

FIRST AMERICANS AND THE FEDERAL
GOVERNMENT: TRIBAL CONSULTATION,
AGRICULTURE, AND A NEW GOVERNMENT-TO-
GOVERNMENT RELATIONSHIP AT THE START OF
THE TWENTY-FIRST CENTURY

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I. INTRODUCTION

Today I am pleased to sign a revised Executive order on consultation with Indian tribal governments [and] . . . reaffirm our commitment to tribal sovereignty, self-determination, and self-government.

. . . [F]irst Americans hold a unique place in our history. Long before others came to our shores, the first Americans had established self-governing societies. Among their societies, democracy flourished long before the founding of our Nation. Our Nation entered into treaties with Indian nations, which acknowledged their right to self-government and protected their lands

Indian nations and tribes ceded lands, water, and mineral rights in exchange for peace, security, health care, and education. The Federal Government did not always live up to its end of the bargain. That was wrong

Today, there is nothing more important in Federal-tribal relations than fostering true government-to-government relations to empower American Indians and Alaska Natives to improve their own lives . . . so that the first Americans can reach their full potential We must respect Native Americans' rights to choose for themselves their own way of life on their own lands according to their time honored cultures and traditions. We must also acknowledge that American Indians and Alaska Natives must have access to new technology and commerce to promote economic opportunity in their homelands.¹

These are the words of President Bill Clinton in his statement on signing executive order 13175, Consultation and Coordination with Indian² Tribal Governments.³ The order was and is binding on all executive departments and agencies and influential to independent agencies. It began to change the way the federal government interacts with Indian tribes in America.⁴

At the beginning of President Barack Obama's administration, President Obama signed a memorandum directing all federal executive departments and agencies to prepare a plan to implement executive order 13175.⁵ The executive order and the memorandum take further steps in an ongoing process to improve the relationship between the federal government and Indian tribes.⁶

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1. Presidential Statement on Signing the Executive Order on Consultation and Coordination With Indian Tribal Governments, 2000 PUB. PAPERS 2487-88 (Nov. 6, 2000).

2. Throughout this Note, "Indian," "American Indian," "Native American," and "First American" are used interchangeably.

3. Exec. Order No. 13175, 3 C.F.R. 304 (2001).

4. *See id.*; Presidential Statement on Signing the Executive Order on Consultation and Coordination with Indian Tribal Governments, 2000 PUB. PAPERS 2487. (Nov. 6, 2000).

5. Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

6. *See id.*; Exec. Order No. 13175, 3 C.F.R. 304 (2001).

President Clinton's order and President Obama's memorandum are not the first Presidential efforts to improve the relationship between the federal government and American Indians;⁷ they do, however, have the potential to improve the relationship in important new ways. Today, with the possibilities available through technology, communication, and education, the executive branch plays an important role in ensuring that every citizen can fully participate in the opportunities this country has to offer. Broadening opportunities for citizens is an important policy initiative for any administration, and it is an issue of critical importance for American Indian policy.

Regular tribal consultation may provide the federal government with the type of information which will allow it to effectively implement programs to broaden economic and cultural opportunities for tribes. It may also aid in keeping the federal government out of costly litigation and help to ensure a more efficient and just administration by federal agencies. With the increased effectiveness and efficiency of agencies which interact with tribes, the United States Congress will find their role in policy-making and allocating funds more satisfying. Before explaining how tribal consultation came to exist and why it is important, this Note explains how the relationship between the federal government and Indian tribes has often been win-lose or lose-lose. Tribal consultation may not be a magic pill which cures all historical and present federal-tribal troubles, but it may be a key ingredient for a remedy which creates a win-win situation between the federal government, Indian tribes, and the American people at large.

Part II of this Note will explore the broad history of federal government policy toward tribes. Part III examines recent Presidential leadership in the arena of the federal government and Indian tribes. Part IV focuses on the USDA and the U.S. Department of the Interior (DOI)—the two federal executive agencies who most often interact with tribes, especially concerning agricultural policy. Part V explains the settlement of two major lawsuits involving tribal claims against the USDA and the DOI—one about discrimination in farm loans and the other about tribal land mismanagement. Part VI deals with Indian agriculture and current public policy as well as programs of critical importance for the future of first Americans in the United States.

7. See KENNETH BOBROFF ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 (Nell Jessup Newton et al. eds., 2005 ed.) (providing a historical overview of reforms in federal Indian policy since 1961).

II. HISTORY OF THE RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND AMERICAN INDIAN TRIBES

A. *The Formative Years (1789–1871)*⁸

The historical relationship between Indian tribes and the U.S. Federal government has been a work in progress, but not always toward progress. It has been a relationship with stability in a Constitutional sense—Article I, Section 8, Clause 3 explicitly gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*,” which means that the Supremacy Clause validates pre-1787 treaties with the Indian tribes⁹ and would seem to suggest that Congress, at the start of the country, would be playing the lead role in this act. Indeed, the Supreme Court has ruled Congress has plenary power over Indian affairs.¹⁰ However, the executive branch, from its founding, has shown that it will play a large role in this relationship and its important role continues to unfold at present.¹¹

Prior to the Articles of Confederation and the establishment of the U.S. Constitution, Americans and foreign governments interacted with Indian tribes and executed legal agreements through treaties because the individual tribes were perceived and treated as separate governments.¹² Once the Federal government was established through the Constitution, a new relationship would occur; the problem was in determining how that relationship would be defined. One thing became clear: the adoption of the Constitution set the federal government, not individual states, as the policy-making body for agreements with the Indian tribes.¹³

The executive branch took initiative as the preeminent part of the new federal government to handle Indian affairs because the tribes were considered to be in the same class as foreign governments, and the executive branch has primary governmental duties in foreign affairs.¹⁴ While the Constitution gives *Con-*

8. *Id.* § 1.03, at 26; *Brief History of U.S.-Tribal Relations*, AM. INDIAN POLICY CTR. (Nov. 1, 2005), <http://www.americanindianpolicycenter.org/projects/history.html>.

9. U.S. CONST. art. I, § 8, cl. 3 (emphasis added); Presidential Statement on Signing the Executive Order on Consultation and Coordination with Indian Tribal Governments, 2000 PUB. PAPERS 2487.

10. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–66 (1903); *see also Littlewolf v. Lujan*, 877 F.2d 1058, 1063–64 (D.C. Cir. 1989) (contextualizing the plenary power of Congress in the “trust” relationship to Indian tribes).

11. *See generally* BOBROFF ET AL., *supra* note 7, §§ 1.03–.07 (tracing the influence of various presidential administrations in the evolution of modern federal Indian policy).

12. *Brief History of U.S.-Tribal Relations*, *supra* note 8.

13. U.S. CONST. art. I, § 8, cl. 3.

14. *Id.* art. II, § 2, cl. 2.

gress power to “regulate commerce . . . with the Indian Tribes,”¹⁵ the Constitution also grants the *Executive Branch* the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹⁶

America’s first administration under President George Washington insisted that the executive branch have control over Indian policy.¹⁷ Washington’s Secretary of War, Henry Knox, pushed to reverse a policy of Indian removal and believed that it would honor Revolutionary principles and “reflect honor on the new government” to ensure that Indians retained their rights to land and not be dispossessed.¹⁸ Secretary of State Thomas Jefferson concurred with this view.¹⁹ The desired policy was not to be, however, and ultimately the federal government and political leaders yielded to the increasing number of white settlers moving west, which made the American revolution for liberty and freedom a tragedy for the land’s first Americans.²⁰

Westward expansion picked up momentum, especially in the wake of the Louisiana Purchase. As citizens began to push west, the need for a solution for acquiring more land became a central problem to be dealt with at the executive level.²¹ Jefferson and James Madison were proponents of persuading Indians to bargain their land in the east for new land in the west.²² When Andrew Jackson took office the process of removing Indians gained steam, created legal conflicts amongst tribal governments, state governments, and the federal government, and the Supreme Court was left to decide what the law was amongst the three.²³

In *Johnson v. McIntosh*, the Supreme Court determined that Indians have a right to occupy their lands but they do not hold title because the United States acquired title by conquest.²⁴ In *Cherokee Nation v. Georgia*, Chief Justice John Marshall laid down the principle that Indian tribes are not foreign states but are their own states as “domestic dependent nations” and exist as “wards” to a “guardian,” the federal government.²⁵ The arrangement is also known as a “trust” relationship.²⁶ In *Worcester v. Georgia*, Marshall again examined the intergov-

15. *Id.* art. I, § 8, cl. 3.

