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1994

## Reconsidering the Tribal-State Compact Process

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### Recommended Citation

Wilkins, David E. "Reconsidering the Tribal-State Compact Process." *Policy Studies Journal* 22, no. 3 (September 1994), 474-488. <https://doi.org/10.1111/j.1541-0072.1994.tb01482.x>

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# Reconsidering the tribal-state compact process

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**Date:** Sept. 22, 1994

**From:** Policy Studies Journal(Vol. 22, Issue 3.)

**Publisher:** Policy Studies Organization

**Document Type:** Article

**Length:** 8,545 words

**Content Level:** (Level 5)

## Abstract:

The tribal-state compact process is an inexpensive, formal, nonadversarial alternative to the litigative approaches being used to resolve disputes between state governments and Native American Tribes. This process needs to be considered by policymakers because, unlike confrontational methods, it engenders mutual respect between the parties involved and yields results which can be adjusted to different situations. The benefits of this approach can be seen in the many positive outcomes of a similar program pursued by Arizona in its relations with the Navajo nation.

## Full Text:

### Introduction

In *United States vs. Kagama* (118 U.S. 375 [1886]) the United States Supreme Court handed down one of its most powerful opinions on the nature of tribal relations. This case dramatically transformed the tribal-federal relationship by sharply diminishing tribal sovereignty on the grounds that tribes and their citizens were "wards" under federal "guardians." This was a devastating case because it established as precedent the doctrines of Indian "wardship," and so-called "tribal dependency." Furthermore, it established the bizarre rule that federal property ownership bestowed unlimited political authority over tribal nations. Each of these doctrines was a severe diminution of tribal sovereignty without historical or constitutional basis.

Nevertheless, one succinct passage in the decision speaks closely to the topic of this essay: "They [tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies" (p. 384). This description of tribal-state affairs is nearly as apropos in the 1990s as it was 110 years ago.

Beginning in the 1960s and continuing into the 1970s, congressional policies (e.g., Indian self-determination) generally favored Indian governmental and economic independence by promoting a measure of tribal sovereignty. This encouragement reinforced Indians' initiative to win political and legal confirmation of tribal claims to property and resources. In this pursuit, tribes often ran headlong into confrontations with states and local governments. States found themselves in a serious dilemma. They were under severe political pressure to resist Indian claims, but they occasionally fared poorly in federal court battles with tribes during the early 1970s. Alternatively, tribes also experienced judicial losses. Thus, by the late 1970s, it was clear to both tribes and states that a formal, alternative, and nonadversarial dispute resolution mechanism was warranted to enable both parties to address their problems more amicably.

The formal mechanism, in contrast to the informal agreement process, that reached Congress' agenda in the 1970s was the tribal-state compact. However, the compact process failed to become law. This paper examines the compact process, the strengths and weaknesses of this nonlitigative process (distinguishing it from the other nonadversarial processes), and suggests that it remains a mechanism in need of reconsideration.

## Literature Review

Conflicts, and occasional amicable agreements, over subjects as diverse as education, taxation, law enforcement, Indian burial sites, water, hunting and fishing practices, the environment, and, the most recent and one of the most explosive issues, Indian gaming, typically entail significant cultural, fiscal, and jurisdictional burdens for all parties involved (Pommersheim, 1991). When the federal government joins the fray, the situation is either exacerbated or ameliorated. While tribal-state relations invoke and entail a host of substantive political (intergovernmental), constitutional and extra-constitutional, social, legal and extra-legal, and cross-cultural issues and concerns, there remains a paucity of scholarly literature on the dynamics of this interracial, intercultural, and interjurisdictional area.(1)

Most of the social scientific and legal literature remains heavily slanted towards explications of the tribal-federal relationship. It is certainly understandable why the federal government receives so much attention: It is the dominant political-economic unit. However, from the foundational case of *Worcester vs. Georgia* (31 U.S. (6 Pet.) 515 [1832]), which affirmed tribal sovereignty, to one of the Supreme Court's most recent pronouncements in *Cotton Petroleum Corporation vs. New Mexico* (490 U.S. 163 [1990]), which held that the state of New Mexico could impose severance taxes on the Cotton Petroleum Corporation's on-reservation production of oil and gas on the Jicarilla Apache Reservation, tribal-state affairs have developed concurrently alongside those of the tribal-federal, state-state, tribe-tribe, and tribal-local levels.

My focus, however, will be on one key aspect of the tribal-state relationship - a policy proposal designed to improve tribal-state relations outside the courtroom - namely, the Tribal-State Compact. More specifically, I will examine closely the inter-governmental relations between the Navajo nation and the state of Arizona, in order to see how one tribe and one state's relationship has evolved in recent years.

### Paving the Way for Amicable Tribal-State Relations

In general, in contrast to litigation, which, as McCool (1993, pp. 85-86) has shown, has cost the United States, states, and tribes "millions of dollars" in "hundreds of court battles" just over the issue of clarifying Indian water rights in the western states, since the 1970s the federal government's official policy has shifted "from litigation to negotiation as part of an effort to end the seemingly endless court battles." This makes sense because "ultimately the litigation mode has done little to resolve the core uncertainties and distrust between states and tribes" (Spaeth, 1993, p. 383).

