

Fourth World Journal



US Consultation Policy and “Free, Prior and Informed Consent”

CWIS Comments: Draft 2011 Department of the Interior Policy on Consultation with Indian Tribes submitted at the request of the US Department of the Interior, Office of the Secretary.

Rudolph C. Rýser, PhD
Center for World Indigenous Studies

The United States Government joined the governments of Australia, New Zealand and Canada to reject the United Nations Declaration on the Rights of Indigenous Peoples when the United Nations General Assembly on September 13, 2007 overwhelmingly approved the new instrument that had been approved of the United Nations Commission on Human Rights. Within months Australia, then New Zealand and finally Canada reversed their opposition and extended their approval...with some caveats. The United States government held back its approval until 2010 before it too joined endorsers.

US approval came with a kind of backhanded caveat that seemed to render a key provision in the Declaration inoperable. In its official statement expressing US policy on the Declaration the US Department of State wrote:

...the United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken. (USDOS, 2010)

On January 14, 2011 Secretary of the Interior Ken Salazar issued a draft of his department's policy proposal for a "Department of the Interior Policy on Consultation with Indian Tribes" (See Annex following this article) that referred only to President Barak Obama's November 5, 2009 "Executive Memorandum on Federal Consultation with Indian Tribes" as the underlying motivation for offering his proposed policy. The Department of Interior policy made no reference to the UN Declaration on the Rights of Indigenous Peoples, but clearly reflects the US government's response to the "free, prior and informed consent" clause to which the Obama, Bush, Clinton and Bush administrations strenuously objected to over the nearly twenty years during which the Declaration was being developed and considered in various UN organs before its adoption by the General Assembly.

American Indian governments, intertribal organizations, and research institutes like the Center for World Indigenous Studies were asked

to comment on the draft US Department of Interior consultation policy proposal. The Center for World Indigenous Studies reply makes up the bulk of this article. Following the Center's comments we provide the full text of the US government's proposed policy.

“Government-to-Government” is an International Obligation:

Responsible government-to-government relations between Indian nations (along with Alaskan Natives and Hawaiian Natives) are an internationally established obligation the United States government has officially pledged and must solemnly uphold and practice. By virtue of its signature on the Helsinki Accords of 1975 and endorsement of the UN Declaration on the Rights of Indigenous Peoples (2007) the US government has affirmed its international obligations. By concluding treaties and Self-Government Compacts the US government affirmed that the basis of its intergovernmental relationship is mutual negotiations and mutual agreements. Changing from political dependence to a position of recognized sovereignty involves constructing a new framework for political relations, defining or reforming domestic institutions, and reducing the longstanding role of the Bureau of Indian Affairs as a governing influence in the internal affairs of Indian nations. Self-government not only implies, but also requires that an Indian nation take responsibility for making and enforcing its decisions.

The contemporary principle of government-to-government relations with Indian governments derives from the US government's announced

policy to the Commission on Security and Cooperation in Europe that it conducts relations with Indian tribes on the basis of Principle VIII (CSCE, 1975) of the Helsinki Final Act (1975), which states, in part:

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

In consequence of the Accord in Helsinki, the United States committed itself to a set of principles that, among other things, established the modern “government-to-government” rule.

In a 1979 report to the Commission on Security and Cooperation in Europe, the US government pledged that it would conduct relationship with Indian tribes on the basis of government-to-government relations:

[The policy] is designed to put Indians, in the exercise of self-government, into a

decision-making position with respect to their own lives. (USDOS, 1979)

The report further asserted that the state's relationship to Indian nations is one where "...the U.S. Government entered into a trust relationship with the separate tribes in acknowledgment, not of their racial distinctness, but of their political status as sovereign nations." (USDOS, 1979) Indeed the publication "Fulfilling Our Promises: The United States and the Helsinki Final Act," had been issued as a report on the US government's progress toward implementing the Helsinki Final Act of 1975 explicitly claiming that a government-to-government relationship was in place.

The US government's commitments under the Helsinki Accords altered how it's leaders and the leaders of Indian governments necessarily applied what is so often referred to as the "Trust Relationship." *By virtue of it's commitment to conduct its relations with Indian governments on a government-to-government basis, the United States government assumed the responsibility to exercise its trusteeship consistent with elevating the political status of Indian tribes to a position of sovereign equality.*

The Modern Origins of "government-to-government."

