.”¹³⁸ “It is clear, given the bewildering complexities and varieties of tribes, locations, natural resources, interests and service needs that have to be dealt with on Area levels, that Area Directors must be highly flexible, competent, and knowledgeable of local concerns.”¹³⁹

However, the task force felt most of the policy differences among areas was a problem reflecting breakdowns in line authority, and urged the assistant secretary to appoint area directors “willing to execute both the letter and spirit of his policies.”¹⁴⁰ They urged direct political appointment of area directors outside of the Civil Service, not to subject incompetents to risk of dismissal, but to guarantee directors’ loyalty to the assistant secretary.¹⁴¹ From the Bureau’s point of view, it seems, the real problem was that local and regional offices “tended to respond to the more immediate pressures from tribes,” rather than be “accountable” to the Central Office.¹⁴²

Increasing Career Opportunities. Besides supporting expansion of the assistant secretary’s office, the task force advocated enlarging several existing Bureau subdivisions and creating new ones to increase resource protection and development activities. The Rights Protection Office was to have more Central Office staff and a new satellite “legal staff” unit in each of the Bureau’s more than eighty agencies.¹⁴³ Each agency also would need “its own trust advocate.” The task force did not indicate whether these “advocates” would be lawyers authorized to advance tribal rights in litigation, engineers needed to protect tribal resources, public relations officers, or flak-catchers to buffer the Bureau from tribes’ complaints.

Along the same lines, the task force recommended creation of two new Central-level offices, an Office of Resources Development for resource inventory and planning “on a tribe-by-tribe

138. *Id.*

139. *Id.*

140. *Id.*, Recommendation #13.

141. *Id.*, 16,297, Recommendation #14. Some tribal representatives feared this would make area directorships “political plums” subject to the “whims of Washington.” *Hearing, Bureau of Indian Affairs Reorganization*, *supra* note 12, at 17, 105. The idea of political appointment originally was Assistant Secretary Gerard’s.

142. 43 Fed. Reg. 16,296 (1978).

143. *Id.*, 16,300 Recommendations ##24, 25. Reid Chambers expressed concern that this might “disperse” the Bureau’s legal talent. *Hearing, Bureau of Indian Affairs Reorganization*, *supra* note 12, at 9.

basis," and an Office of Business and Economic Development to provide Indian entrepreneurs "sophisticated assistance in finance, economics, and marketing."¹⁴⁴ The two new offices would "develop the necessary infrastructure . . . for qualified Indian entrepreneurs," "stimulate venture capital" and coordinate financing, and "lower the administrative barriers to Indian entrepreneurship" arising from federal laws and regulations.

The Bureau already was spending more than \$80 million annually for resource management and development when this proposal was made; another \$80 million was being spent by the Departments of Labor and Commerce.¹⁴⁵ It is incredible that a sum in excess of \$1 million per reservation each year was insufficient to provide technical assistance of the nature suggested. Were existing field staff incompetent? The task force would have added one more layer of central administration to an already ineffectual program.¹⁴⁶

You can't be the doctor if you're the disease. With one hand, the Bureau would continue to spend millions on field staff to supervise, and thereby tax reservation economic enterprise. With the other, new Bureau offices would be spending millions on field staff to "lower the administrative barriers to Indian entrepreneurship." Instead of reducing reservation white tape and the load of Bureau economic regulation directly, the task force solution was to hire new regulators to regulate the old regulators. This is becoming familiar in our government. The Department of Agriculture continues to subsidize tobacco farmers while the Surgeon General mounts advertising campaigns to persuade people to stop smoking. Bad programs aren't killed. They are overlaid with counter-programs, at ever-increasing cost.

To address the problem of employee incompetence, the task force urged more on-the-job training. "There is limited capability in the Bureau to prepare BIA employees in their assignments or to develop tribal expertise in program administration. A massive training effort is required."¹⁴⁷ Training would qualify BIA staff "to occupy higher level appointments, not only within BIA, but

144. 43 Fed. Reg. 16,300 (1978), Recommendations ##24-25.

145. LEVITAN & JOHNSON, *supra* note 4, at 20.

146. The task force also recommended consolidating all of the Bureau's training and technical assistance operations, 43 Fed. Reg. 16,295 (1978), Recommendation #5, but this also would have required a new Central layer of management to "oversee" the combined program. *Id.*

147. *Id.*

throughout the Federal government as a whole.”¹⁴⁸ This allusion to an “up-and-out” process hints that tribes would not necessarily benefit from better-trained Bureau staff. Perhaps BIA employment standards have been so low that increasing employees’ credentials simply would trigger outward migration. BIA personnel structure does appear to have traded off high levels of skill for large numbers of employees. Indeed, the task force assumed its “massive training effort” would necessitate borrowing expertise from other agencies. “Because management competence is lacking in many areas, outside experienced managers must be brought in to do and teach at the same time, either through varieties of on-the-job training, or by means of intensive minicourses of short duration.”¹⁴⁹ Why hadn’t the Bureau hired “experienced managers” in the first place? If Bureau positions have been unattractive, relatively low-paid, overclassified, and largely protected from competition, current employees’ only incentive to take new training opportunities seriously would be the possibility of outward mobility.

Protective Coloration. The task force was not a little concerned about BIA job security, promising to “make constructive changes . . . but not change only for the sake of change,” and assuring the assistant secretary that reorganization “need not result in major disruption and anxiety” among employees. “[I]f civil servants are replaced, alternative Civil Service jobs should be found for them, or they should be otherwise provided for via early retirement or by other means.”¹⁵⁰ More than a practical regard for the power of the Civil Service Commission and federal employees unions was involved here. Although a major factor in retarding reservation economic development, the Bureau is the nation’s largest employer of Indians. A cynic might say that Bureau jobs are one form of public assistance specially available to Indians. Indian organizations have opposed some past attempts to “RIF” the Bureau on the grounds of increased Indian unemployment.¹⁵¹ For that reason, Indian preference serves as protective coloration for the agency; it can turn red when it needs to.

148. *Id.*, 16297.

149. *Id.*

150. *Id.*, 16293, 16301. Guaranteed reassignment also was provided in Section 105 of the Indian Self-Determination Act. See 25 C.F.R. § 401.77.

151. *Hearing, Reduction in Force in the BIA*, *supra* note 80, at 2-4.