While negotiation, or bargaining, intuitively and pragmatically appears to have advantages over litigation, McCool (1993, pp. 86-87) sought to test how real the alleged advantages were. He organized the purported advantages as follows: (a) Negotiation requires less time than litigation; (b) negotiation is less expensive than litigation; (c) negotiated results are more certain and lasting; (d) negotiation is less risky than litigation; (e) negotiation allows for more flexibility in the needs of the parties; and (f) negotiation is inherently less confrontational and generates less animosity.

After assessing the relative merits of each assumption, McCool (1993, p. 101) concluded that of the six advantages it is only in the last two areas where negotiation stands out as being vastly superior to litigation. McCool ascertained that negotiation does generally "offer the potential for substantive, flexible agreements that can be tailored to specific situations" and that the negotiated process "by nearly all accounts," is a "more humane" approach to settling conflicts. Furthermore, he noted that another of the "dividends of the negotiation policy is the sense of legitimacy bestowed on all participants" (McCool, 1993, p. 101). While acknowledging that negotiated settlements were not a "panacea," in certain situations "they may be a tedious, expensive way to compensate for past injustice and increase harmony between state [and] tribal governments" (McCool, 1993, p. 101).

Conflicts over water are arguably the most divisive, particularly in the semi-arid and arid western states where there is much less water and where most indigenous peoples happen to live. Other issues, however, also stand formidably in the way of improved tribal-state relations. States and tribes, keeping within the negotiation mode, have tried a number of different non-litigative conflict resolution approaches. And while "it is unreasonable to expect negotiation always to be fruitful, it is evident that they have significantly greater long-term advantages than litigation" (Gover, Stetson, Williams, Walker, Marx, Hart, & Pearlman, 1991, p. 277).

Before examining the compact process as one way of resolving some of the many contentious issues dividing tribes and states, it behooves us to discuss the merits and demerits of other nonlitigative approaches that have been employed and are currently being utilized in various states.

One caveat before continuing. Pommersheim (1991, pp. 264-265) suggests that even when tribes and states have a preference to negotiate an agreement "often litigation precedes an agreement, since litigation may be required to eliminate unknowns and clarify the rights of the tribes and the states ... [since both parties] often find themselves in the unenviable position of construing and implementing federal policy and law that was drafted on a national level, and whose specific contours may not be clear at the state and tribal level." Litigation, however, is not a necessary predicate for all issues, although some problems seem to generate the most lawsuits - water rights, Indian gaming, Indian child welfare, fishing rights, questions of jurisdictional authority, natural resource conservation, and taxation, in particular. And while it is less true in the area of water rights, as McCool described, it appears that the other issues still occasionally may require an adjudicated settlement before a negotiated arrangement can be developed.

The first and most essential ingredient necessary for producing an environment conducive to a successful negotiated cooperative agreement is determining the authority of each governmental entity to enter such an agreement. While this is the legitimate basis from which to begin to flesh out the intergovernmental process, it has not always been so clearly understood. For example, for a number of years some states acted under the presumption that, while they had the "inherent authority" to enter an agreement with the United States, other states, or tribes, they wrongly presumed that tribes lacked a similar amount of authority (Spaeth, 1993, p. 384). Tribes, on the other hand, occasionally have dismissed states as inferior political entities, since only tribes historically had the treaty-making capacity, a power that states lack.

Generally, however, state and tribal attitudes have evolved towards more constructive ends, although there remain certain states which refuse to acknowledge the recognized political status of tribes as sovereign entities. For instance, Pommersheim (1991, p. 261) found that the state of Alaska's policy, as of 1991, was to "challenge, through litigation, native groups seeking tribal status."

Once the authority of each party to negotiate has been identified and accepted, there are a number of other factors that can enhance the chances of establishing a positive agreement. First, seek to find a common ground on which to base relations.<sup>(2)</sup> That is, identify where possible those issues or resources (i.e., wildlife habitat, threatened fish or animal species, or environmental protection or other

transboundary resources) that might be affected adversely by potentially longterm litigation.

Second, seek compromises through creative cross-issue development. States and tribes need to discuss issues of significant import in a nonadversarial setting that has the potential to lead to solutions in a less costly manner. These compromised solutions "need not be viewed as capitulation by either the state or tribe, but rather as the means for each government to reach respective goals" (Spaeth, 1993, p. 393).

Third, avoid ultimatums requiring jurisdictional concessions. That is, issues related to internal sovereignty (noninterference in the right to be selfgoverning) are often the most intractable obstacles precluding negotiations. Understandably, neither party, state or tribe, ordinarily is willing to surrender sovereignty over any of its territory, people, or activities. Thus, both entities should develop agreements in those areas not profoundly implicated by jurisdictional authority (Spaeth, 1993, p. 394).

Fourth, directly include all persons to be affected by the agreement in the negotiating process. This factor's importance is self-evident. By involving everyone affected, while potentially extending the approval date, necessary community support is developed. It also builds "credibility and trust" into the negotiating process (Spaeth, 1993). Fifth, the parties must accept as legitimate the existing legal and factual framework. While there may be abundant jurisdictional and factual confusion at the outset, the parties must accept the general legal parameters-faults and all-and build from there. The agreement, in most cases, is voluntary and often is self-enforcing. The duration of the agreement, whether perpetual or renewable, should be spelled out explicitly.