16. *Id.* art. II, § 2.

17. JOSEPH J. ELLIS, *AMERICAN CREATION* 135 (2007).

18. *Id.*

19. BOBROFF ET AL., *supra* note 7, § 1.03[2], at 33–34.

20. ELLIS, *supra* note 17, at 130.

21. *See id.* at 232.

22. *Id.* at 233.

23. *See* BOBROFF ET AL., *supra* note 7, § 1.03[4][a], at 48–54.

24. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 573–74 (1823).

25. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

26. *Cobell v. Norton*, 240 F.3d 1081, 1086–89 (D.C. Cir. 2001) (detailing trust relationship).

ernmental relationship when the Court overturned Georgia laws, affecting Indians in Georgia, by declaring that states lacked power to make such laws, and instead, the power to make laws affecting Indians is reserved to the federal government.²⁷

B. *Allotment and Assimilation (1871–1928)*²⁸

During the period of allotment and assimilation, central power to make agreements with tribes shifted from the executive branch to Congress, which implemented broad policies over individualized agreements with specific tribes.²⁹ In 1871, Congress passed an Appropriations Act which barred the federal government from making treaties with American tribes.³⁰ In the place of treaties, the government continued to interact with tribes by agreements and statutes enacted by Congress and by executive orders issued by the executive branch.³¹

The overall goal of the government during this period was assimilation—to eliminate any distinction between Indians and whites as separate people and thus to assimilate Indians into white society by granting individual tracts of land to Indians.³² In 1887 Congress passed the Dawes Act which replaced the common ownership of all reservation land with a model based on individual land rights (called “allotments,” tied to specific acreages) but the land itself was held in government trust for a period of time.³³ In 1924, they passed the Citizenship Act, which granted Indians American citizenship.³⁴ Despite any good intentions for the policy of assimilation, the result was white acquisition of Indian land and

27. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 531 (1832). Georgia’s laws aimed at Indian removal were struck down, but the policy of removal did not cease. After this opinion was given, the quote, “John Marshall made his law, now let him enforce it,” was supposedly (but in all likelihood not actually) said by President Jackson. BOBROFF ET AL., *supra* note 7, § 1.03[4][a], at 50.

28. BOBROFF ET AL., *supra* note 7, § 1.04, at 75.

29. *Id.* §1.04.

30. Act of Mar. 3, 1871, 16 Stat. 544 (codified at 25 U.S.C. § 71); BOBROFF ET AL., *supra* note 7, § 1.03[9], at 75.

31. BOBROFF ET AL., *supra* note 7, § 1.03[9], at 75.

32. *See, e.g.,* Rennard J. Strickland, *Friends and Enemies of the American Indian: An Essay Review on Native American Law and Public Policy*, 3 AM. INDIAN L. REV. 313, 320 (1975) (describing the allotment policy as an attempt by “Indian friends” to “make little red Farmer Joneses and Native Old MacDonalds out of the American Indian,” so that the group might “become another lost race in the American melting pot”).

33. General Allotment (Dawes) Act, 24 Stat. 388 (1887); *see also* BOBROFF ET AL., *supra* note 7, § 1.04, at 77–78.

34. Indian Citizenship Act of 1924, Pub. L. No. 68-175, Ch. 233, 43 Stat. 253; *see also* BOBROFF ET AL., *supra* note 7, § 1.04, at 83.

resources.³⁵ The policy of allotment failed miserably and the dire repercussions continue to plague the government and Indian tribes throughout America.

C. Indian Reorganization (1928–1942)³⁶

In 1928, the Brookings Institute released a report which documented the failure of the Allotment policy toward Indians.³⁷ The report resulted in the Indian Reorganization Act of 1934 (IRA) which was the top piece of legislation during a new reorganization era that reflected a push for cultural and economic determination for Indians.³⁸ This period represented a change in government policy from assimilation toward “respect for traditional aspects of Indian culture.”³⁹ Indian land allotments became locked into trust with the federal government⁴⁰ and ended further allotment.⁴¹

D. Termination (1943–1961)⁴²

Reorganization policy did not last long. Government policy soon took a sharp turn away from self-government and self-determination toward the elimination of a trust relationship between the tribes and the federal government.⁴³ Legislation enacted during this time period caused Indians to hold the same status as all other Americans, which effectively left the tribes and their members on their own.⁴⁴ The result was a continued loss of Indian land as well as exacerbated poverty and unemployment in Indian country.⁴⁵

35. BOBROFF ET AL., *supra* note 7, § 1.04, at 77–78.

36. *Id.* § 1.05, at 84.

37. LEWIS MERRIAM, BROOKINGS INST., THE PROBLEM OF INDIAN ADMINISTRATION (Johnson Reprint Corp. 1971) (1928); BOBROFF ET AL., *supra* note 7, § 1.05, at 84.

38. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, 48 Stat. 948 (1934) (codified as amended at 25 U.S.C. § 461 (2006)); BOBROFF ET AL., *supra* note 7, § 1.05, at 86.

39. BOBROFF ET AL., *supra* note 7, § 1.05, at 84.

40. 25 U.S.C. § 462 (2006).

41. *Id.* § 461.

42. BOBROFF ET AL., *supra* note 7, § 1.06, at 89.

43. *Brief History of U.S.-Tribal Relations*, *supra* note 7.

44. *See* BOBROFF ET AL., *supra* note 7, § 1.06 at 89–97.

45. *Id.* § 1.06, at 97.

E. *Self-Determination and Self-Governance (1961–Present)*⁴⁶

The modern era, led by presidential efforts to make new policy in this area of American life, has shown the federal government's new commitment to a government-to-government relationship with the tribes.⁴⁷ The tribes have been recognized as the "basic governmental unit of Indian policy."⁴⁸ Each President since the 1960s has supported tribal self-determination.⁴⁹ This support has been demonstrated by governmental response to the needs of Indians. Given today's vast federal administrative state, the executive branch maintains a prominent role regarding Indian affairs as they lead Indian policy, maintain land trusts, administer government programs, and handle disputes.⁵⁰ Presidents Clinton and Obama have made the most recent and notable efforts in regards to building the trust relationship the federal government has with Indian tribes.⁵¹ Whereas Congress has the ability to enact legislation affecting Indians, the executive branch plays a pivotal role in relations through carrying out programs passed by Congress which deal with Indians and the executive branch has responsibilities in engaging the tribes as it executes the general laws of the United States government.⁵²

Today, an Indian is recognized by the federal government if they are a person of Indian blood and recognized by an Indian tribe.⁵³ Sometimes they are referred to as "First Americans."⁵⁴ In terms of eligibility for federal programs and federal protection, an Indian must be a member of one of the 565 federally

46. *Id.* § 1.07, at 97.

47. *Id.* § 1.07, at 99.

48. *Id.*

49. *Presidential Policies*, ONEIDA INDIAN NATION (Sept. 9, 2010),

<http://www.oneidaindiannation.com/about/sovereignty/Presidential-Policies-on-Indian-Self-Determination-and-Self-Government.html>.

50. Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 738–40 (1995) (explaining the background and modern role of the executive branch in interactions with Native Americans).

51. See Exec. Order No. 13175, 3 C.F.R. 304 (2001); Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

52. See Exec. Order 13175, 3 C.F.R. 304; Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

53. *About Native Americans*, U.S. DEP'T JUST., <http://www.justice.gov/otj/nafaqs.htm> (last visited Sept. 25, 2011). See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010) for a list of all federally recognized tribes. This list is published annually pursuant to the requirements of 25 U.S.C. § 479a–1 (2006).

54. See Remarks at the Opening of the American Indian and Alaska Native Tribal Nations Conference and a Discussion with Tribal Leaders, 2009 DAILY COMP. PRES. DOC. 886 (Nov. 5, 2009).

recognized tribes.⁵⁵ Indians are U.S. citizens, vote in U.S. elections, and can hold office in state and the federal government.⁵⁶ Within their own tribes, tribal members are free to participate in the organization and activities of their respective tribes which are recognized as sovereign within the United States.⁵⁷ Thus, Indians can be fully engaged in American life, both within their tribes and outside their tribes.