A philosophy of augmenting Indian income through federal employment is incompatible with reservation economic development. Fattening the Bureau payroll diverts public funds from reservation capital formation and conventional career education for private-sector employment. It increases the complexity of the Bureau and the federal white tape that ensnares reservation enterprises. Indian payroll growth is a self-feeding process, moreover. As more Indians' fortunes become dependent on BIA survival, political pressure for expansion of the agency at tribes' expense increases. In short, offering Indians preferential employment was the smartest thing the Bureau ever did.

Cosmetic Management

Many task force recommendations involved appearances, client pacification, and public relations, *e.g.*, giving Indians more "input" to decision making without any greater control, and issuing high-sounding but unenforceable policy directives. Cosmetic management works only when clients and critics are taken in by the disguise. This places a premium on maintaining the semblance of sincerity and trust with the clientele.

Saying Nice Things About Indians. Commenting on tribes' fear that self-determination contracting might be "merely another form of termination, in which services once performed by agencies of the government will be contracted out, and then funding will be cut off," the task force recommended placing contracting directly in the assistant secretary's office.¹⁵² This would "reflect the high level of commitment" of the Bureau to self-determination, but would not resolve the problems tribes feared. Similarly, the task force urged the Secretary of the Interior to "periodically state publicly his support [for] Indian self-determination" as a way of improving "credibility" with tribes, and suggested that contract funding "should reflect the funding needs at the reservation level to underscore that the Federal Government is serious about self-determination."¹⁵³ Trust responsibility, too, should be "clearly stated, understood, and supported by managers."

"Plans for all education-related activities should include statements or steps which recognize or reinforce Indian or Alaska Native cultural heritage as a basis for identity and strength."¹⁵⁴

152. 43 Fed. Reg. 16,285, 16,295, Recommendation #4 (1978).

153. *Id.*, 16,296 Recommendation #13; *id.*, 16,297, Recommendation #16.

154. *Id.*, 16,302, Recommendation #31.

The task force recognized that

the overwhelming bulk of [federal education] funds are administered outside tribal and community control, despite the fact that the statutory objective of federal Indian policy is to begin "an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of these programs."¹⁵⁵

Including boilerplate cultural heritage declarations in federally controlled education activities hardly would do much to change this situation, however. The only way to assure appropriate cultural content in Indian education is to have Indian control of schools. Indeed, the task force proposal could have *reduced* Indian control of education content. Requiring cultural "statements or steps" in tribes' applications for BIA funding of education would have given the Bureau one criterion for disapproval: inadequate cultural content.

Harmlessly Vague Goals. Several task force recommendations set laudable goals in language too vague for meaningful implementation or accountability. According to the task force, the Bureau should "*strengthen*" trust responsibility; funding "should be *related* to needs" or "*soundly based* on [local] needs," and should be "*effectively integrated*"; trust protection units should have "*strong, versatile staff*"; staff should have new job descriptions "*reflecting the unique aspects* of the particular area" and including "clear performance standards"; and management should take advantage of "positive incentives."¹⁵⁶ No one would argue with these statements in principle, but whether any particular management action conformed to them would depend entirely upon the point of view of the evaluator. Many different budget formulas could be "related" to a tribe's needs, even ones the tribe would oppose. "Versatility" cannot be measured.

Generalizations of this kind can be applied to almost any organization with equal validity and equal uselessness. They are nothing more than the textbook synonyms for contemporary good management practice. Making them work involves attention to the peculiarities of individual cases, and in this regard the task

155. *Id.*, 16,301.

156. *Id.*, 16,295-16,300, Recommendations ##5, 8, 11, 15, 16, and 23 [emphasis mine].

force offered no light. There are endless possibilities for devising "positive incentives," for example, but who will be rewarded for what, how, and by whom, must depend upon the character, functions, and goals of employees.

Increasing Indian Input. Federal agencies characteristically respond to clients' demands for control by offering them "input." Some day, perhaps, we will substitute "input" for the electoral franchise. The task force promised Indians "input" in the place of self-determination. "The assistant secretary should establish a regular, informal process through which he can make direct contacts to hear the views of a wide variety of field employees of the BIA, Indian tribal members, and Alaska Natives,"¹⁵⁷ they advised, but not for tribes' sake: "The major rationale for this recommendation is to correct the complete absence of upward communication within the Bureau. It is also intended to improve morale among BIA employees by providing rank and file field employees a means of access to top management."¹⁵⁸ All this means is that the assistant secretary should spend more time listening to staff and client gripes. Could that be satisfied by attending more pow-wows and testimonial dinners?

The task force also advised the Bureau to "[c]learly define the consultation process" as it relates to Indians, without suggesting any real transfer of power.

The consultation process is clearly meaningless if it is nothing more than random information haphazardly collected from groups prior to a decision made by the Federal government agency involved. On the other hand, consultation cannot be broadly interpreted to mean that Federal appointments or decisions by the Federal trustees can be vetoed by a tribe or group.¹⁵⁹

To make it clear to tribes what "input" means, the task force recommended circulating a statement to the effect that "consultation does not convey veto power," but is only a "process of communication with tribes and groups on policy . . . by providing them with an opportunity for review and response." No commitment would be made to reject even those actions vociferously and unanimously opposed by tribes. Indians still do not know what is good for them; the Bureau must remain independent of tribes'

157. *Id.*, 16,295, Recommendation #3.

158. *Id.*

159. *Id.*, 16,304.

wishes if it is to fulfill its "obligations" as their trustee. Self-determination notwithstanding, it still comes down to helping Indians whether they like it or not, rather than assisting tribal aims with capital and expertise.