Sixth, Spaeth (1993, pp. 394-395) spoke of special considerations. There can be no blueprint for all tribal-state agreements; complicating factors are legion. They would include: Whose law applies, whether a waiver of sovereign immunity by either or both parties is necessary or warranted, whether the agreement is a delegation of authority or merely a "delineation of respective authority," and, most importantly, whether federal approval is necessary.

Having identified some of the key factors in cooperative negotiated settlements, I will now discuss the relative merits and demerits of other nonlitigative approaches that have been employed in tribal/state affairs.

#### Informal Model (Also Known as the Evolutionary Model)

In this approach, neither party, tribe or state, has a written or otherwise codified statutory or other policy concerning intergovernmental relations (Pommersheim, 1991, p. 261). In effect, issues and problems are handled on an ad-hoc basis. There are a great variety of informal policies in existence. As Pommersheim found in his study, diversity is the key. In Iowa, he found that the governor's office invites tribal representatives for biannual meetings to discuss bilateral affairs; in Maine, an assistant attorney general is assigned to deal with Indian issues; and in Nevada, the state's attorney general stated that his office maintained an "open door policy" regarding tribes.

Theoretically, this model allows tribes and states to resolve differences in an evolutionary, highly flexible manner worked out by the tribe and state, without federal involvement (Rotenberg, 1987, pp. 96-97). However, the sheer informality of this process is a potentially fatal flaw, particularly for the smaller, less economically secure tribes. Moreover, there is no formal acknowledgement of the recognized governmental authority of either party, although this is much less problematic for states than for tribes because of their constitutional status.

#### State Public Policy Concerning Tribes

Pommersheim (1991, p. 270) argues that, in tribal-state relations, there is a severe shortage of states that have a well-defined public policy regarding tribes and that, similarly, it is probable that few tribes have well-established policy frameworks that lay out the basis of intergovernmental relations with state governments. He suggests, therefore, that there is a real need for a well-established public policy. An important first step in establishing such a policy, from the state's perspective, would be for each of the governors in those states with recognized tribal groups "to appoint a commission of Indian and non-Indian experts from within the state and the reservations to prepare a public report to review the status of tribal-state relations within the particular state" (Pommersheim, 1991, p. 270). This report would: (a) detail the state's entire historical relationship with the tribes involved; (b) provide an analysis and description of current problems; and (c) give suggestions for future policy options (Pommersheim, 1991, p. 270). The report would also identify and address the important question of which branch of state government would be in charge of administering the state's affairs and responsibilities regarding tribes.

Historically, the creation of federal Indian policy has been in the hands of the legislative branch, with Congress being empowered under the Indian Commerce Clause to regulate trade with tribes. Pommersheim notes, however, that in some states, like South Dakota, much of that sovereign's policy has been defined and exercised by the executive branch, especially the attorney general's office. Hence, the "prosecutorial" mentality of that office has tended towards litigation "on an ad-hoc basis without apparent thought for the implications to the overall character of tribal-state relations" (Pommersheim, 1991, p. 270).

The state public policy approach is even more effective when additional elements are developed either simultaneously or at a later date. For example, while the legislature rightfully should take the lead role in developing the general policy framework, the executive branch, in some instances, has worked closely with the legislature and tribal leaders to hammer out what Pommersheim (1991, p. 269) calls sovereignty accords. These are innovative, but nonbinding, policy statements that establish the groundwork for more serious problemsolving. These accords seek to build confidence in the possibility of the government-to-government relationship, by according recognition and respect to all parties' sovereignty. Moreover, they do not force any party to relinquish any jurisdictional rights.

One of the most important functions of such accords "is to improve the delivery of services to all individuals represented by all parties. In reaching this goal ... the accord stresses the importance of communication at the agency level, and designates that each party needs to be accountable" (Pommersheim, 1991, pp. 263-264). For example, Washington state and every recognized tribe in that area entered into the Centennial Accord on August 4, 1989. This document does more than merely articulate state policy: "It actually attempts to rise above the narrow public policy of the State to a unique level of mutual understanding" (Pommersheim, 1991, p. 264).

Sovereignty accords represent a significant advancement over the informal/evolutionary model. These accords, especially when couched within a larger state public policy, entail "the next logical and progressive step in advancing state (and tribal) proclamations of goodwill and reconciliation" (Pommersheim, 1991, p. 264). Moreover, they place tribes and states on a similar political plane by formalizing political relations. "Our policy," said Governor Booth Gardner of Washington at the time of the Centennial Accord's signing, "is to work together with Indian tribes to solve problems, and this declaration serves to reaffirm the integrity of the principle of the government-to-government relationship which is the foundation of cooperative problem solving" (Brown, 1991, p. 1). The states of Arizona, New Mexico, and Utah entered into a sovereignty accord with the Navajo Nation on two separate occasions, in 1984 and in 1992. I will discuss these accords later.

Another key component to state public policy, according to Pommersheim, is educational reform. This is a perennial recommendation, especially in affairs involving Indian tribes, because there remains an "incredible ignorance" (Pommersheim, 1991, p. 271) among the larger nonIndian community about tribes, reservation life, and the unique political and legal rights tribes possess and exercise as sovereign nations. Equally important, as Pommersheim notes, is that education helps determine what is authentic and legitimate in America. Since contemporary Indians and their governments and lands are either stereotypically misrepresented or largely ignored in schools, there is an "implicit message that tribal governments and reservations are not meaningful and legitimate, and, therefore, they cannot have problems and claims that merit the serious attention of fellow citizens" (Pommersheim, 1991, p. 272).