From a legal standpoint the U.S. federal government still exercises plenary power over tribes, but it has always been true that tribes retain their own sovereignty, something which existed long before the federal government was established.⁵⁸

F. *Cobell and Keepseagle: Recent Litigation Involving the Department of Interior and the USDA*

The need for change in the relationship between the federal government and the Indian tribes has been exemplified by major litigation involving tribes and the federal government. *Cobell v. Salazar* and *Keepseagle v. Veneman* are two of the most important contemporary cases involving the effect of the federal government's relationship with Indians.⁵⁹ Both cases have involved complex and time-consuming litigation. Settlement in both cases has been reached and approval for the release of funding has been granted.⁶⁰

55. *About Native Americans, supra* note 53; see Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810.

56. *About Native Americans, supra* note 53.

57. *Id.*

58. *See id.*

59. *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (previously *Cobell v. Kempthorne*, *Cobell v. Norton*, and *Cobell v. Babbitt*); *Keepseagle v. Veneman*, Civ. A. No. 1:99CV03119, 2001 WL 34676944 (D.D.C. Dec. 12, 2001) (subsequently *Keepseagle v. Vilsack*).

60. *See* Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064, 3066–70 (2010) (showing funding approval for Cobell lawsuit); Press Release, Attorney General Holder, Secretaries Salazar and Vilsack Applaud Final Passage of the Claims Settlement Act, 1 (Nov. 30, 2010), available at <http://www.bia.gov/idc/groups/public/documents/text/idc012370.pdf> (describing approval of *Cobell* funding settlement and also *Pigford II* funding, which was a discrimination lawsuit against the USDA similar to *Keepseagle*); *Keepseagle v. Johanns*, 236 F.R.D. 1 (D.D.C. 2006); Settlement Agreement, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.D.C. 2010); David Bennett, *USDA/Keepseagle: Settlement \$680 Million*, DELTA FARM PRESS (Oct. 20, 2010), <http://deltafarmpress.com/government/usdakeepseagle-settlement-680-million> (describing the settlement process and the reason the *Keepseagle* funding does not need Congressional approval).

1. *Cobell*⁶¹

Cobell involved a claim of mismanagement of Tribal lands.⁶² The Circuit Court found the DOI had mismanaged trust accounts and that the plaintiffs were entitled to equitable accounting.⁶³ One month after President Obama met with tribal leaders and signed the memorandum in 2009, the parties reached a settlement totaling \$3.4 billion, entailing a \$1.4 billion distribution to those members who suffered from trust mismanagement and accounting and \$2 billion for the “purchase and consolidation of fractioned Indian land and other trust related reforms” with up to \$60 million out of that amount to be set aside for American Indian higher education.⁶⁴ In December of 2010 President Obama signed the Claims Resolution Act of 2010 into law, thus officially ending the litigation and settling the claims.⁶⁵

2. *Keepseagle*⁶⁶

Keepseagle involves complaints that the USDA was involved in discriminating against Indians through their farm loan program.⁶⁷ The settlement ended eleven years of litigation and not only resolves an ongoing dispute but places a starting point on which to build a new relationship between Indians and the USDA. For damages, the USDA has agreed pay a total of “\$680 million . . . to thousands of Native American farmers and ranchers and forgive up to \$80 million worth of outstanding farm loan debt.”⁶⁸ This money represents years of

61. *Cobell*, 573 F.3d 808.

62. *Id.* at 809.

63. *Id.* at 813.

64. Press Release, Salazar: Settlement Agreements with First Americans Mark Historic Progress in Reconciliation, Empowerment, 1–2 (Dec. 8, 2010), available at <http://www.bia.gov/idc/groups/public/documents/text/idc012557.pdf>; WHITE HOUSE DOMESTIC POLICY COUNCIL, FORGING A NEW AND BETTER FUTURE TOGETHER: 2010 WHITE HOUSE TRIBAL NATIONS PROGRESS REPORT 8 (2010) [hereinafter WHITE HOUSE DOMESTIC POLICY COUNCIL, 2010 TRIBAL PROGRESS REPORT], available at http://www.whitehouse.gov/sites/default/files/rss_viewer/tnc_progress_report.pdf; see Settlement Agreement, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.D.C. 2010).

65. Claims Resolution Act of 2010, § 101, 124 Stat. at 3066–70.

66. *Keepseagle v. Veneman*, No. Civ.A.9903119EGS1712, 2001 WL 34676944 (D.D.C. 2001).

67. *Id.* at **2–3.

68. Settlement Agreement at 12, 26, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.D.C. 2010); Press Release, Cohen Milstein Sellers & Toll, PLLC, Native American Farmers, Ranchers and USDA Reach Historic Settlement (Oct. 19, 2010) 384 [hereinafter Press Release, Historic Settlement], available at <http://www.cohenmilstein.com/news.php?NewsID=>

credit which American Indians have been denied.⁶⁹ The settlement also results in a revamping of the USDA farm loan system, as well as a creation of a Native American Farmer and Rancher Council which will serve in an advisory position to the USDA on Native American issues.⁷⁰ Additionally, the USDA plans to create regional sub-offices to aid American Indian farmers and ranchers, create a guide to applying for credit, establish an office of Ombudsman to address concerns for those who are disadvantaged, and collect and report on a regular basis how American Indians are doing under the loan program.⁷¹

These lawsuits exposed years of faulty federal government policy and management exposed through our justice system. The lawsuits are both a catalyst for change in the future and a reminder of how deeply Indian policy in America has gone wrong. They are also a snapshot in time, looking at a few decades of disorder and disorganization. The remedies, in terms of dollar amounts, of the two mentioned lawsuits over a few decades seem enormous. Consider the merits and the money of these two lawsuits against a backdrop of a few centuries, however, and one gains a sense of the magnitude of what government policy has meant to Indian country.

G. Tribal Consultation

The problems of Indian country seem benignly neglected throughout America's history. However, despite an American history of missteps, the government has made recent progress to put the trust relationship between the two sovereign entities back on more solid ground.⁷² Since the Nixon administration, there have been efforts by the government to work with Indians.⁷³ Presidents have made personal efforts to improve the relationship between the executive branch and Indian tribes and developments since the 1990s have the potential to be meaningful. The executive branch is leading the way toward building a relationship of mutual benefit by emphasizing tribal self-determination.

69. See Settlement Agreement at 8–9, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.D.C. 2010); Press Release, Historic Settlement, *supra* note 68.

70. Settlement Agreement at 33–35, *Keepseagle v. Vilsack*, No. 1:99CV03119 (D.D.C. 2010).

71. *Id.* at 35–37.

72. *E.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 to 458ddd–2 (2006); Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064, 3066–70; Exec. Order 13175, 3 C.F.R. 304; Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

73. See BOBROFF ET AL., *supra* note 7, § 1.07 at 100–01.

The executive branch is in the process of fully implementing an executive order issued by President Bill Clinton in 2000.⁷⁴ Executive order 13175, entitled Consultation and Coordination with Indian Tribal Governments, provides executive agencies and departments with rules on consultation with tribes.⁷⁵ Congress clearly has a crucial part of setting policy toward Indian Country through legislating and appropriating money, but it is the executive branch that has the crucial responsibility of carrying out the laws of the United States.⁷⁶ Today's federal government and its agencies are pervasive in American life, and given the government's unique responsibilities toward tribes, agency interaction with tribes is extremely important. It is the executive branch that ensures that tribes and the federal government operate on a government-to-government basis.⁷⁷ For the past three decades, American Presidents have all reiterated the importance of the government-to-government relationship with tribes and tribal consultation.⁷⁸ In the next section the efforts of President Clinton, Bush, and Obama are described.

III. RECENT EXECUTIVE LEADERSHIP

Executive leadership has always had a robust place in American law and policymaking. This is especially prevalent in the area of Indian affairs given the President's historical role relating to tribes.⁷⁹ As American political paradigms shifted over time, different Presidents moved for or against change and some have demonstrated leadership in improving relations between the government and tribes. The history between the two entities has not always provided good reason for hope amongst the tribes in regaining their history and well-being. Despite the ebb and flow of positive and negative strides the government has made in improving relations with the tribes, recently the government has supported a more sustained engagement with the tribes and there is ample evidence to suggest that commitment is moving forward again.