The task force interpreted "clarification" of the consultation process to mean formalizing "who is the appropriate person or group to consult" and "when consultation is appropriate."¹⁶⁰ This actually would have *reduced* Indian participation in BIA decisions because deciding who *is* appropriate to listen to involves deciding who *is not*, and deciding what actions require prior review involves deciding what actions do not. The task force provided the Bureau with an excuse for officially excluding certain groups from decisions. They even recommended inviting only "national Indian organizations" to participate "on matters of national Indian priority," consulting regional associations and tribal governments only in actions affecting them specially.¹⁶¹ Neither the National Congress of American Indians nor the National Tribal Chairmen's Association can claim to speak for all tribes, much less all Indians.¹⁶² Institutionalizing these organizations as Indians' national representatives would limit debate, alienate and isolate tribes from the federal government, and entrench an elite of national Indian influence brokers.¹⁶³

This could not help but benefit the Bureau. Since the Depression-era administration of Commissioner John Collier, the Bureau has held regional tribal meetings before taking major action. Transcripts of Indians' comments at "Uncle Sam's Road Show" have been used to lobby Congress for more Bureau positions and budget, but road shows also have provided tribal officials opportunities to meet at federal expense and to organize coalitions for or against Bureau policy. The task force seemed to favor abandoning these mass tribal meetings for simpler, cheaper, and perhaps more polite roundtables with the officers of the national Indian associations, in the capital.

Indians should have "[m]aximum participation . . . in the decisionmaking process" in education, the task force argued, recommending that schools operated by the Bureau "as soon as possi-

160. *Id.*

161. *Id.*

162. Indeed, NTCA originally was organized and funded by the federal government, *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 8, and both organizations have depended in large part on federal grants and contracts, *Hearing, Nomination of the Assistant Secretary of the Interior, supra* note 12, at 33.

163. *I.e.*, the "Washington Redskins," *Hearing, BIA, supra* note 11, at 16.

ble” be turned over to community school boards.¹⁶⁴ Although these boards would have continued to depend upon the Bureau for annual funding, they would have been “accountable to students, parents, tribal and village governments, and school administrators for the quality of education.”¹⁶⁵ Powerless to prevent budget cuts but visibly responsible and legally liable for program failure, community school boards’ positions would be unenviable ones, conducive to a breakdown of Indian confidence in Indian government. This is what many tribes feared would result from self-determination contracting.

Ducking

Ducking actions delay change and deflect criticism. Bureaucratic ducking usually takes the form of commissioning further studies of problems. Closely related is generating mountains of new internal paperwork on the pretense of planning and implementing changes. Ducking also can take the form of truly trivial, but time-consuming and misleading organizational changes that either slow critics down or throw them off the track. The only disadvantage of ducking is that it often is costly for an agency to cast out a smokescreen of superficial changes and paper—more costly than adopting harmlessly vague goals, for instance.

The Paper Mill. Thirty years ago Commissioner Collier employed a staff of anthropologists to evaluate the cultural appropriateness of field programs, and the Bureau already was under congressional fire for its “survey habit.”¹⁶⁶ It still is a problem. The task force called for new paperwork at every level of the Bureau. The merits of new documentation depend, of course, on what will be discovered and what will be done about it.

The Bureau was advised to develop “clear organizational and programmatic objectives” and to engage in a “systematic review and periodic restatement of priorities.”¹⁶⁷ Each area office should “establish tribal needs.”¹⁶⁸ A national “statement of the philosophy of education for Indians and Alaska Natives should be formulated,” and “community and tribal [educational] needs

164. 43 Fed. Reg. 16,301 (1978).

165. *Id.*, 16,301-302, Recommendation #29.

166. S. REP. No. 310, 78th Cong., 1st Sess. (1943), at 19.

167. 43 Fed. Reg. 16,298 (1978), Recommendation #17.

168. *Id.*, 16,296, Recommendation #9.

assessments” should be conducted nationwide.¹⁶⁹ Each BIA service-delivery unit “should be carefully reviewed” for possible reorganization, and each office and function of the entire agency should be subject to an annual management audit.¹⁷⁰ At all levels, goals would be set and performance monitored by federal employees, not by the tribes.

Needs and objectives are highly subjective, and “[w]e have tons of them already.”¹⁷¹ A new series of national needs assessments could be used to justify existing programs, not to improve them. Even if the Bureau were committed to adopting tribes’ own priorities, they might be formalized in meaninglessly vague language. For example, one tribe’s “goals,” as drafted by a private consulting group working on a HUD comprehensive planning grant, are to

Maintain [the r]eservation as a cultural, economic, social, and political unit for the continuing *benefit* of the tribal members.

Utilize the *natural resources* of the reservation in the best interest of the tribal members, collectively and individually.

Create opportunities for productive, satisfying *employment* for every member of the . . . [t]ribe who desires to work on or adjacent to the reservation.

Making available *housing* and *education* opportunities, including job training, for both young people and adults.

Provide *community services* and a satisfactory living environment.

Understanding *history* as it relates to present problems.

*Land acquisition.*¹⁷²

Who would disagree? Only the seventh and last of these goals can be measured objectively, however. Outside observers could disagree whether tribal members had “satisfying” jobs or natural resources had been applied to tribal members’ “best interest.” Any kind of housing would satisfy the fourth goal, but that could not have been the tribe’s intention.

Federal agencies spent millions of dollars in the 1970s to draft just such goals for tribes. More than seven hundred planning

169. *Id.*, 16,301, Recommendation #27; *id.*, 16,303, Recommendation #33.

170. *Id.*, 16,300, Recommendation #18; *id.*, 16,298, Recommendation #18.

171. All-Indian Pueblo Council Delfin Lovato, *Hearing, Bureau of Indian Affairs Reorganization*, *supra* note 12, at 89.

172. Port Madison Comprehensive Plan, Part 2, 2-3.

grants were made by the Economic Development Administration alone, at a total cost of \$25 million.¹⁷³ Unless considerably more rigorous than the hundreds of tribal plans already in print, a new round of plans would be a staggering and needless expense. The real problem has been getting things done, not writing wish lists. The only way to guarantee programs' compatibility with tribes' real needs and goals, furthermore, is to let tribes run their own programs.

The paperwork involved in annually auditing each BIA organizational unit also would prove formidable and would be used to justify additional staff and operating budget.¹⁷⁴ Assuming audits produced specific, significant recommendations,¹⁷⁵ they probably would not be implemented. General Accounting Office audits of Bureau programs have been ignored.¹⁷⁶ In 1973, the Senate Indian Affairs Subcommittee commissioned Touche Ross & Co. to audit the Bureau's Pine Ridge Agency, and their report, detailed and specific, was never implemented despite congressional pressure.¹⁷⁷ It is doubtful the Bureau ever will impose major management changes on itself without a clear statutory mandate and strict budget discipline from Congress.