The western states, Pommersheim (1991, p. 273) argued, can no longer ignore either the distinctiveness or the permanence of tribal societies, and should no longer deprive their nonIndian citizens of the opportunity to learn about and from tribal cultures. This is essential to longterm improvement in tribal-state relations.

Finally, the last major component of state public policy would be the need to develop forums for dialogue and public policy making. Here Pommersheim is speaking of the need for joint training and workshops for tribal and state employees who work in Indian-related areas. He also encourages state and tribal department heads and policymakers to meet regularly to share and discuss issues and concerns that may arise. At the state level, he asserts that there is a need for legislation to insure this open communication across departments and through their respective roles. This legislation, he says, also should call for an annual report for legislative, executive, and public review that evaluates, in great detail, the tribal-state policy and other developments that have occurred during the year.

Finally, Pommersheim (1991, p. 273) derides the states' political parties for not having something to say about tribal issues. He suggests that each party establish "planks" that are sensitive to and reach out to Indian people. Tribes and states also may enter into informal agreements, which are government-to-government discussions between tribal and state officials leading to mutually satisfactory arrangements that do not involve the application or enforcement of each other's laws (Endreson, 1991, p. 5). Congress, on the other hand, in its capacity as the primary entity charged constitutionally with regulating the federal government's affairs with tribes, may always step in and draft legislation or issue a set of basic policy directives to clarify jurisdictional matters (Williams, 1989, pp. 436-437).

Clearly, the state public policy framework is superior to the informal/evolutionary process described earlier. In fact, other nonlitigative strategies also are being employed under the heading "alternative-dispute resolution." Pommersheim (1991, p. 274, note 221) mentions such processes as mediation, arbitration, private judging, neutral factfinding, and the use of ombudsmen. Depending on the issue, the tribe, the role of the federal government, and other factors, tribes and states today have greater latitude in selecting which approach is most appropriate for a specific problem. In the next section, I examine the compact process generally, and then the tribal-state version in particular. The compact process is brought forth not as a replacement for or as necessarily superior to the previously discussed non judicial models, but as an additional process that tribes and states have at their disposal and that they might wish to consider for the resolution of certain problem areas. In a real sense, the compact process represents the most advanced version of negotiation, and it is the one that appears most likely to meet the concerns that are generated by litigation.(3)

### Interstate Compacts: The Predecessor

The use of interstate compacts antedates the constitutional structure of the American federal system by several years. Throughout the colonial period disputes between colonies, often involving boundary disputes, were resolved through formally negotiated agreements, or compacts (Bowman & Kearney, 1986, p. 239). Furthermore, the Articles of Confederation provided for interstate compacts. Today, the legal basis of interstate compacts is the "compact clause" (Article 1, sec. 10) of the United States Constitution, which states that "no state shall, without the consent of Congress ... enter into any Agreement or Compact with another state, or with a foreign power."

Interstate compacts have an interesting history. Florestano (1993, p. 5) says this about them:

Basically, the compact is a legal agreement between two or more states entered into in order to deal with a problem or concern that crosses state boundaries. Protected by the Constitution, a compact takes precedence over prior law or legislation that may later be enacted by member states because of its contractual character. After two or more states enact basically duplicate statutes creating and defining a compact, it comes into existence. But because the compact is also a contract between the participatory states, it

differs from other statutes. As a contract, an interstate compact is binding on member states in the same manner as any other contract entered into by an individual or corporation. Once they have been entered, compacts cannot be unilaterally amended or repealed, and they are binding on all citizens of the signatory states. The Supreme Court has original jurisdiction over their enforcement.

Hence, compacts have the validity of state law, federal law, and contractual law (Bowman & Kearney, 1986, p. 240). Few interstate contracts were drawn up before the twentieth century, but their numbers have increased considerably since World War II. In fact, over 100 were created between 1940 and 1975 (Council of State Governments, 1984-85, p. 11). While the number of ratified compacts dwindled in the early 1980s (to 19 in all), since then the number has risen again (12 additional enacted, 14 proposed) (Florestano, 1993, p. 23). The impetus for this growth in compact use has been the increasing complexity of society combined with a concomitant demand for a flexible decisionmaking framework for dealing with policy matters that have interstate implications.

Bowman and Kearney (1986, p. 242) identified four advantages to the compact process: (a) They are extremely pliable instruments; (b) they afford a strong legal foundation; (c) their applicability extends both vertically (state-federal, state-local, state-international) and horizontally (interstate); and (d) they effectively fend off potential federal encroachments on state sovereignty.

Thus, the formal process for agreements between states is clearly delineated. Because of the "commerce" and "treaty" clauses, the political relationship between tribes and the federal government is at least clear on its face, although the United States has empowered itself with the authority to alter the relationship unilaterally at any time. What, though, of tribal-state relations, a set of relationships with equally important ramifications? As Pommersheim (1991, pp. 248-249) observed: "The legal relationship of tribes to the states has been unclear from the very beginning of the republic. It finds, for example, no elucidation in the United States Constitution ... nor can there be found a true description of the State-tribal relationship within any state or tribal constitution."