A. *President Bill Clinton*

President Clinton stands out among our nation's Presidents because of his work to improve relations with American Indians. When the United States

74. Exec. Order No. 13175, 3 C.F.R. 304.

75. *Id.* at 306–07.

76. U.S. CONST. art I, § 8, cl. 3; *id.* art. II, § 3.

77. Exec. Order No. 13175, 3 C.F.R. at 305.

78. See BOBROFF ET AL., *supra* note 7, § 1.07.

79. See ELLIS, *supra* note 16, at 135.

was enjoying record prosperity and the economy was the number one issue in America, Indians were still an important part of the President's agenda.⁸⁰ Few other Presidents have put forth the effort President Clinton gave in terms of personal interaction with tribes, policy statements, and executive leadership over departments and agencies. Some of his more notable personal interactions include visiting the Pine Ridge reservation in South Dakota in 1999 which made him the "first sitting president to visit an Indian Reservation since Franklin Roosevelt visited a Cherokee reservation in North Carolina in 1936,"⁸¹ and in April of 1994 he became the first President since James Monroe to invite every leader of the Indian tribes to meet at the White House.⁸²

At the historic 1994 meeting with the tribes, President Clinton signed a Presidential memorandum which provided executive departments and agencies with principles to guide interaction with and policy concerning Indian tribes.⁸³ President Clinton sought to ensure that the government recognizes that it operates on a government-to-government relationship with the federally recognized tribes.⁸⁴ Agencies were to consult with tribes prior to taking action which would affect them, consider tribal impact regarding current programs and policies, and remove barriers to communication.⁸⁵

Toward the end of Clinton's second term he issued an executive order which provided the executive branch with more detailed directions on how to implement the broader policy of government-to-government tribal consultation set forth in the 1994 memorandum.⁸⁶ The order had a stronger binding effect on future administrations. President Clinton signed Executive Order 13175 on November 6, 2000, and the order went into effect on January 5, 2001.⁸⁷ The order was binding upon all executive departments and executive agencies and all independent agencies were encouraged to comply with the order on a voluntary basis.⁸⁸ Each agency was required to designate an official which is to head the crea-

80. WILLIAM J. CLINTON, *MY LIFE* 796–97 (2004).

81. *Native American Voices: "The New Buffalo"?*, DIGITAL HIST., http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=3&psid=728 (last visited Sept. 25, 2012).

82. Presidential Statement on Signing the Executive Order on Consultation and Coordination With Indian Tribal Governments, 2000 PUB. PAPERS 2487 (Nov. 6, 2000).

83. Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936 (Apr. 29, 1994).

84. *Id.*

85. *Id.* at 936–37.

86. See Exec. Order No. 13175, 3 C.F.R. 304 (2001).

87. *Id.* at 304, 307; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES AND INDEPENDENT REGULATORY AGENCIES 2 (2010) [hereinafter OMB MEMORANDUM], available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/m10-33.pdf>.

88. Exec. Order No. 13175, 3 C.F.R. at 305, 307.

tion of a tribal consultation plan, prepare progress reports, and ensure compliance with Executive Order 13175.⁸⁹

The order recognizes that American tribes have the right to tribal sovereignty and self-government.⁹⁰ In accordance with the provisions of the order, all executive departments and agencies are directed to consult with tribes regarding policy which may affect them.⁹¹ Anytime an agency puts forth a “regulation, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes,” the government-to-government relationship, or on the “distribution of power and responsibilities between” them, the agency is required to consult with tribes beforehand.⁹² When formulating and implementing policies impacting tribes, agencies are directed to always consider tribal sovereignty and the unique government-to-government relationship, to allow tribes to have wide discretion on implementing policymaking carried out by tribal governments, to allow the tribes to create their own programs and standards, and to consult with tribes about the need for federal standards and explore alternatives which would minimize federal standards.⁹³ Regarding legislation, agencies cannot submit proposals to Congress that thwart the policymaking considerations and tribal consultation.⁹⁴ If legislation having a tribal impact is proposed by an agency, then they must certify that consultation requirements were met.⁹⁵ When an agency moves toward adopting a new regulation, they must engage in tribal consultation and show they have a process in place for consultation.⁹⁶ In two particular circumstances—when a rule imposes unfunded mandates on tribes or [when] a rule preempts tribal law—there are specific procedures to follow.⁹⁷ The procedures require that the agency consult with tribes early in the process, and prepare a “tribal impact statement” showing the extent of the prior consultation, input received from tribes, the agency’s need to implement the order, as well as a statement as to the extent that the concerns of tribal officials have been met.⁹⁸ In addition, when a final draft of a regulation is submitted to the Office of Management and Budget (OMB) for approval, the

89. *Id.* at 306; *see also* OMB MEMORANDUM, *supra* note 87 (providing additional guidance to agencies in implementing the requirements of Executive Order 13175).

90. Exec. Order No. 13175, 3 C.F.R. at 305.

91. *Id.* at 306.

92. *Id.* at 304, 306.

93. *Id.*; OMB MEMORANDUM, *supra* note 87, at 4.

94. OMB MEMORANDUM, *supra* note 87, at 4–5.

95. *Id.* at 4–5.

96. *Id.* at 5–6.

97. *Id.* at 5.

98. *Id.* at 5–6.

agency must submit any written communication it has received from tribes.⁹⁹ Executive Order 13175 was an enormous step toward ensuring a government-to-government relationship with tribes.

B. *President George W. Bush*

After President Clinton left office, Tribal relations did not hold quite as strong of a place on the President's agenda. By way of an executive memorandum, however, President Bush reiterated that Executive Order 13175 was recent a part of an ongoing recognition of a government-to-government relationship with tribes and that the federal government would support tribal sovereignty and self-determination.¹⁰⁰ President Bush also issued three executive orders which worked to improve Tribal education and economic programming, mostly by strengthening the President's knowledge through his circle of advisors.¹⁰¹

In 2002 President Bush signed Executive Order 13270 which established in the Department of Education the President's Board of Advisors on Tribal Colleges and Universities (Board) and the White House Initiative on Tribal Colleges and Universities (WHITCU) which serves to support the Board.¹⁰² The purpose of the order was to promote educational excellence and opportunity for American Indians through a focus of federal efforts to improve Tribal colleges and universities.¹⁰³ Executive agencies and departments participating on the Board appoint a Federal official and create a three year plan showing compliance with the order.¹⁰⁴ The order also mandates that the Board and WHITCU encourage the private sector's involvement.¹⁰⁵

In an additional move focused on federal education policy, President Bush signed Executive Order 13336 in 2004, which was implemented to assist American Indian students in meeting the academic standards of No Child Left

99. *Id.* at 6.

100. Memorandum on Government-to-Government Relationship with Tribal Governments, 40 WEEKLY COMP. PRES. DOC. 2106, 2106-07 (Sept. 23, 2004).

101. See Exec. Order No. 13270, 3 C.F.R. 242 (2002) (establishing an advisory board to provide counsel to the President and serve as liaison between tribal colleges and the White House); Exec. Order No. 13336, 3 C.F.R. 163 (2004) (establishing an Interagency Working Group to study areas of improvement to bring Indian schools in compliance with the standards of No Child Left Behind); Exec. Order No. 13339, 3 C.F.R. 172 (2004) (establishing a commission within the Department of Commerce to advise the President on increasing economic opportunities for Pacific Islanders and Asian Americans).

102. Exec. Order No. 13270, 3 C.F.R. at 242-43 (2002).

103. *Id.* at 242.

104. *Id.* at 243-44.

105. *Id.* at 244.

Behind.¹⁰⁶ An Interagency Working Group (Working Group) oversees the implementation of the order.¹⁰⁷ The Working Group consists of the Departments of Education, Interior, Health and Human Services, Agriculture, Justice, Labor, and “other executive branch departments, agencies, or offices as the Co-Chairs of the Working Group may designate.”¹⁰⁸

Moving beyond education, in 2004 Executive Order 13339 set up the President’s Advisory Commission on Asian Americans and Pacific Islanders (Commission) within the Department of Commerce.¹⁰⁹ The Commission provides recommendations on how best to economically assist Asian and Pacific Islanders.¹¹⁰ To support the Commission, an office called the White House Initiative on Asian Americans and Pacific Islanders (Office) was created in the Department of Commerce.¹¹¹ An interagency working group was also established and is headed by the Director of the Commission.¹¹² The working group serves as an advisor to the Secretary of Commerce on federal government efforts to improve economic opportunities for Asian Americans and Pacific Islanders.¹¹³ The Secretary has the ability to assign executive agencies and departments to the working group and those agencies and departments must designate an official to report on the activities related to this order.¹¹⁴ The appointed agencies and departments are required to create plans to support Asian American and Pacific Islanders.¹¹⁵ Such plans are subject the review of the Secretary of Commerce.¹¹⁶

106. Exec. Order No. 13336, 3 C.F.R. 163 (2004).

107. *Id.*

108. *Id.*

109. Exec. Order No. 13339, 3 C.F.R. 172 (2004).

110. *Id.* at 173.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 173–74.