173. Computed from data in Economic Development Administration, "Indian Projects Funded By EDA" (December 1977).

174. The task force recommended an increase from 12 to 20 "highly graded people" in the Bureau's Management Research and Evaluation Unit (MR & E). 43 Fed. Reg. 16,295-96 (1978). (Actually, MR & E already had 19 positions, *Hearing, Bureau of Indian Affairs Reorganization*, *supra* note 12, at 219.) MR & E staff previously had been assigned such indispensable duties as "reduc[ing] paperwork" and "develop[ing] a program to train BIA employees in the use of the metric system." *Id.*

175. This anticipates "evaluat[ing] the actual costs of accomplishment of objectives." 43 Fed. Reg. 16,299 (1978). If implemented rigorously, this would lead the way to radical reform of BIA administration by providing a standard of comparison of programs. However, the utility of costing programs depends entirely on whether we can measure program benefits reliably. No matter how precisely program costs are calculated, the subjective estimation of social benefits can be inflated or deflated sufficiently to arrive at any conclusion. If the Bureau were to devise the estimation method, it could control the results, and justify any action.

176. *E.g.*, GAO, "More Effective Controls Over Bureau of Indian Affairs Administrative Costs Are Needed (Feb. 15, 1978); GAO, "Controls Are Needed Over Indian Self-Determination Contracts, Grants, And Training And Technical Assistance Activities To Insure Required Services Are Provided To Indians" (Feb. 15, 1978); MANAGEMENT OF INDIAN RESOURCES, SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 94th Cong., 2d Sess. (Comm. Print 1976) [report prepared by GAO].

177. *Hearings, Occupation of Wounded Knee, Subcomm. on Indian Affairs, Senate Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess. (1973), at 365-506. In 1977, the tribe petitioned the General Accounting Office to investigate BIA noncompliance. Oglala Sioux Tribal Council Resolution No. 77-113.

Musical Chairs. Ducking may involve changing the names of offices without altering their functions and relocating functional units. The task force proposed changing the name of the Office of Indian Services to Office of Community Services “to underline the comprehensive planning approach.”¹⁷⁸ Relocation of field offices was suggested,¹⁷⁹ as well as transfers of functions and the establishment of new organizational units at the Central level.¹⁸⁰ Superficial organizational changes would have forced tribes’ advocates to deal with new faces and new lines of authority, and that would have slowed them down for a while. A whole strategy of bureaucratic self-defense could be designed with the idea of shuffling desks and titles faster than Indians can figure out who really is in charge of what. Seeing how frequently the courts and Congress vacillate on Indian policy, it is tempting to suppose that such a strategy already is engaged.

Magnanimous Concessions. Regulatory agencies often can score points with their clientele by agreeing to do what they were supposed to do in the first place but didn’t. These magnanimous concessions demonstrate power, not responsiveness, because agencies can choose not to make them in defiance of their legal duties. For example, the task force urged the Bureau to comply more fully with Civil Service regulations.¹⁸¹ Taking this advice would be an improvement, but nothing more than what the Bureau has been responsible to do by law for years.

Magnanimous concessions also include promises the agency cannot keep. The task force recommended “some form of commitment” by the Bureau “to a relatively stable level of funding” for Indian schools,¹⁸² but the Indian education budget is fixed by Congress. In the final analysis, stable tribal education funding will depend upon development of tribal revenue from taxes and enterprise. The Bureau cannot, on its own, increase federal subsidies for Indian services. The Bureau can give tribes far greater control of their own economic resources, however, since the use of “trust responsibility” to override tribal decisions largely is a

178. 43 Fed. Reg. 16,301 (1978), Recommendation #26; *id.*, 16,299.

179. *Id.*, Recommendation #30; *id.*, 16,302. The Bureau went through another episode of musical chairs a few years earlier. *Hearings, Realignment of the Bureau of Indian Affairs Central Office, Subcomm. on Indian Affairs, Senate Comm. on Interior & Insular Affairs*, 93d Cong., 2d Sess. (1973).

180. 43 Fed. Reg. 16,295, 16,299-16,301, Recommendations ##1-5.

181. *Id.*, 16,298, Recommendation #21.

182. *Id.*, 16,303, Recommendation #34.

matter of administrative discretion. This the task force did not propose to do.

Evaluation

On the whole, implementation of task force recommendations would have increased staff and administrative costs, consolidated central control of Indian affairs, limited Indian input, and decreased Bureau responsiveness to tribal advocacy. No significant growth in employee expertise or effectiveness could have resulted, and no deregulation of tribal governments and reservation economies would have been achieved. Some individual task force proposals had merit, chiefly in the field of education, e.g., getting BIA schools accredited, reducing the proportion of federal education funds in discretionary area and Central Office accounts, and financing Indian higher education students directly rather than through contracts with a few selected institutions. Also meritorious were suggestions for a computerized file of Indians possessing "critically needed skills," for "be[ing] sure that success stories and useful experiments are relayed to other communities as options for solving their problems," and updating the BIAM.¹⁸³ The task force urged formalizing the custom of permitting Interior and Justice Department attorneys to file separate briefs ("split briefs") in litigation involving tribal rights.¹⁸⁴ None of these ideas got to the heart of the matter, however, because none would have limited BIA to a service role in Indian affairs.

III. *Circumspection Prevails*

Retreat From Change

Historically, we have . . . witnessed countless "Reorganizations." Each task force study that has preceded every reorganization has rediscovered the same management problems, organization deficiencies, and the same unmet needs. [W]hile BIA reorganizations have come and gone, the problems confronting the Indian people have multiplied in complexity and numbers. . . . We cannot afford another reorganization which will result in nothing more than more of-

183. *Id.*, 16,298, Recommendation #22; *id.*, 16,301-303.