The United States Supreme Court, in its foundational case, *Worcester vs. Georgia* (1832), said that tribes were sovereign nations with broad, inherent powers of selfgovernment. Moreover, Indian country, Chief Justice Marshall said, was excluded from the application of state law because of the extraterritorial status of tribes, their preexisting sovereignty, and the legality of Indian treaties. Despite this powerful precedent, over the last 160-plus years the *Worcester* ruling has been modified and the once impregnable wall shielding tribes from state jurisdictional authority has been breached by federal laws and Supreme Court decisions that in some instances have allowed states a major presence in Indian country. These breaches of tribal sovereignty, sometimes authorized by federal authority, and sometimes simply precipitated by states, have created the conditions that result in the inharmonious situation in which tribes and states often find themselves. However, because of the unique extraconstitutional political/legal status of tribes, in contrast to the constitutional status of the states, even when tribes want to proceed with improving political relations, it is not exactly clear how this is to proceed politically and legally.

Thus, while it is permissible for tribes and states to share responsibility for various governmental services or even to administer like laws jointly, the "distinction between such agreements, compacts, or contracts and those involving [the] actual application of another jurisdiction's laws is imprecise" (United States Congress, Senate Select Committee on Indian Affairs, 1979, p. 1). In less obtuse words, if a tribe or state wishes to engage in an activity that may affect the sovereign jurisdiction of the other party directly, there is uncertainty about how this is to be carried out. The only area where there is no ambiguity involves cases in which Indian property (land or funds) is held in trust by the federal government for the tribe or the Indian individual. In those cases, the treaty relationship, congressional statutes, and the trust responsibility mandate that the federal government be involved directly.

Presently, there are three limited exceptions in the federal statutes that authorize tribal-state compacts explicitly: Public Law 280 (67 St. 588), which permits flexible transfer of authority to the states and retrocession of jurisdiction to the federal government; the Indian Child Welfare Act of 1978 (92 St. 3069), which provides broad authority for compacts respecting the care and custody of Indian children, and Class III (casino) gambling operations under the Indian Gaming Regulatory Act of 1988 (102 St. 2467).(4)

#### A Description of the Tribal-State Compact Process

By 1978 Congress was cognizant of the growing importance of establishing procedures whereby states and tribes could draw up and ratify agreements "which ... provide for the application of civil, criminal, and regulatory laws of either entity over Indians and non-Indians as the parties may see fit to agree" (United States Congress, 1978, p. 7). The Tribal-State Compact bill, introduced by Senator James Abourezk (Democrat, South Dakota), did not intend to alter the basic framework within which the tribes, states, and the United States exercised authority, nor did it purport to authorize a state or a tribe to enter into any agreements not authorized by their own constitutions and laws. In other words, it would have neither enlarged nor diminished the governmental powers of states or Indian tribes. It simply would have allowed those entities to allocate between themselves certain governmental responsibilities.

The Abourezk bill died in the House. In the 96th Congress, however, almost identical legislation(5) was introduced by Senator Dennis DeConcini (Democrat, Arizona). In September of 1979, hearings were held by the Senate Select Committee on Indian Affairs to receive testimony on S. 1181. Peter MacDonald, Chairman of the Navajo Tribe, gave a stirring address in which he reviewed the checkered history of Navajo-state relations. MacDonald asserted that "with rare exceptions, the State and local governments have set themselves up as our enemy" and that the state has "looked covetously at our poor people and our poor land and instead of trying to help with our problems, has chosen instead to try to tax our people, take our resources and use our water" (United States Congress, Senate Select Committee on Indian Affairs, 1979, p. 27). Despite his trepidation, the chairman realized the potential of the legislation and urged its enactment.

Governor Bruce Babbitt (Democrat, Arizona) also strongly endorsed the proposed bill. Babbitt stressed that tribes, the state, and local governmental subdivisions of the state had an opportunity to improve problemsolving processes "not as adversaries, but as neighbors" (United States Congress, Senate Select Committee on Indian Affairs, 1979, p. 15). The compact bill again cleared the

Senate but died in the House. It was reintroduced in 1981, again by Senator DeConcini. Congressman Bereauter (Republican, Nebraska) introduced companion legislation in the House. Although the House version (H.R. 5001) had 20 co-sponsors, it again failed.(6) Apparently, the window of opportunity which made debate of the measure possible closed sometime during 1982.

In part, the closure occurred because of growing tribal concerns that under such an act "the longstanding principle of strict federal control over dealing between the states and Indians would be seriously eroded" (National Lawyers Guild, 1982, p. 87). The tribal-state compact bill, concluded the editors of *Rethinking Indian Law* (National Lawyers Guild, 1982, p. 87), "would open the door to the very real possibility of a return to the type of fraudulent dealings which characterized most of the 'treaties' which states made with Indians in the early 1800s." From the states' perspective, the process may have been allowed to lapse because, with the advent of the Reagan years and the ideological shift of the Supreme Court to the right, the states sensed that their power position vis-a-vis tribes would be emboldened. This has been borne out in a number of Supreme Court decisions rendered in favor of states over tribes and individual Indians in the areas of water rights (Burton, 1991), natural resource issues (Holland, 1989), and religious freedom cases (Deloria, 1992).

#### Navajo Nation and Arizona's Affairs: 1978-1992

I focus on the Navajo (Dine') for several reasons. First, the Navajo Reservation, delineated in the 1868 treaty with the United States, is the largest in the country. In fact, it has nearly quadrupled in size since it was established and sprawls into three states - Arizona, New Mexico, and Utah. This vast land is slightly larger than the state of West Virginia. It also has the largest population of any reservation in the nation.(7) Second, the Navajo Nation's government resembles that of states and the federal government. It now has, for example, three relatively coequal branches.