116. *Id.* at 174.

C. *President Barack Obama*¹¹⁷

By way of Executive efforts and appointments to his administration, President Obama has been committed to improving relationships with the tribes.¹¹⁸ As a part of another historic meeting with tribal leaders which was similar, but larger, than the 1994 conference President Clinton held, President Obama issued a Presidential memorandum directing executive departments and agencies to come forward with a plan to implement Executive Order 13175.¹¹⁹ Before signing the memorandum, President Obama provided some remarks highlighting its importance:

Some of your reservations face unemployment rates of up to 80 percent. Roughly a quarter of all Native Americans live in poverty. More than 14 percent of all reservation homes don't have electricity and 12 percent don't have access to a safe water supply. In some reservations as many as 20 people live together just to get by. Without real communication and consultation, we're stuck year after year with policies that don't work on issues specific to you and on broader issues that affect all of us. And you deserve to have a voice in both.

... In the final years of his administration, President Clinton issued an Executive order establishing regular and meaningful consultation and collaboration between your nations and the Federal Government. But over the past 9 years, only a few agencies have made an effort to implement that Executive order, and it's time for that to change.

117. At the opening of the 2009 Indian and Alaska Native Tribal Nations Conference, President Obama explained that he had become the adoptive son of Hartford and Mary Black Eagle. Remarks at the Opening of the American Indian and Alaska Native Tribal Nations Conference and a Discussion with Tribal Leaders, 2009 DAILY COMP. PRES. DOC. 886 (Nov. 5, 2009). The actual name given to then Senator Obama was "Awe Kooda bilaxpak Kuuxshish" which means, "one who helps people throughout the land." Tahman Bradley, *Obama's New Name? Barack Black Eagle*, ABC NEWS (May 19, 2008), <http://blogs.abcnews.com/politicalradar/2008/05/obamas-new-name.html>.

118. President Obama fulfilled his campaign promise to appoint Native Americans to key positions in the executive branch. Some of those positions include Assistant Secretary for Indian Affairs for the Department of the Interior, Director of the Indian Health Service, Solicitor of the Department of the Interior, Commissioner of the Administration for Native Americans at the Department of Health and Human Services, Deputy Assistant Secretary for Civil Rights at the Department of Agriculture, Senior Policy Advisor for Native American Affairs for the White House Domestic Policy Council, and Deputy Associate Director of the White House Office of Intergovernmental Affairs. WHITE HOUSE DOMESTIC POLICY COUNCIL, 2010 TRIBAL PROGRESS REPORT, *supra* note 64, at 6–7.

119. Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

... [W]orking together, we're going to make sure that the first Americans, along with all Americans, get the opportunities they deserve.¹²⁰

Obama's Presidential memorandum calls on each executive agency to prepare a plan to implement Executive Order 13175 and appoint a person to coordinate the preparation of progress report and the implementation of the plan.¹²¹ Additionally, the OMB will be reviewing all of the agency plans and the Director of the OMB, with the Assistant to the President for Domestic Policy, will report on the implementation of Executive Order 13175.¹²² The Obama administration stressed that the issuance of the memorandum is a beginning, not an end, to a lasting conversation toward a "new and better future" with tribal nations as "full partners."¹²³ The plans are a huge step in the administration of the federal government relating to Indian tribes. They add teeth to Executive Order 13175 and solidify the government-to-government commitment throughout the executive branch. Now, unlike ever before, U.S. executive agencies must provide official documentation that they have consulted with tribes before changing their policies. The specific plans of the USDA and the DOI will be discussed later in this note.

President Obama's memorandum is the current centerpiece of fostering a government-to-government relationship with Indians. President Obama has made a personal commitment to oversee progress being made in Indian Country through hosting Tribal Nations Conferences and requiring progress reports be issued by the White House after consulting with executive agencies.¹²⁴

June of 2010 the White House released their progress report regarding Executive Order 13175 and tribal affairs.¹²⁵ The report, entitled, *Forging a New and Better Future: 2010 White House Tribal Nations Conference Progress Report*, included summaries of the most important issues facing tribes.¹²⁶ The report was developed after Obama administration officials and tribal leaders met to ad-

120. Remarks at the Opening of the American Indian and Alaska Native Tribal Nations Conference and a Discussion with Tribal Leaders, 2009 DAILY COMP. PRES. DOC. 886 (Nov. 5, 2009).

121. Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

122. *Id.*

123. Remarks at the Opening of the American Indian and Alaska Native Tribal Nations Conference and a Discussion with Tribal Leaders, 2009 DAILY COMP. PRES. DOC. 886 (Nov. 5, 2009).

124. Remarks at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. 1076 (Dec. 16, 2010); Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

125. WHITE HOUSE DOMESTIC POLICY COUNCIL, 2010 TRIBAL PROGRESS REPORT, *supra* note 64.

126. *Id.*

dress obstacles before them in areas requiring the most attention.¹²⁷ Among the most important issues identified were strengthening the government-to-government relationship, sustainable economic development, and the environment.¹²⁸ These issues, along with agency consultation plans, will be discussed further in this Note.¹²⁹

In December 2010, President Obama hosted the second White House Tribal Nations Conference at the DOI.¹³⁰ He used the occasion to reiterate his administration's commitment to improving the government-to-government relationship and improving the lives of Indians in America.¹³¹ In addition to highlighting improved federal resources for economic development, education, health care, and public safety, President Obama highlighted his support for legislation making it explicitly clear that the DOI can still take Indian land into trust¹³² and explained that the Cobell and Keepseagle lawsuits, mentioned earlier in this Note, have been settled.¹³³

In December 2011 the Obama Administration, for the third year in a row, invited representatives of all 565 federally recognized tribes to join with the President, cabinet members, members of Congress, and others to participate in the White House Tribal Nations Conference.¹³⁴ The White House also released another progress report highlighting steps taken to improve life in Indian country.¹³⁵ Amongst the issues of progress were the government-to-government relationship, sustainable economic development, health care, education, protecting American Indian lands and the environment, and respecting cultural rights.¹³⁶

At the conference President Obama also signed a new executive order establishing an initiative aimed at improving the education of American Indians

127. *Id.* at 6.

128. *Id.*

129. *See infra*, Parts IV, V.

130. *See* Remarks at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. 1076 (Dec. 16, 2010).

131. *Id.*

132. *Id.* A recent Supreme Court case, *Carcieri v. Salazar*, held that only tribal lands under federal jurisdiction at the time the Indian Reorganization Act was passed in 1934 and subsequent to its enactment, can be entered into trust. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009).

133. *See* Remarks at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. 1076 (Dec. 16, 2010); *see also* discussion *supra* Part II.F.

134. *See* Remarks at the White House Tribal Nations Conference, 2011 DAILY COMP. PRES. DOC. 924 (Dec. 2, 2011).

135. WHITE HOUSE DOMESTIC POLICY COUNCIL, ACHIEVING A BRIGHTER FUTURE FOR TRIBAL NATIONS: 2011 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT (2011), available at http://www.whitehouse.gov/sites/default/files/2011whntnc_report.pdf.