184. This originally had been proposed by Attorney General Mitchell, and had been used successfully by the Interior Department on at least six occasions until discontinued. *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 9.

files, new titles, and a new list of priorities for the same old problems and needs.¹⁸⁵

Let's try to put an end to this dance here.¹⁸⁶

Noting that the task force simply had repeated "general principles," Senator Abourezk complained at the April 1978 oversight hearings, "We have to quit studying this matter and do it."¹⁸⁷ It was "reprehensible" that the task force absolved the Bureau from its express commitment to change area offices' functions,¹⁸⁸ especially in light of continuing abuses by area directors under Forrest Gerard's assistant secretaryship.¹⁸⁹ In particular, several Pueblo governors had been given the message that demanding a voice in selection of a new Albuquerque area director was "biting the hand that feeds you." "This talk about division and to quiet down or you will hurt all the other Indians is one of the basic ploys used in any colonial power," Abourezk charged, calling for Gerard's resignation.¹⁹⁰

Guilt is a powerful tool of bureaucratic self-defense. An effective way to discredit uncooperative public advocates is to blame them for the retaliation taken by the government. Explaining to the Select Committee why his department had delayed reorganization and protected area directors, Undersecretary Joseph explained that Interior "remain[ed] committed to major changes, but it is still our intention to insure that they do not cause major interruptions in the flow of services to Indian people."¹⁹¹ In other words, if Congress pressed too hard for BIA reform, it would bear responsibility for hurting Indians. Service interruption can be used as an argument against *any* administrative change, of course, no matter how mild or how necessary.

185. Delfin Lovato, *id.* at 12.

186. Senator Abourezk, *id.* at 133.

187. *Id.* at 1, 110.

188. *Id.* at 6, 111, 116, 130, 140. "For sheer temerity," Senator Abourezk told the Interior Department witnesses, "I think you should get some kind of an award." *Id.* at 127. Task force members admitted their area structure recommendations had been based only on their own beliefs and discussions with BIA personnel. *Id.* at 146.

189. *Id.* at 15-17, 20-23, 88, 134-45, 138-39.

190. *Id.* at 24. "I was so shocked that I wrote a letter to Secretary Andrus asking for Mr. Gerard's resignation, not only for that reason, but for the reorganization delays and obfuscations that he has undertaken. In other words, there is a direct violation of his commitments and promises. . . . [This] is what gives politics a bad name." *Id.* at 23.

191. *Id.* at 112, 123.

Interior was not opposed to purely managerial reforms, "to insure wiser spending."¹⁹² The area office problem was one of "personnel" only, the Department argued, of "management" rather than "organization."¹⁹³ Simply increasing the number of top-level policy directives would improve staff performance,¹⁹⁴ and area office problems, if any really existed, could be reviewed on a case-by-case basis.¹⁹⁵ No commitments would be made on specific task force recommendations, moreover, until they had been circulated within the Bureau for review.¹⁹⁶ To avoid "rushing" this process, Undersecretary Joseph suggested giving it another three to four years.¹⁹⁷

Interior and Bureau spokesmen argued that abolishing area offices would *increase* overall staffing and costs,¹⁹⁸ but had not hesitated to ask Congress for new funding to hire management specialists and enlarge the assistant secretary's staff.¹⁹⁹ Task force member Ted Marston told the Select Committee that the Bureau should be *strengthened before* attempting any structural changes, *i.e.*, fattening as a prelude to dieting.²⁰⁰ As for self-determination, tribes must learn that "consultation does not mean that the agency relinquishes its appointment authority" or other management prerogatives.²⁰¹ "Why bother even to consult with them," wondered Committee Chairman Abourezk, "if you're not going to listen to them?"²⁰²

A General Accounting Office study of BIA administrative costs released in February 1978 underscored the need for prompt

192. *Id.* at 122.

193. *Id.* at 129, 134.

194. *Id.* at 136; *see also id.* at 147-48, 150, from task force member Tom Sawyer.

195. *Id.* at 117, 131, 137.

196. *Id.* at 118-19, 141.

197. *Id.* at 129, 142.

198. *Id.* at 132-33. It is difficult to understand how eliminating an intermediate layer of *management* could increase overall personnel needs. Reproducing regionally located *direct services* at a large number of local units could necessitate staff increases because of lost efficiency. No one argued that areas were in the business of providing direct services, however.

199. *Id.* at 116, 131. Senator Abourezk failed later that year to impose better cost accounting on federal Indian programs legislatively. *Hearings, Indian Program Evaluation and Needs Assessment, Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. (1978)*. An earlier attempt is recorded in *Hearing, National Indian Goals and Progress Act, Subcomm. on Indian Affairs, Senate Comm. on Interior & Insular Affairs, 93d Cong., 1st Sess. (1973)*.

200. *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 146.

201. *Id.* at 139.

202. *Id.*

reform. Congressional auditors discovered that BIA program accounts concealed costs that properly were administrative. The Bureau's "3599" administrative account actually was being used only to clear expenses before charging them to programs, and therefore substantially underestimated total overhead.²⁰³ When Congress ordered the Bureau to reduce its overhead for fiscal years 1977 and 1978, the agency simply had charged off a greater portion of the 3599 account to programs, making it appear that administrative costs had fallen.²⁰⁴

BIA budgetary legerdemain extended also to personnel requirements. When, in 1976, Congress directed the Bureau to reduce *positions*, it reduced only the *ceilings* on positions allocated to its functions.²⁰⁵ Since some positions had been vacant, reducing ceilings did not result in any layoffs or cost reductions. Indeed, the Bureau had set its position ceilings well above its manpower needs, creating in each organizational unit a slush fund of vacant and superfluous positions for sacrifice in lean budget years.²⁰⁶ Sometimes Bureau units had hired employees simply out of fear that too many vacant positions would lead to ceiling reductions; when, in the lean years, BIA units ran out of vacancies, they customarily separated employees on the last day of the year when ceiling compliance was monitored and rehired them the next day.²⁰⁷

The Bureau also was guilty of converting "permanent" positions into "nonpermanent" positions so that it would appear to be reducing staff requirements without any real net loss of manpower.²⁰⁸ This had fooled Congress, the Comptroller General argued, and abused job classification regulations.²⁰⁹ Position conversions actually increased costs, moreover, because on the average nonpermanent positions are more highly paid.

Record-keeping errors, inconsistencies in accounting, and failures to break down expenditures for multiple programs made it impossible to measure precisely the Bureau's true overhead.²¹⁰ However, the Bureau's public estimate of between 2 and 6 per-

203. GAO, "More Effective Controls Over Bureau of Indian Affairs Administrative Costs Are Needed" (Feb. 15, 1978), at 2, 15-17.

204. *Id.* at 8-10.

205. *Id.* at 11-12.

206. *Id.* at 12.

207. *Id.* at 12, 20-22.

208. *Id.* at 22-24.

209. *Id.* at 24.