The modern origins of the expression, "government-to-government relations" began in the US government's agreement to settle World War II boundaries and spheres of influence in Europe under the Helsinki Accords of 1975—commitments made to Europe states and the

Union of Soviet Socialist Republics in connection with Indian tribes and natives inside the boundaries of the United States. It was the decision of Indian governments meeting in western Washington State in 1979 during a Conference of Tribal Governments hosted by the Quinault Indian Nation to recognize that the United States government had made its commitment to European states under the Helsinki Accords and should be urged to make the same commitment to Indian governments through a US Presidential Policy. After adopting the “government-to-government” resolution, the Conference of Tribal Governments submitted a resolution to the Affiliated Tribes of Northwest Indians (ATNI), which promptly adopted its resolution urging the US government to replace its “consultation policy” with a “framework for government-to-government relations.” The resolution was subsequently submitted to the National Congress of American Indians and adopted there. When NCAI President Joe DeLaCruz signed the resolution, thus urging the US government to adopt a framework for government-to-government relations, he promptly directed that discussions with the Ronald Reagan Administration commence with the intention that *the US government adopt the principle of “government-to-government relations” with Indian governments and immediately begin to negotiate a framework for the conduct of government to government relations.*

President Reagan incorporated the NCAI government-to-government proposed policy into his “American Indian Policy” statement of 1983. Stating, “Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy on self-government for Indian tribe[s] (sic) without threatening

termination” (USGOV, 1983) the Reagan administration attempted to demonstrate its commitment to dealing with the governments of Indian nations by moving the White House liaison for federally recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs. The Reagan Administration did not establish a “framework for government-to-government relations.” As a result, the policy has been in place, but there is no consistent framework in the US government or a consistent framework policy for government-to-government relations with Indian tribes despite the efforts of Indian governments for more than twenty-eight years to establish a mutually defined framework.

Government-wide Application

Indian governments individually and through their intergovernmental bodies urged the United States government to adopt a “government-wide” policy on intergovernmental relations with Indian governments. The current Administration has not altered the earlier pattern of promoting the development of Agency-by-Agency government-to-government policies. This practice continues to fragment and distort the principle of government-to-government relations. *We urge the Department and the Administration to establish a government-wide government-to-government framework for conducting relations with Indian governments. This government wide framework must be mutually negotiated with Indian governments.*

Comments on the US Interior Secretarial Consultation Draft

1. **The notion that the principle of government-to-government relations is embedded in the history of relations between the United States government and Indian nations is largely true, though the expression “government-to-government” is of relatively recent origins as we note above.**

The Secretary’s Draft Consultation Policy begins with the words: “The obligation for Federal agencies to engage with Indian Tribes on a government-to-government basis is based on the Constitution, treaties, statues, executive orders, and policies. Federal agencies meet that obligation though (sic) consultation with Indian Tribes.” (USDOJ, 2011)

The first sentence in the Draft is essentially accurate though the conduct of treaty negotiations is the basic foundation for government-to-government relations and the principle underlying these intergovernmental engagements growing from the *Law of Nations* was and is the “mutuality of negotiations.” This is so due to the fact that treaty relations conducted between governments took place between colonial governors and Indian governmental representatives and later between representatives of the Continental Congress—both of which occurred before the US Constitution. Therefore present day “government-to-government relations must be, by the statement of the Secretary and, indeed, predecessor Administrations going back to Lyndon Baines Johnson predicated on “mutually defined negotiations,” and “mutual agreement”—the essence of intergovernmental relations.

2. **The second sentence may well represent the view of the Secretary, but “consultations” *per se* can only be understood to represent a small part of the government-to-government process. “Consultations” are only a part of the process. They are not THE process.**

US government officials have insisted on claiming the existence of a “government-to-government policy, but the emphasis has been on “consultations.” This rather narrow emphasis has prevented the development of a government-wide “government-to-government” framework in large measure due to the failure of US government officials and many Indian government officials to recognize that “consultations” are but a part of a “government-to-government” relationship.