136. *Id.*

and Alaskan Natives.¹³⁷ The executive order is similar to President Bush's Executive Order 13270, but with more detail and guidance on purpose and objectives.¹³⁸ The initiative is co-chaired by the Secretary of Education and the Secretary of the Interior.¹³⁹ An Executive Director will be appointed to head the initiative and report to the Secretaries.¹⁴⁰ An interagency Working Group is also established, and agencies in the working group are to develop four year plans to fulfill the purpose of the order, and private sector involvement is also enlisted to help in this effort.¹⁴¹

IV. AGENCY PLANS FOR TRIBAL CONSULTATION

In addition to the Executive Office of the President and the Office of the Vice President, the executive branch has fifteen main agencies which carry out the laws of the United States.¹⁴² The executive agencies playing the largest role regarding tribal affairs related to agriculture are the DOI, mainly through the Bureau of Indian Affairs, the USDA and their Office of Tribal Relations, and the Office of Management and Budget, which plays a critical role in working with various agencies and coordinating the executive branch.¹⁴³ By examining these three agencies, their policies, and their plans of action regarding tribal consultation, one can gain a better understanding of how consultation actually works.¹⁴⁴

137. Exec. Order No. 13592, 76 Fed. Reg. 76,603 (Dec. 2, 2011).

138. Compare Exec. Order No. 13592, 76 Fed. Reg. 76,603, with Exec. Order No. 13270, 3 C.F.R. 242 (2003).

139. Exec. Order No. 13592, 76 Fed. Reg. 76,603, 76,604.

140. *Id.*

141. *Id.* at 76,605–06.

142. *The Executive Branch*, THE WHITE HOUSE, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Sept. 25, 2012).

143. See BOBROFF ET AL., *supra* note 7, § 5.03; *Resources Within U.S. Federal Agencies*, THE WHITE HOUSE, <http://www.whitehouse.gov/nativeamericans/resources> (last visited Sept. 25, 2012).

144. See WHITE HOUSE INDIAN AFFAIRS EXECUTIVE WORKING GROUP, CONSULTATION AND COORDINATION ADVISORY GROUP, LIST OF FEDERAL TRIBAL CONSULTATION STATUTES, ORDERS, REGULATIONS, RULES, POLICIES, MANUALS, PROTOCOLS AND GUIDANCE (Jan. 2009), available at <http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20ACHP%20version.pdf>, for an extensive—though not exhaustive—list of statutes, orders, regulations, and other executive branch materials on tribal consultation.

A. Office of Management and Budget

In order to ensure compliance with Executive Order 13175 and Obama's November memorandum, each executive agency is directed to submit to the OMB not only their action plan for tribal consultation but annual progress reports and any recommended updates to their plans.¹⁴⁵ After the first year and first submission of action plans, OMB was charged with submitting an executive branch report on the implementation, plans, and progress of Executive Order 13175.¹⁴⁶ Additionally, the OMB is to make recommendations for making consultation with tribes more effective.¹⁴⁷ Review of these plans and compliance with Executive Order 13175 and Obama's memorandum will continue on an annual basis.¹⁴⁸ Within the OMB the Office of Information and Regulatory Affairs is in charge of overseeing agency compliance with the executive order and memorandum.¹⁴⁹ In order to assist all departments and agencies on their progress, the Director and Administrator of OMB have provided guidance on the memorandum and executive order through a memorandum directed to all executive departments and agencies and independent regulatory agencies.¹⁵⁰

B. USDA

The USDA is a large and important federal agency with vast responsibilities. The Department includes seventeen separate agencies with fourteen offices and seven mission areas.¹⁵¹ The USDA has a presence in virtually every county throughout the United States.¹⁵² The agency has the goal of becoming a model agency for program delivery and customer satisfaction.¹⁵³ Strategic areas of focus have been established during the Obama administration, including: economic self-sufficiency, food security, infrastructure, rural vitality, conservation, sustainability, nutrition and health, and sustainable tribal communities.¹⁵⁴ In con-

145. Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

146. *Id.*

147. *Id.*

148. *Id.*

149. OMB MEMORANDUM, *supra* note 87.

150. *Id.* at 2. Although the memo was distributed to all independent regulatory agencies, Executive Order 13175 does not bind them as it does executive departments and agencies. *Id.*

151. See *USDA Agencies and Offices*, USDA, <http://www.usda.gov/wps/portal/usda/> (follow "agencies and offices" hyperlink) (last visited Sept. 25, 2012).

152. *Action Plan for Tribal Consultation and Collaboration*, USDA 2 (2010), <http://www.usda.gov/documents/ConsultationPlan.pdf>.

153. *Id.*

154. *Id.*

junction with addressing these strategic areas, interaction with tribal leaders and governments is an integral part of the agency's goals.¹⁵⁵ No other federal department, including the DOI, has such an important impact through programs and interactions offered.¹⁵⁶

After President Clinton issued Executive Order 13175 the USDA developed agency regulations to guide internal agencies on tribal consultation, but only a few agencies implemented the regulations and there was no meaningful way of tracking progress and accountability for complying with the order.¹⁵⁷ After President Obama's memorandum, Secretary of Agriculture and former two-term Iowa Governor, Thomas Vilsack, released a letter to the leaders of every federally recognized tribe regarding USDA creation of a tribal consultation plan of action.¹⁵⁸ In the letter, Secretary Vilsack described the USDA's commitment to comply with the President's memorandum, and asked the leaders for formal written comments on how the USDA can best implement a plan for tribal consultation.¹⁵⁹ Further, Secretary Vilsack encouraged the tribal leaders to attend regional consultation conferences so that the USDA would receive further input on crafting its policy.¹⁶⁰ Since President Obama's memorandum, the USDA has developed a full and dynamic policy.

For the fiscal year 2010, the USDA received approval for a new office, the Office of Tribal Relations, which serves as the focal point for tribal affairs and communication between the agency and all federally recognized tribes in the United States.¹⁶¹ This is the lead office for implementing Executive Order 13175, and the single point of contact is the Senior Advisor to the Secretary for Tribal Affairs.¹⁶² In addition, each agency and mission area in the USDA will have a single person as the point of contact.¹⁶³ The new policy acts as an umbrella for all USDA agencies and they are to use the formal consultation process which ensures reporting and accountability through USDA's work with Indian tribes.¹⁶⁴ In accordance with establishing an umbrella policy for all the individual USDA

155. *Id.*

156. *Id.* at 9.

157. *Id.* at 8; see also *Departmental Regulation 1350-001, Tribal Consultation*, USDA (Sept. 11, 2008), <http://www.ocio.usda.gov/directives/doc/DR1350-001.pdf>; *Departmental Regulation 1340-007, Policies on American Indians and Alaska Natives*, USDA (Mar. 14, 2008), <http://www.ocio.usda.gov/directives/doc/DR1340-007.pdf>.

158. Letter from Tom Vilsack, Sec'y of Agric., USDA, to Tribal Leaders (Dec. 4, 2009), available at http://www.usda.gov/documents/Tribal_Leaders.pdf.

159. *Id.* at 1.

160. *Id.*

161. *Action Plan for Tribal Consultation and Collaboration*, *supra* note 152, at 6.

162. *Id.* at 6, 18. The first person to hold this position is Janie Simms Hipp. *Id.*

163. *Id.* at 19.

164. *Id.* at 9.

agencies, the USDA will develop a Departmental Regulation, which will include triggering events which require automatic consultation.¹⁶⁵

The agency will, for the first time, review budgetary, legislative, and policy items by incorporating a tribal perspective¹⁶⁶ and will revise their 2007 “Guide to USDA Programs and Services for tribes.”¹⁶⁷ Venues will be created for tribes to make recommendations regarding policy formulation and implementation.¹⁶⁸

To ensure accountability, the USDA will report on an annual basis on all tribal consultation and the impact of department programs.¹⁶⁹ Additionally the USDA aims to provide “department-wide guidance on performance measurements relating to tribal consultation and collaboration.”¹⁷⁰ The measurements will be included on performance evaluations commensurate to each employee’s level of responsibility and employees will have specific training plans for understanding and working with tribal governments.¹⁷¹ The Department is developing a platform to include a consultation plan which is constantly providing contact and accountability.¹⁷² The consultation need not be rigidly formalistic because the objective is to encourage robust communication between staff.¹⁷³

Consultation is encouraged in a face-to-face manner, but additional means of communication are allowed if desired, including use of video and web conferencing technology.¹⁷⁴ Official consultation, however, occurs through written correspondence between the agency and tribal leaders, and “should occur on a regular basis and can also occur on an ‘as needed’ basis.”¹⁷⁵ The variety of consultation is allowed to change and adapt according to what works best between the tribes and the government.¹⁷⁶ Many federal programs may require state-level

165. *Id.* at 10. The USDA has two departmental regulations, given in 2008, which established policies regarding tribal consultation. See *Departmental Regulation 1350-001, Tribal Consultation*, USDA (Sept. 11, 2008), <http://www.ocio.usda.gov/directives/doc/DR1350-001.pdf>; *Departmental Regulation 1340-007, Policies on American Indians and Alaska Natives*, USDA (Mar. 14, 2008), <http://www.ocio.usda.gov/directives/doc/DR1340-007.pdf>.