Finally, many other tribes closely observe the strategic political, educational, and economic actions of the Navajo Nation's political officials, particularly regarding state politicians and corporate interests, and use these comparisons as a basis for their own actions. In short, the Navajo Nation is often the trend-setter for other tribes in their dealings with other polities. When these demographic data, structural alignments, and intratribal dealings are combined with the distinctive legal and political position Navajos occupy as a separate, but economically undeveloped, sovereign nation, a complex picture is apparent.

While Congress struggled futilely to create a broad legal mechanism to better tribal-state relations, the Navajo Nation and Arizona cautiously proceeded to strengthen their relationship through the intermittent use of the informal agreement process. Agreements, which have been defined as the resolution of conflict "provided for by state statutes and regulations enacted specifically for this purpose, and those which are centered within an agreement previously authored" (Endreson, 1991, p. 20), have been reached between the Navajo Nation and Arizona in areas as broad and diverse as social service programs, health service delivery, education, cross-deputization of police, extradition, and economic joint ventures.(8) The rationale for these undertakings is clear: Tribes, local governments, and states have a multitude of shared interests, and many similar problems, and, from the states' perspective, Indians are, after all, citizens of the state they reside in. There is a growing understanding that coordinated work in such areas as protection of the environment, law enforcement, and natural resource management, is essential if these common problems are to be resolved.

The Arizona legislature supported this improving relationship by establishing a Joint Select Committee on Indian Affairs on March 22, 1979. The committee solicited information from state agencies, Indian tribes, and other states to obtain specific issues for its review, such as legislation or agreements in effect, and services which were being dispersed to Indian tribes. The committee also drafted a bill that included a provision calling for the establishment of a permanent committee authorized to negotiate informal agreements, contracts, and compacts with tribes (Hanna, 1981, p. 7).

Similarly, the Navajo Tribal Council established a permanent Intergovernmental Relations Committee on January 25, 1983, to "represent the interests of the Navajo Nation, its governmental relationships with federal agencies, states, counties, municipalities and other tribal governments..." (Navajo Nation, 1982, Navajo Tribal Code, title 2, section 871). This committee was the brainchild of the newly-inaugurated chairman, Peterson Zah, who stressed "partnership" with surrounding states and local governments (Navajo Times, 1983, p. 1). Zah's partnership policy and the earlier efforts of the Arizona legislature led to the formation of a "state-tribal relations" committee consisting of Governors Bruce Babbitt, Toney Anaya (Democrat, New Mexico), and Norman H. Bangert (Republican, Utah), and the attorneys general of each political jurisdiction. Their work culminated in the first sovereignty accord between the four sovereigns, on April 19, 1984. Simply titled a "statement of policy," this policy established the ground rules of a relationship that was to be based on mutual respect of one another's sovereignty. The "policy" reads, in pertinent part:

1. There are mutual issues and problems facing the parties hereto concerning both Navajo and non-Navajo people living within the various jurisdictions, and the parties agree that a procedure setting out a cooperative joint effort shall be coordinated to address these issues and problems; and
2. The Navajo people are citizens of the State of Arizona, the State of Utah, or the State of New Mexico as well as of the Navajo Nation, and possess all the privileges and rights afforded citizens of these States, and are entitled to the same services and benefits afforded by these States to their citizens, consistent with law; and
3. Due to the sovereign status of the Navajo Nation and its geographical location in three (3) states, the States and the Navajo Nation have been in confrontation over issues such as taxation, water rights, state services to the Navajo people, and other issues where the interests of the States and the Navajo Nation are at odds or where the extent of jurisdiction of the parties are not clearly defined; and
4. Coordination and cooperation between the parties will improve the delivery of services to all people within the affected jurisdictions.

Chairman Zah and the three governors agreed that in the future their relations were to be "predicated on a government-to-government relationship" that was to be carried out "in a spirit of cooperation, coordination, communication and good will" (Navajo Times, 1983, p. 1). The chief executives agreed to meet regularly and to abide by the following structure in their future relations:

- a. The initial negotiations shall be conducted by the appropriate Division or Department; b. The Chairman and each Governor will

designate a person on their staff with whom the Divisions and Departments will consult as needed; c. The Chairman and the Governors shall be kept informed of issues of potential conflict by their designated staff person and shall give such direction as is necessary to resolve those conflicts as early as possible; d. The Attorney General of the Navajo Nation and the Attorneys General of the respective states will consult with one another, prior to the filing of any litigation involving the Navajo Nation and the respective state governments as opposing parties (emphasis theirs).

Peter MacDonald, who had served previously as chairman of the Navajo Tribal Council from 1970 to 1982, returned to that office in the fall of 1986 when he narrowly defeated Peterson Zah. McDonald was the first Navajo to be elected to a fourth term.

Following on the heels of Zah's "Partnership Policy," MacDonald asserted that "we must take up the challenge of developing strong and positive relationships with our surrounding states. If Navajo and New Mexico can work together as business partners - if Navajo and Arizona can together promote our tremendous tourism potential - if Navajo and Utah can learn to resolve matters in dispute before they reach the land of litigation - then, and only then, will we be able to show business that ours is a safe, secure, and profitable home for their investment interests" (MacDonald, 1987, p. 7).