210. *Id.* at 18-19, 28-33.

cent clearly was in error, actual overhead being at least 14 to 21 percent.²¹¹ The principal reason for high overhead was extreme "layering and overlapping of duties," the Comptroller General concluded, to the extent that some units employed one supervisor for every four employees.²¹²

Another Reorganization Counterproposal

Assistant Secretary Gerard responded to GAO and Select Committee criticism by organizing a number of in-house staff committees in May 1978 to review the task force recommendations and identify implementation options.²¹³ The resulting "decision documents" would be distributed to area directors and agency superintendents for comment before submission to Gerard and Interior Secretary Andrus. Written by outsiders, the original AIPRC recommendations had been too radical. Written by insiders and outsiders, the task force recommendations had compromised considerably, but still were too radical. Now it was the turn of Bureau insiders.

The decision documents did not take issue with task force critiques of agency management. Admittedly needed were firm leadership, performance evaluation and accountability, consolidation of similar activities, more skilled managers, less employee turnover, and improved morale.²¹⁴ "Indian performance, coupled with uncertain leadership and an absence of a coordinated effort to improve management skills, ha[d] contributed greatly to low morale and a low level of effectiveness."²¹⁵ A major overhaul of Bureau organization was not warranted, however, because "[t]he present system appears to be working" and change might make things worse.²¹⁶ Implementation of task force suggestions would be limited to personnel matters and would minimize structural reform.

Agency Self-Serving Revisited. Task force recommendations for centralizing power were revised to avoid the risk of losing power to the Interior Department. Shifting operational control of the Bureau up from the Commissioner's Office to an enlarged assistant secretary's office would "requir[e] extreme organiza-

211. *Id.* at 18.

212. *Id.* at 13.

213. *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 174-77.

214. *Id.* at 230.

215. *Id.* at 270; also *id.* at 230.

216. *Id.* at 232; also *id.* at 366-67.

tional realignment resulting in employee anxiety and work interruption."²¹⁷ Instead, the assistant secretary should remain purely a policymaker and advocate, leaving day-to-day operational control where it always had been, with the Commissioner.²¹⁸ To keep the assistant secretary's costly, expanded staff from "undermin[ing]" Bureau operations, moreover, they would serve only as *ad hoc* policy advisors and have no direct involvement with field or program units.

There should be no national Indian Trust Council, the decision documents warned, for that might "compromise" trust responsibility.²¹⁹ The Bureau must have been less concerned for tribes than for its own independence from external control, however, admitting its own difficulty being "a single-minded advocate" of tribal rights "when that . . . runs counter to what appears to be in the interest of the general public."²²⁰

Assistant Secretary Gerard already had taken fire in Congress for the task force's retreat from breaking the power of area directors, and the decision documents retreated even farther. Although tribes considered area offices an "obstacle," dismantling them and duplicating their functions at the agency level, as the AIPRC had proposed, supposedly would increase total BIA staffing.²²¹ Some "streamlin[ing]" of area structure might be possible, and each area might operate under an individualized plan suited to regional needs.²²² Area plans would be negotiated with area directors by the Central Office, not by the tribes served, however, and area directors would be delegated *more* power instead of losing power.

Having saved their power, the decision documents deemed it unwise to make area directors political appointees. Job insecurity would drive off experienced career employees and frequent turnover could disrupt services.²²³ Tribes would suspect politically appointed area directors' loyalty to them, the documents' writers warned, as if civil-servant area directors' loyalty to tribes was to be assumed. The problem of incompetent or rogue area directors could be dealt with by formalizing the process of musical chairs that tribes had been criticizing. Routine rotation of area directors

217. *Id.* at 179.

218. *Id.* at 188-93.

219. *Id.* at 347.

220. *Id.*

221. *Id.* at 234-35, 243, 245, 248-49.

222. *Id.* at 235, 249-53, 258.

223. *Id.* at 283.

would provide them with "versatility and increased skills," although at considerable expense.²²⁴ The fallacy of this plan is plain, however. Areas fortunate enough to get good directors soon lose them, and bad directors never get removed from the system.

The decision documents had no argument with Bureau-wide staff training or with creating new central-level economic development offices, conceding the Bureau's lack of technical experience and the failure of development efforts in the past.²²⁵ This would not mean greater tribal control of resources, however. According to the documents' draftsmen, *economic development and trust responsibility may conflict*,²²⁶ hinting that the Bureau would continue to tell tribes that the economic growth they want is bad for them and would veto development on the pretense of exercising trusteeship.

Trust responsibility is not strong enough, though, for the Bureau to become more actively involved in tribes' legal efforts to protect their resources. Some forms of "low visibility" technical assistance to tribes might be increased, but greater Bureau participation in trust resources litigation would "provid[e] a focal point for backlash" by non-Indian groups.²²⁷ In other words, when protecting Indians angers non-Indians to the point of threatening Bureau survival, let the Indians fend for themselves.

In only one area did the decision documents' draftsmen *oppose* centralizing power and increasing staffing: self-determination contracting. Instead of consolidating this activity in a central-level unit as both the AIPRC and task force had urged, the decision documents advised dispersing it throughout the Bureau.²²⁸ This would raise administrative overhead, but make it clear that self-determination is "a process not a program." Dispersing contracting duties also probably would increase the difficulty and white tape of tribes' winning self-determination contracts, however.

Less Input. Even seemingly innocuous task force recommendations were weakened by the documents' draftsmen. Fearing political resistance to the suggestion that the Secretary of the In-

224. *Id.* at 285, 288.

225. *Id.* at 272-75, 351-54, 357-60, 363.

226. *Id.* at 361, 362.

227. *Id.* at 337-42, 350. At that time the Indian Affairs Division of the Interior Department had 17 attorneys. *Id.* at 343-44.