166. *Action Plan for Tribal Consultation and Collaboration*, *supra* note 152, at 16.

167. *Id.* at 17; see also USDA, AMERICAN INDIANS AND ALASKA NATIVES GUIDE TO USDA PROGRAMS (2007), available at <http://www.usda.gov/documents/AmerIndianNativeAlaskGuide-07%2011%2007.pdf>.

168. *Action Plan for Tribal Consultation and Collaboration*, *supra* note 152, at 16.

169. *Id.* at 11.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 12.

174. *Id.* at 14.

175. *Id.*

176. *Id.*

consultation.¹⁷⁷ There will be formal regional conferences to focus on topics and issues which are of primary importance.¹⁷⁸ Additionally, the USDA is looking at establishing regional centers to serve as physical locations for tribal consultation.¹⁷⁹

As mentioned, the Office of Tribal Relations within the USDA is the focal point of contact regarding the government-to-government relationship. This office reports directly to the Secretary and is in charge of coordinating all issues.¹⁸⁰ The office also has single points of contact within the seven mission areas of the USDA, which allows greater coordination within the USDA.¹⁸¹ Review of consultations, programs, recommendations for change, and explanation for what has worked will come from a USDA internal "Working Group on Tribal Consultation."¹⁸² Each USDA agency will be represented, and subcommittees will evaluate policy, reporting and accountability, and education and training.¹⁸³ The point of the review is to provide the Secretary with information on how to improve consultation. Tribal leaders may be leery concerning the function of these bodies, however, as each tribe is unique and there is no centralized voice for them.¹⁸⁴ The USDA is cognizant of this view and will work to examine how best to use such bodies, meaning that the Agency needs to satisfy their procedural requirements for input, but such bodies may not have the final word.¹⁸⁵

It is important to note that the USDA recognizes that not everything will be perfect, and they are working on a means for conflict resolution, keeping in mind that tribes may seek out other bodies, such as the courts, to settle disputes.¹⁸⁶ The main asset of the plan seems to be that it can evolve according to what the agency and tribes learn, and new forms and methods of communication through technology can and will be utilized. The role of technology will only become more important as this relationship develops, especially considering the federal government's investment in broadband technology to rural America and on tribal lands.¹⁸⁷

177. *Id.* at 16.

178. *Id.* at 13.

179. *Id.* at 18.

180. *Id.*

181. *Id.* at 19.

182. *Id.* at 13, 16.

183. *Id.* at 13.

184. *See id.* at 14. The consultation process will largely be shaped by the specific concerns at issue and the larger background situation. *Id.*

185. *See id.* at 15. Regional consultations will allow for more localized input on specific issues. *See id.*

186. *Id.* at 17.

187. Press Release, USDA, President Obama Announces Rural Broadband Projects to Bring Jobs and Economic Opportunity to Rural Communities and Native American Tribal Lands

C. *Department of the Interior: Bureau of Indian Affairs*¹⁸⁸

Along with the USDA, the Bureau of Indian Affairs (BIA) plays one of the premier roles in providing services for nearly all aspects of Indian tribal life and governance in the United States.¹⁸⁹ BIA is responsible for resource and trust management of fifty-five million acres of surface land and fifty-seven million acres of subsurface resources.¹⁹⁰ Communication between tribes and the Bureau of Indian Affairs is of critical importance in improving the effectiveness of the federal government in relation to Indian life and the tribal consultation policy has been created with serious consideration from a variety of government and tribal members.

Shortly after the announcement of President Obama's memorandum, the DOI released information on its plan to begin developing a tribal consultation policy.¹⁹¹ The DOI began by taking comments from tribal leaders on what, in accordance with Executive Order 13175 and Obama's memorandum, the policy should look like.¹⁹² By February 2010, hundreds of DOI representatives had met with hundreds of tribal officials and completed a plan of action for developing the agency policy, which included creating a new team with an official leader.¹⁹³ The plan of action was meant to ensure that tribal comments were taken into consideration, tribal leaders were involved in the drafting, communications, and review processes, and that interdepartmental communication allowed for better collaboration and understanding.¹⁹⁴ The guiding principles stated in the action plan are meant to establish "regular and meaningful consultation" through several objectives:

(July 31, 2010) [hereinafter Press Release, Rural Broadband Projects], *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2010/07/0354.xml>.

188. Department of Interior is still working on approving this final consultation policy. It is currently in the "comment" stage of the process.

189. *What We Do*, U.S. DEP'T INTERIOR, INDIAN AFF. (July 2, 2012), <http://www.bia.gov/WhatWeDo/index.htm>.

190. *Id.*

191. Press Release, U.S. Dep't Interior, Interior to Develop New Tribal Consultation Policy: Action Follows President Obama's November 5 Executive Memorandum (Nov. 27, 2009), *available at* <http://www.bia.gov/idc/groups/public/documents/text/idc002729.pdf>.

192. *Id.*

193. Press Release, U.S. Dep't Interior, Salazar Announces Plan of Actions to Develop a Department-wide Policy on Tribal Consultation Per President's November 5 Directive, at 1-2 (Feb. 22, 2010), *available at* http://www.doi.gov/news/pressreleases/2010_02_22_releaseA.cfm.

194. DEPARTMENT OF THE INTERIOR PLAN TO DEVELOP A TRIBAL CONSULTATION AND COORDINATION POLICY IMPLEMENTING EXECUTIVE ORDER 13175, *available at* <http://www.doi.gov/news/pressreleases/upload/DOIConsultationActionPlan.pdf> (last visited Sept. 25, 2012).

- Recognize the special legal status of tribal governments;
- Respect tribal sovereignty and support self-determination and self-governance;
- Honor the United States trust obligations;
- Demonstrate Interior's commitment to improving communications while maximizing tribal input and coordination;
- Ensure that Interior consults on a government-to-government basis with appropriate tribal representatives;
- Identify appropriate Interior officials who are knowledgeable about the matters at hand and are authorized to speak for Interior;
- Ensure that Interior's bureaus and offices conduct consultation in a manner consistent with the department-wide policy, thus harmonizing the consultation practices of Interior's bureaus and offices;
- Be clear, understandable, workable and compliance-friendly.¹⁹⁵

In March of 2010, tribal leaders were invited by the Assistant Secretary of Indian Affairs to submit nominations for a tribal consultation team which would consist of a Bureau of Indian Affairs official from each internal bureau/office and three tribal officials per region.¹⁹⁶ The purpose of the team was to create the consultation policy, submit it to tribes, revise the policy after receiving comments, and submit it to the Secretary of Interior for final approval and publication.¹⁹⁷ In August the team was officially assembled and DOI predicted that once the new policy was complete, it would have a "profound and positive impact" on how the DOI makes policy relating to Indians.¹⁹⁸

In January 2011, the team released its draft policy to the tribes and published the policy in the Federal Register.¹⁹⁹ The policy recognized the government-to-government relationship with Indian tribes, the Agency's obligations for consultation, and stated that the consultation policy "creates a framework for

195. *Id.*

196. Letter from Larry Echo Hawk, Asst. Sec'y, Dep't of Interior, Bureau of Indian Affairs, to Tribal Leaders (March 22, 2010), available at http://www.doi.gov/news/pressreleases/upload/Mar_22_2010-Tribal_Leader_letter.pdf; Press Release, U.S. Dep't Interior, Secretary Salazar Announces Next Stage in Developing Department-Wide Tribal Consultation Policy (Mar. 25, 2010), available at <http://www.bia.gov/idc/groups/public/documents/text/idc008367.pdf>.

197. Letter from Larry Echo Hawk to Tribal Leaders, *supra* note 196.

198. Letter from Laura Davis, Assoc. Deputy Sec'y, Dep't of Interior, to Tribal Leaders (August 19, 2010), available at <http://www.bia.gov/cs/groups/public/documents/text/idc010894.pdf>.