The full range of government-to-government relations involves negotiation of mutually beneficial policies, settlement of disputes via negotiations, resolution of past wrongs, establishment of protocols for the conduct of intergovernmental activities, assignment of contracts, adjustment of economic relations, and the conduct of foreign relations among other things. These matters may be initiated by either an Indian government or by the United States government. In any case, *negotiations mutually formalized with protocols mutually agreed to must be understood by all parties to be the essential mechanism for defining, addressing and resolving intergovernmental matters of mutual concern.*

Now it is possible that an Indian government may chose not to exercise its responsibilities as a co-equal partner in the intergovernmental process. Such a government may choose not to engage in a

government-to-government activity. *The United States government could not, in good faith, proceed to an action unless the government affected specifically relinquishes its responsibility to engage in a mutually established intergovernmental activity. To effect a decision of relinquishment, an Indian government must “officially opt-out” with the option to reserve the right to “opt-in.”*

3. Communications between an Indian government and the US government (agency) must be delivered well in advance of an action that may have an effect on the interests of the party (Reference: Paragraph V).

A definite time of thirty-days advance notice by either the United States to an Indian government or an Indian government notice to the United States must be assured. If that amount of time is not possible due to an emergency, both parties must agree to give timely responses. The emergency must be real and unavoidable.

Where more than one Agency or even a department (perhaps Justice, or Human Resources) is involved, the sponsoring agency must coordinate participation, and when more than one agency of an Indian government is involved the sponsoring tribal agency must coordinate participation.

4. Both the US government and Indian governments must be held accountable for the intergovernmental process. (Reference: Paragraph VI)

Both parties must maintain reporting procedures internally including scope, costs, and evaluation of the quality of those communications. Accountability by both parties is essential to ensure appropriate intergovernmental balance and fairness.

5. Any changes in the structure or practices of intergovernmental engagement between an Indian government(s) and the US government must be formalized by mutual agreement avoiding unilateral changes.

While it is beneficial for the Department of the Interior to work toward innovating its practices to offer examples across the Administration, it is essential that these innovations or adjustments when offered become a part of official communications to Indian governments. It is equally appropriate that if an Indian government seeks to innovate with new or different intergovernmental practices it must communicate such changes to the United States government. When each side has essentially communicated its proposed innovation, each side must formally establish a mutual agreement on changed protocols.

6. Consultation Guidelines must incorporate mutual agreement and Opt-In and Opt-Out provisions. It must be a two-way process that respects the intergovernmental nature of the relationship. Where the US government is obliged to behave in a particular way, and Indian government must have similar

obligations. Such is the nature of mutual arrangements between governments.

Here are the minimum requirements for government-to-government consultations:

- View consultation as a first step in government-to-government communications that may involve bi-lateral mutually agreed discussions or US agency dialogue with many Indian government representatives.
- Recognize that an intergovernmental US and Indian tribal framework mutually agreed to by the parties is essential for the conduct of effective government-to-government relations, and for the implementation of protocols for which both the US government and each Indian government is accountable.
- Convey the expectation that consultation will not be regarded as merely a procedural step for unilateral decision-making, but rather as part of an intergovernmental process of good faith communication, collaborative dialogue, and information exchange to try to reach decisions that reflect mutual accommodation of interests. Early (pre-decisional) and continuing dialogue on matters of concern to Indian tribes should be required.
- Encourage the use of formal understandings and agreements to memorialize expectations and commitments with Indian tribes.
- Recognize and respecting protocols and procedures adopted by tribal governments for their interactions with the US government.

- Clarify that consultation requirements extend to the development of agency positions regarding litigation involving Indian rights or interests.
 - Require federal agencies to coordinate with each other to minimize the potential for conflict and inconsistency and to ensure that relevant decision makers are involved in discussions with Indian tribes at appropriate times.
 - Require information regarding issues to be discussed with Indian tribes to be provided in advance, consistent with the principle of free, informed, and prior consent, so that tribes have the opportunity for substantive review.
 - Require agencies to inform Indian tribes of how tribal concerns are addressed in final agency actions.
 - Establish protocols to ensure that individuals with appropriate decision-making authority are available to participate as needed to conclude agreements or understandings.
 - Encourage the use of waivers or opt-out clauses for formal agreements in instances where tribal values and needs may be incompatible with regulatory requirements designed for application to the general public.
7. **The Trust Responsibility must not be used as a rationale for US unilateral action that affects the interests of an Indian Nation without its prior or informed consent.**

The Trust Responsibility is evolving and the mere existence of the policy of government-to-

government relations, and the Self-Governance Compacts are testimony to the evolution. The Trust Responsibility must be understood to be a dynamic obligation and relationship that must enhance and not retard the political development of Indian governments or their right to evolve a political status and structure beneficial to their interests. The US government must be now understood to have an “international trusteeship obligation” that not only requires it to preserve, protect and guarantee the rights and property of Indian nations, but of Alaskan Natives and Hawaiian Natives. Furthermore the Trusteeship must be socially, economically and political dynamic to support the continuing improvement of life and decision-making powers of increasingly self-determining Indian communities. At the same time, it is only fair to ensure that the exercise of self-determination and self-government occur at a pace sufficient to the interests of each Indian community and each native government must have the recognized authority to opt-in or opt-out of an intergovernmental action.