228. *Id.* at 206-11.

terior make public statements in support of self-determination, they proposed simply giving more encouragement to the Bureau's own, existing Public Information Office.²²⁹ On time and cost grounds, the decision documents also rejected making the assistant secretary more available to Indians through more road shows, regular attendance at regional and national tribal meetings, or institution of an annual tour of the reservations.²³⁰ It would be sufficient for the assistant secretary to hold open office hours once weekly in Washington, although this might invite confrontations and "mob psychology" with angry Indians!²³¹

"Consultation" was another victim. Although BIA consultation with tribes admittedly had "regressed to a compilation of facts and opinions collected on a haphazard basis used at random at the discretion of Bureau officials," the decision documents recommended permitting each BIA unit to define for itself how and when tribes should be consulted.²³² Tribes would have no minimum right to be heard, nor "veto power."²³³ No commitment should be made to heed individual tribes' education goals, either, because they might be "inconsistent" with Bureau policy.²³⁴ The Bureau should not cede control of any part of Indian education to regional or national Indian education committees appointed by tribes because to do so would "contradict" self-determination.²³⁵ The Bureau was protecting itself from both sides. Listening to individual tribes would be an abdication of trusteeship; listening to multi-tribal committees would violate individual tribes' right to self-determination.

The Paper Mill Grows. Conceding the paucity of meaningful program standards and objectives, the decision documents placed the blame on Congress and the "delicate balance" between self-determination and trust responsibility, not on mismanagement.²³⁶ The Bureau's critics "in fairness" should understand that accountability deteriorated "at a time when major changes occurred in Indian policy, and much uncertainty has existed as to the proper role of [the] Bureau."²³⁷ Most employees simply had "not received necessary guidance in helping them adjust" to self-

229. *Id.* at 280-81.

230. *Id.* at 195-200.

231. *Id.*

232. *Id.* at 407-409, 412.

233. *Id.* at 411.

234. *Id.* at 371-74.

235. *Id.* at 380-83.

236. *Id.* at 307.

237. *Id.* at 313.

determination. Considering that the self-determination policy already was eight years old, however, this excuse does not reflect favorably on BIA management.

To better relate funding to tribes' real needs, the documents' writers recommended doing more band analysis and more needs assessments.²³⁸ Both devices had failed in the past, but under new leadership the Bureau predicted they would forge a "cohesive working relationship" with tribes, provide "better justifications for added funding," and "be received more favorable [*sic*] by the public."²³⁹ In principle, tribes would bear primary responsibility in the future for this process, but the Bureau might not always be able to follow tribes' wishes.²⁴⁰ In short, nothing would change.

Formalizing "management by objectives" would prove too costly and would elevate "process over program," the documents' draftsmen concluded.²⁴¹ It would be preferable simply to establish policy through the existing "directives system," codified in the BIAM, "where we find our sense of purpose and our reason for being."²⁴² Updating and maintaining the directive system would require a new office and more staff positions, of course, and an annual budget of \$300,000.²⁴³

More important than the way organization objectives are disseminated is the way they are enforced. The decision documents adamantly opposed any form of independent, external evaluation of Bureau performance. Although an outsider's work "could not be said to be either a whitewash or self-serving . . . the contractor's lack of knowledge of Bureau programs and of the BIA mission might result in either a superficial evaluation or an evaluation which does not take into account the real needs of the tribes."²⁴⁴ Interior Department evaluators were rejected for the same reasons.²⁴⁵ Only a "Bureau team would not have a hidden agenda,"²⁴⁶ *i.e.*, could be trusted to keep the agency's survival foremost. Evaluation therefore should be the job of a new office within the Bureau.²⁴⁷

238. *Id.* at 289-90, 292, 300-301.

239. *Id.* at 256, 258.

240. *Id.*

241. *Id.* at 308-309, 312.

242. *Id.* at 311-12.

243. *Id.* at 328, 331.

244. *Id.* at 226-27; also *id.* at 316-17.

245. *Id.* at 315-16.

246. *Id.* at 318.

247. *Id.* at 220-27, 318. It might be asked how a new office with new employees would be any more knowledgeable of BIA than an outside contractor—unless the Bureau

Deeper Motives. The underlying tenor of the decision documents was survival. Indicative were some of the reasons given by the documents' writers for opposing task force recommendations: "morale problems," "employee anxiety," "undermining program directors," overlook[ing] BIA input," admitting past errors, and being forced to separate employees.²⁴⁸ Even a sense of spite emerges in the draftsmen's warning to tribes that they will lose their "whipping boy," the Bureau, should reorganization actually succeed in "provid[ing] better service delivery," as if that were a reason not to make changes.²⁴⁹

The decision documents reflected BIA fear of preemption by general federal human services agencies and intimated that too much tribal criticism of the Bureau might prove self-defeating. Suggested transfers of Indian education programs to DHEW or to a new Department of Education would erode trust responsibility and Indian preference and reduce service quality, the documents warned tribes, urging instead that all Indian programs be consolidated under Bureau control.²⁵⁰ "It is the trend to establish numerous programs for Indians in various federal agencies under the assumption of 'improvement in services,'" the documents' draftsmen observed. "Are we doing things now to perpetuate the trend that in the final analysis will result in the Indians losing their own agency?"²⁵¹

On the other hand, the Indians' "own agency" as yet was unprepared to share its power with tribes. Direct formula funding of tribal government programs without continuing BIA supervision was dismissed as "political," "unrealistic," "inequitable," and "too expensive."²⁵² If directly funded, tribes would suffer the "loss of Bureau expertise," the decision documents argued, forgetting the Bureau's repeated admissions of technical incompetence.²⁵³ The documents' writers even suggested that direct funding "discourages planning," hinting that tribes would use direct funding irresponsibly.²⁵⁴ Direct funding might be considered in education, but only if tied to BIA needs assessments.²⁵⁵

assumed it would be transferring into the new evaluation branch long-term employees. Long-term employees had made the system bad in the first place, however.

248. *Id.* at 178, 188, 189, 191, 210, 215, 232.

249. *Id.* at 235.

250. *Id.* at 402-406.

251. *Id.* at 362.

252. *Id.* at 302, 299.

253. *Id.* at 302-303, 305.

254. *Id.*

255. *Id.* at 400-401.