The Navajo Nation's Intergovernmental Relations Committee, no doubt encouraged by their chairman's efforts at cooperative dealings with local and state private and public entities, continued to work out agreements with the local, county, and state governments via a plethora of informal memorandum of understandings, intergovernmental agreements, cooperative agreements, and professional service agreements. These, again, were agreements meant to stabilize and strengthen the budding government-to-government relationship between the Navajo Nation and the state and nonstate governments. The various names given these agreements - memorandum of understanding, intergovernmental agreement, etc. - indicate two things. On the positive side, it shows that there is a great deal of flexibility in the political process articulated in the 1984 sovereignty accord, allowing individual tribal divisions and their state, county, and local counterparts to be creative in the approach to resolving sometimes complex issues. On the negative side, it could indicate that there is still no consistent or uniform manner in which the two sovereigns and their subdivisions treat with one another. In fact, it appears that policy negotiations from both the tribal and state perspectives remain exceedingly diffuse.

For instance, from 1990 to 1992, the Navajo Nation, through its various divisions and agencies, entered into agreements or contracts with the following Arizona state agencies: Department of Public Safety, Department of Transportation, Arizona Board of Regents, Department of Education, Game and Fish Commission, and, most frequently, with the Department of Economic Security for the administration and delivery of various local services to Navajos as a result of their entitlements and eligibility for services as state citizens.(9)

The most important negotiation, however, was a second sovereignty accord signed on January 6, 1992. It was entitled a "Statement of Government-to-Government Policy," and was again signed by the chief executives of the Navajo Nation and the States of New Mexico (Bruce King, Democrat), Arizona (Fife Symington, Republican), and Utah (Norman H. Bangerter, Republican). In the memorandum attached to the policy, the former chairman of the Navajo Nation, now-President, Peterson Zah said:

This policy of cooperation and coordination with the states on issues of mutual concern shall be followed and adhered to by all offices and programs of the Executive Branch of the Navajo Nation. The basic concept of this policy is that since we must coexist as neighbors we must recognize the sovereignty of one another in order to effectively meet the needs of our common constituents and resolve our common problems. An important part of this policy is that we will attempt to discuss and negotiate problems and issues with the states before resorting to court action. I believe this policy serves the best interests of the Navajo Nation and the Navajo people, as well as the states.

The four heads of state once again pledged that their interactions hereafter would be "predicated on a government-to-government relationship" and that a "spirit of cooperation, coordination, and communication and goodwill" would be the guiding principles in their intergovernmental relations. It was reaffirmed that the parties would still meet on a regular basis and that issues of concern would continue to be addressed through the structure established eight years earlier. Vivian Arviso (1994, April 14, telephone interview), an executive assistant to President Zah, has said that this reaffirmed sovereignty accord has been of significant import in improving intergovernmental relations. This is because, at the state level, agency directors and others are generally less resistant to accepting the doctrine of tribal sovereignty than they were before, and, at the tribal level, Indian officials have been fortified in their relative political equality vis-a-vis their state counterparts.

It is too soon to predict, however, whether these sovereignty principles will prove to be an effective mechanism to forestall adversarial relations on more longstanding subjects such as water rights, land-related claims, or the potential problems that may ensue as the Navajo Nation proceeds with its plans to establish Class C gaming operations within reservation boundaries. Water, land, and related issues are perennial resource-based subjects that each sovereign perceives as crucial to its stability and longterm development, whereas gaming, taxation, and others are jurisdictional-based issues that also tend to pose recurring problems. Furthermore, this government-to-government policy will be tested strenuously so long as dual jurisdiction problems (e.g., water and air pollution which present on-reservation/off-reservation problems), concurrent jurisdiction problems (e.g., double taxation, which forces reservation-based businesses to bear heavier tax burdens), and the problem of physical structures that, although situated on Indian land, actually are owned by another sovereign (e.g., public schools, power plants, or state highways, to name a few) remain.

## Conclusion

Predictions in any area of international, domestic, or federal Indian policy are risky ventures. The field of intergovernmental affairs, especially when tribes are a recognized party, are an even trickier area to navigate, although historically and until the early 1970s one could predict safely that tribes and states would litigate, not negotiate, their disputes. This is true, in part, because of the



preconstitutional and extraconstitutional status of tribes and the treaty-defined nature of their Indian sovereignty - a sovereignty, in short, which generally is not subject to the United States Constitution or state constitutions. However, due to the unique features of tribal sovereignty, the United States Supreme Court has delineated a distinctive position in American law for American Indians and tribes. While they are recognized sovereigns, they also suffer the disadvantage of being subject to congressional plenary power that can lead to their legal termination (i.e., the Termination era of the 1950s). States, on the other hand, are constitutional entities, partners if you will, with the federal government, with a guaranteed right to exist.

The federal government's role, therefore, is crucial in this interplay of distinctive nonfederal sovereigns. Since the national government under the doctrine of federalism is linked constitutionally and shares political authority with the states, tribes suffer the structural disadvantage of having treaty-based rights that the Supreme Court has determined the federal government is not mandated constitutionally to protect (*United States vs. Kagama*, 118 U.S. 375 [1886]) and *Lone Wolf vs. Hitchcock* (187 U.S. 553 [1903]). Notwithstanding the Indian Commerce Clause and the treaty relationship, tribes in a very real sense remain "beyond the pale of the constitutional framework ... [a]nd unless and until there is some positive move by the federal government to accept limitations on its exercise of naked political power over the tribes, Indians will remain people without a status and, more importantly, without the ability to protect themselves from the continuing exploitation visited upon them by the U.S." (Deloria, 1988, p. 266). Until tribes have a political status that is not subject to the vicissitudes of the United States Congress and the Supreme Court, there can be no permanent solution to either the tribal-federal or tribal-state relationship.