Final Comment:

A relationship between governments must respect the sovereign decision-making power of each one. A framework for government-to-government relations must operate at several levels and must be mutually defined. The relationship must also be bi-directional. Either party must be able to take the initiative and the other party must respectfully respond. The United States and Indian nations (Alaskan Natives as well as Hawaiian Natives) have a great many mutual interests that benefit both parties, but neither party must presume to decide for the other. Indian

nations and their Alaskan Native and Hawaiian Native equals have social, economic and political interest that may differ from one another and those differences must be understood and respected. The whole of the US government must act as one just as the whole of each Indian government must act as one in principle.

Where American Indian nations have domestic interests that diverge from those of the US, there must be a mutually defined process for dealing with differences. Where Indian nations have international interests that diverge they must seek to find accommodation in mutual agreement based on negotiations. The process of government-to-government relations is about mutually agreed negotiations and mutual settlement of differences. The balance is the tight wire on which both governments must walk.

Quinault President Joe DeLaCruz (former two term President of NCAI and the National Tribal Chairman's Association, and North American delegate to the World Council of Indigenous Peoples) spoke before the National Congress of American Indians on the nature of self-determination and self-government that is worth repeating. He said,

No right is more sacred to a nation, to a people, than the right to freely determine its social, economic, political and cultural future without external interference. The fullest expression of this right occurs when a nation freely governs itself. We call the exercise of this right Self-determination. The practice of this right is Self-Government.
(DeLaCruz, 1989)

This sentiment can truly be realized only through a mutually determined framework for government-to-government relations between the United States and Indian and other native peoples.

References

- CSCE (1975). "Declaration on Principles Guiding Relations between the Participating States) Conference on Security and Co-Operation in Europe (CSCE), Final Act, Helsinki 1 August 1975 – (<http://www.hri.org/docs/Helsinki75.html> Retrieved on 28 February, 2011)
- DeLaCruz, Joseph B. (1989) "From Self-Determination to Self-Government." in Indian Self-Governance. Ed. Carol J. Minugh, Glenn T. Morris and Rudolph C. Ryser. Fourth World Papers Series, Center for World Indigenous Studies: Olympia. 1-14pp.
- USDOI (2011) "Draft Tribal Consultation Policy, Department of the Interior Policy on Consultation with Indian Tribes." 14 January 2011, Secretary Ken Salazar, Deputy Chief of Staff Laura Davis, Department of the Interior.
- USDOS, (2010) "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to promote the government-to-government relationship & improve the lives of indigenous peoples." US Department of State.
- (1979). "Fulfilling Our Promises: The United States and the Helsinki Final Act," Washington, D.C.: Commission on Security & Cooperation in Europe. November 1979, p. 149. This document was originally drafted in the US Department of Interior, approved by the National Security Council and submitted to the Commission on Security and Cooperation in Europe.
- USGOV (1983). "American Indian Policy," January 24, 1983, Preamble: "President Ronald Reagan issued

an American Indian policy statement which reaffirmed the government-to-government relationship of Indian tribes with the United States; expressed the primary role of tribal governments in reservation affairs; and called for special efforts to develop reservation economies. The President's policy expanded and developed the 1970 national Indian policy of self-determination for Indian tribes. President Reagan said it was the goal of his administration to turn the ideals of the self-determination policy into reality."

About the author

Dr. Rudolph Rýser is the Chairman of the Board of Directors of the Center for World Indigenous Studies and Editor in Chief of the Fourth World Journal; and is the author of the soon to be released book by Routledge entitled "Indigenous Nations and the Modern State" examining the political development of indigenous nations in North America and elsewhere in the world. He earned his doctorate in the field of International Relations.

Citation for this article:

Ryser, R. (2011). US Consultation Policy and "Free, Prior and Informed Consent". *Fourth World Journal*, 10(1), 95 - 122.