Congress Concedes Defeat

In August 1978 the Senate Select Committee again held oversight hearings on the status of reorganization. Assistant Secretary Gerard reaffirmed his position that "any organizational changes should be fundamental—not cosmetic,"²⁵⁶ using guilt to justify continuing delay. "[I]t is easy to move boxes and titles on an organization chart, but the victims of such actions would be the Indian people themselves."²⁵⁷ Delays in some instances were due to "elements within the Bureau who are resistant to change," but Gerard warned the Select Committee not to interfere with his "management prerogative" to reorganize in his own way and at his own pace.²⁵⁸

Action had been taken on about half of the task force recommendations,²⁵⁹ but was of debatable significance. Most task force proposals were in planning or restudy, *e.g.*, the assistant secretary had "issued a mandate requiring a plan" for updating the BIAM.²⁶⁰ Band analysis had been modified but had not been replaced with zero-base budgeting as the Interior Department had promised.²⁶¹ Only one task force recommendation had been implemented fully, according to Bureau witnesses: the assistant secretary would "periodically state publicly his support [for] Indian self-determination."²⁶² No cost reductions were anticipated. Instead, the Bureau had submitted requests for additional funds to plan the establishment of new organizational units.²⁶³

For Committee Chairman Abourezk, these "cosmetic changes" meant "business as usual" and "indefinite" delay of fundamental reforms.²⁶⁴ His retirement from the Senate a few months later relieved the Bureau of its most aggressive critic and guaranteed failure of the reorganization movement. In September 1978 the Bureau reduced its "decision documents" to a "Management Improvement Plan" (MIP).²⁶⁵ The division of Bureau leadership in-

256. *Id.* at 6, 131, 140.

257. *Id.*

258. *Id.* at 2, 16.

259. *Id.* at 3, 7-8, 18, 28-29. Some action or decision reportedly had been made on Recommendations #2-5, 11, 13, 15-17, 19, 21, 22, and 27.

260. *Id.* at 4, 9-11, 26-27. Updated, BIAM would become the "bible" for field staff, BIA witnesses predicted. *Id.*

261. *Id.* at 23-25.

262. *Id.* at 22. "That's nice," Select Committee Chairman Abourezk retorted. *Id.*

263. *Id.* at 13, 22.

264. *Id.* at 31-32.

265. *Hearing, Budget of the Bureau of Indian Affairs for Fiscal Year 1980, Senate Select Comm. on Indian Affairs, 96th Cong., 1st Sess. (1979), at 5.*

to a policy chief (assistant secretary) and operations chief (Commissioner) was finalized,²⁶⁶ but other MIP action consisted chiefly of initiating new studies, including contracts with Price Waterhouse & Co. to propose a new accounting system (“Project Integrity”) and with the Sterling Institute to write a “concept paper” on consolidating BIA technical assistance and training units.²⁶⁷ New internal committees had been assigned to review the old internal committees’ suggestions for a national administrative services center, data processing, and personnel management.²⁶⁸

By the time the Bureau announced its fiscal year 1980 budget, new excuses had been found for delays and inaction. Although the Bureau “realized . . . [w]e must make major changes in our systems, structures, and management,”²⁶⁹ too much had been expected of it. “As a result of the history of conflicting [congressional] policies . . . the BIA has been used and viewed as the focal point for criticism of the Federal-Indian relationship, while the agency itself has been in a serious state of upheaval and neglect.”²⁷⁰ This is *coopting the clientele*, i.e., asking Congress and critics to feel sorry for what they did to the agency, diverting attention from what was done by the agency to Indians. It is a plea for a second (or third, or fourth) chance.

“Within the spirit of Tribal self-development and enlightened public administration,” Assistant Secretary Gerard assured the Select Committee in March 1979, “the MIP approach may well demonstrate the Bureau’s ability to correct its own mistakes and set its course anew to meet the challenge and the opportunity of Indian people in the 21st century.”²⁷¹ Overstating the significance of MIP is not this flag-waving statement’s only flaw. It assumes that the Bureau will be around twenty-five years from now when, according to the principle of self-determination, its usefulness long since would have ended. “[N]o matter how much reshuffling or reorganizing that you do,” Tesuque Pueblo Governor James Hena observed, “you never seem to get at the problem, and that is to get rid of some of the excess staff people.”²⁷²

266. *Id.*

267. *Id.* at 5-6, 8-11.

268. *Id.* at 5-9.

269. *Id.* at 2.

270. *Id.* at 3.

271. *Id.* at 11.

272. *Hearing, Bureau of Indian Affairs Reorganization, supra* note 12, at 89.

IV. Conclusion: The Survival Syndrome

The concrete final results of MIP vindicate the Bureau's survival optimism. Third-round management improvement studies have resulted in budget increases; the Bureau's "concept paper" on consolidating training and technical assistance alone cost the taxpayers an additional one-half million dollars.²⁷³ Wherever the Bureau has been unable to win new Central Office management positions from Congress, it has used reorganization to justify converting direct services field positions into administrative ones.²⁷⁴ This centralization of manpower has resulted in a decrease in service delivery capability and an increase in the cost of personnel.²⁷⁵ Although the "Indian Intake" internship program proposed by the AIPRC has begun—at an annual cost of \$800,000—about half of the newly created entry level positions are administrative.²⁷⁶ Under questioning by the Select Committee last year, Deputy Commissioner Seneca admitted that the Bureau's ability to meet tribes' technical needs had not improved; tribes were being referred to other federal agencies.²⁷⁷

Reorganization has accomplished little for Indians. If the few management changes implemented by the Bureau have resulted in greater staff efficiency, there is no evidence that net service output has increased and the Bureau's budget has not decreased.²⁷⁸ Cutbacks in permanent positions continue to be offset by increases in higher-paid nonpermanent positions and administrative overhead remains high. This means reorganization has accomplished a great deal for the Bureau. The Bureau has survived pressure from both Congress and the Carter Administration in spite of admittedly poor performance. Once more the Bureau has been rewarded for planning its own funeral. Surely it has learned by now that the formula for survival and growth is to confess its ills—and to be its own doctor.

273. *Hearing, Budget of the Bureau of Indian Affairs for Fiscal Year 1980*, *supra* note 265, at 10-11.

274. *Id.* at 28.

275. *Id.* at 18-21.

276. *Id.* at 22-23.

277. *Id.* at 20-21.

278. Phased consolidation of Indian education functions in the new Department of Education under the provisions of the Department of Education Organization Act, Pub. L. 96-88, 93 Stat. 668, 20 U.S.C. §§ 3401 *et seq.*, may result in some decrease in the education component of the Bureau's Fiscal Year 1980 and subsequent budgets. It should be kept in mind that this decrease does not reflect increased BIA efficiency, but a transfer of programs triggered, indeed, by Congress' concern over BIA inefficiency.