In the meantime, the Navajo Nation most likely will continue to rely on the agreement processes, overarched by the sovereignty accords of 1984 and 1992. This approach, however, while affording flexibility and some substantive standing to the parties involved, still lacks the comprehensiveness that will arrive only with a well-developed policy apparatus formulated by the states and the Navajo Nation, and sanctioned by the federal government.

The tribal-state compact approach needs to be added to the list of nonadversarial processes available to the states and tribes to consider, depending on the issues involved. The policy choices made, of course, will vary from tribe to tribe and across states. This is not surprising, considering the enormous amount of diversity evident in Indian country. Progress towards reaching and sustaining common ground is slowed, even today, by misunderstandings, skepticism, and sometimes open hostility. There is, therefore, no easy answer for whether historic animosities will persist or whether the Navajo Nation and other tribal communities can expand their fledgling efforts at mutual accommodation.

## Notes

I wish to thank the co-editors of *Policy Studies Journal* for their patient support, and especially the three anonymous readers who provided critical and incisive comments on earlier drafts.

1 This is slowly changing, however. For example, consult G. A. Phelps, "Representation without taxation: Citizenship and suffrage in Indian country," *American Indian Quarterly*, 9 (1985), and his article "Mr. Gerry goes to Arizona: Electoral geography and voting rights in Navajo country," *American Indian Quarterly and Research Journal*, 15 (1991), pp. 63-92; D. L. Rotenberg's "American states and Indian tribes: Power conflicts in the Supreme Court" *Dickinson Law Review*, 92 (Fall, 1987), pp. 81-93; and F. Pommersheim, "Tribal-state relations: Hope for the future?" *South Dakota Law Review*, 36 (1991), pp. 239-276; and K. Gover, et al., "Tribal-state dispute resolution: Recent attempts," *South Dakota Law Review*, 36 (1991), pp. - 277-298.

Pommersheim notes, for example, that a recent law review literature search for a four-year period revealed that of the more than 300 Indian law articles, fewer than 10 dealt with tribal-state relations. Finally, see D. McCool's recent study, "Intergovernmental conflict and Indian water rights: An assessment of negotiated settlements," *Publius*, 23 (Winter, 1993), pp. 85-101. Of the major Indian political and legal texts, consult R. L. Barsh & J. Y. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980); C. F. Wilkinson, *American Indians, Time & the Law* (New Haven: Yale University Press, 1987); and S. L. Pevar, *The Rights of Indians*, 2nd ed. (Carbondale, IL: Southern Illinois University Press, 1992). While each of these valuable texts contains some discussion of the problems and possibilities inherent in the tribal-state relationship, the material tends to be couched in either the historical relationship or the ongoing jurisdictional battles between the two sovereigns.

2 These factors are detailed in N.J. Spaeth (Ed.), *American Indian law deskbook: Conference of western attorneys general* (Niwot: University Press of Colorado, 1993), pp. 393-395.

3 I wish especially to thank reviewer #3 for suggesting this idea of the sophisticated nature of the compact process.

4 Gaming in Classes I and II includes social and traditional games and games of chance, principally bingo, which are not subject to state regulation. Class III gaming entails banking card games, blackjack, baccarat, etc.

5 Refer to the United States Congress, Senate Select Committee on Indian Affairs. Hearings on the tribal-state compact act of 1979, Ninety-sixth Congress, First Session, on S. 1181, September 1, 1979, for a copy of DeConcini's bill.

6 United States Congress (1982), Senate Report on S. 563, Tribal-State Compact Act, Ninety-seventh Congress, Second Session, October 1, Senate Report No. 97-563, p. 5, has the legislative history of this process.

7 The Navajo land base is 16.2 million acres (25.351 square miles). In 1993 the Navajo population resident on the reservation was estimated at 161,405 (Larry Rodgers (Ed.), *Chapter Images: 1992 edition* (Window Rock, Arizona: Navajo Nation, 1993), p. 3.

8 For illustrations, refer to United States Congress, Select Senate Committee on Indian Affairs (1979), Hearings on the "Tribal-state

compact act of 1979," Ninety-sixth Congress, First Session, September 1, 1979; the Navajo tribal code (Navajo Nation, 1982), Title 17, Section 1951-52; and Arizona revised statutes annotated, Title 13, Section 3869-3874.

9 The author has a list of intergovernmental resolutions agreed to during this period.

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**Source Citation** (MLA 8<sup>th</sup> Edition)

Wilkins, David E. "Reconsidering the tribal-state compact process." *Policy Studies Journal*, vol. 22, no. 3, 1994, p. 474+. *Gale In Context: U.S. History*, [https://link.gale.com/apps/doc/A16674144/UHIC?u=vic\\_uor&sid=UHIC&xid=247d3bec](https://link.gale.com/apps/doc/A16674144/UHIC?u=vic_uor&sid=UHIC&xid=247d3bec). Accessed 11 Dec. 2019.