199. Press Release, Dep't Interior, Secretary Salazar, Assistant Secretary Echo Hawk Submit Draft Consultation Policy to Tribal Leaders (Jan. 14, 2011), available at <http://www.bia.gov/idc/groups/public/documents/text/idc012835.pdf>; see Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28,446 (proposed May 17, 2011).

synchronizing the Department's consultation practices with its Bureaus and Offices."²⁰⁰ Key components of the policy include guidelines for consultation at various stages of agency action.²⁰¹ Any department action with tribal implications requires notice to the tribes of the chance to consult at the initial planning stage, proposal development stage, and before final federal action pertaining to "regulation, rulemaking, policy, guidance, legislation proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on . . . Tribal cultural practices, lands, resources, . . . areas of cultural or religious importance on Federally managed lands," tribal governance, and the relationship between the DOI and tribes.²⁰² Understanding and sensitivity to Indian culture is meant to promote greater collaboration and the DOI plans to engage in innovative training for its officials in order to furnish better consultation.²⁰³

The DOI has designated a Tribal Governance Officer which will be in charge of complying with Executive Order 13175 and all consultation efforts.²⁰⁴ Additionally, there will be Tribal Liaison Officials in each bureau or office.²⁰⁵ Communication is to be "meaningful," the consultation process itself is subject to ongoing discussion, and innovative methods of communication will be explored.²⁰⁶ Conflict resolution, accountability, and reporting are all components of the plan, and Indian tribes have the ability to request in writing that they be consulted on issues they believe require consultation.²⁰⁷ Finally, the Secretary of Interior will provide an annual report on consultation to Indian tribes.²⁰⁸

Nearly a year after the draft policy release, comments were received from tribes and taken into consideration by the consultation team. In accordance with the Department's plan of action, Secretary of Interior Ken Salazar issued Order No. 3317 entitled "Department of the Interior Policy on Consultation with Indian tribes."²⁰⁹ The order officially approves and implements the final policy created by the consultation team.²¹⁰ The final policy is substantially similar to the draft policy. Some changes include integrating a Federal Tribal Team that will

200. Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28,446.

201. *Id.* at 28,446–49.

202. *Id.* at 28,446.

203. *Id.* at 28,447.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 28,447–48.

208. *Id.* at 28,447.

209. Dep't Interior Order No. 3317 (Dec. 1, 2011), available at <http://www.bia.gov/cs/groups/public/documents/text/idc015809.pdf>.

210. *Id.*

recommend how to implement and improve the policy, and further defining the roles of the Tribal Governance Officer and the Tribal Liaison Officer.²¹¹

The policy provides an official outline for all DOI bureaus and offices which are required to update their individual consultation policies in accordance with the new adopted policy.²¹² The policy covers a lot of ground for the DOI, and is subject to review not only in its final implementation, but after it is officially approved and in effect. One of the hallmarks of tribal consultation is listening, and like the USDA, the DOI understands that consultation is a deliberative process. They appear to be open to suggestions for change in order to facilitate meaningful communication and understanding between governments.²¹³

V. TRIBAL RURAL DEVELOPMENT AND FARM FUNDING POLICY

Indians own and live on millions of acres of land throughout the United States.²¹⁴ In fact, they occupy four percent of all land in the United States.²¹⁵ The range of differences in the land throughout the country are as unique as the tribes themselves and concurrently present opportunities and obstacles for prosperity. One point is clear, however: the federal government could be making better investments in Indian Country. Roughly one percent of Americans are considered to be American Indian or Alaska Native persons.²¹⁶ Because of the historical relation between tribes and white settlers, chronic unemployment on reservations, and low income generated from tribal lands, federal funding and support does not

211. *Id.*

212. *See* Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28,446; Press Release, Dep't of Interior, Secretary Salazar, Assistant Secretary Echo Hawk Launch Comprehensive Tribal Consultation Policy (Dec. 1, 2011), *available at* <http://www.bia.gov/idc/groups/public/documents/text/idc015738.pdf>.

213. *See* Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28,446.

214. Press Release, Dep't of Justice, Attorney General Holder, Secretary Salazar Announce Settlement of Cobell Lawsuit on Indian Trust Management (Dec. 8, 2009), *available at* <http://www.justice.gov/opa/pr/2009/December/09-ag-1312.html>; *see also* Darla J. Mondou, *The American Indian Agricultural Resources Management Act: Does the Winters Water Bucket Have a Hole in it?*, 3 *DRAKE J. AGRIC. L.* 381, 387–408 (1998) (explaining that a large amount of Indian land is not being used at all and past land use provided great benefits for tribes).

215. *See* CYNTHIA NICKERSON ET AL., *ECON. RESEARCH SERV., USDA, EIB-89, MAJOR USES OF LAND IN THE UNITED STATES, 2007*, at 37 tbl.12 (2011), *available at* http://www.ers.usda.gov/media/188404/eib89_2_.pdf. The total acreage of lands held in trust for Indians by the BIA, including land managed for Alaskan Natives, is approximately 102 million acres, or roughly four percent of U.S. land. *Id.*

216. *State & County QuickFacts*, U.S. CENSUS BUREAU (June 7, 2012), <http://quickfacts.census.gov/qfd/states/00000.html>.

represent a courtesy, but an obligation and a wise investment. Early American settlers benefitted from assistance obtained from Indians. Perhaps further exploring their culture and building a more stable relationship is in the best American interest for the greater good of our life and agriculture policies.

The United States and the world owe significant credit to Indians for cultivating most of today's vegetables available for consumption. Prior to Europeans reaching the West in the fifteenth century, many varieties of plants were unknown to most of the world including: "avocados, [several types of beans], cacao (for chocolate), cassava, chicle (for chewing gum), chilies, corn, hickory nuts, jicama, maple syrup, manioc, papayas, peanuts, pecans, peppers, persimmons, pineapples, potatoes, pumpkins, squashes, sunflower seeds, sweet potatoes, tapioca, tomatoes [and] vanilla."²¹⁷ It is estimated that between half and three-fifths of all the world's current crops in production were originally domesticated by Indians.²¹⁸

A. *Indian Farming and Ranching*

Still today American Indians have a lot to offer the American agricultural community. Despite the allotment policy that drove many Indians off their lands and farms, and other failed Indian policies, many Indians have worked to maintain their farms and raise their native crops.²¹⁹ The most recent agriculture census shows that presently there are nearly 80,000 Indian farmers.²²⁰ Although there have been some farming failures, there have also been astounding successes, not only in producing crops but in growing ones which outlast commercial crops more susceptible to being destroyed by elements of nature.²²¹ Indians have been, and continue to be successful farmers who plant and harvest many crops.²²² Their farms can be diverse²²³—both within themselves and diverse in comparison to the

217. Linda Habenstreit, *Council Seeks Export Outlets for "Made by American Indians" Products*, FASONLINE (Oct. 14, 2004), <http://www.fas.usda.gov/info/agexporter/1999/articles/council.html>.

218. *Id.*

219. GARY PAUL NABHAN, *ENDURING SEEDS* 64 (1989).

220. NAT'L AGRIC. STATISTICS SERV., USDA, 2007 CENSUS OF AGRICULTURE—UNITED STATES SUMMARY OF STATE DATA app. A-18 tbl.D (2009) [hereinafter 2007 CENSUS OF AGRICULTURE], available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/usv1.pdf.

221. NABHAN, *supra* note 219, at 64 (successful crops include, but are not limited to, the Gila Pima corn, Pima cushaw squash, Papago sugar cane, Papago dipper gourds, and Tepary beans).

222. Mondou, *supra* note 214, at 421–22.

223. *Id.* at 397–408 (describing Navajo, Hopi, and Zuni agriculture).

commercial crop market—which can be beneficial to a U.S. agricultural community focused on producing large commodities.

The USDA and BIA have not historically made the commitment to track and promote the use of Indian crops in America—those commitments have been given to imported crops²²⁴ and genetically modified crops.²²⁵ Helping improve Indian farms may come from specific investments in small farms and businesses as has been occurring recently under USDA initiatives.²²⁶ A broader commitment toward exploring Indian crops, promoting their growth, and incorporating them into the food stream of commerce could yield potential improvements in the richness and stability of our food system in the United States. Our current system using genetically modified plants to create greater and greater yields has outpaced the conservation and preservation of wild seeds, but our current system is not reported to be sustainable, and wild and diverse plant sources will be needed to strengthen our crop system.²²⁷

At one time, Indians were also successful ranchers, raising and herding animals on America's plains.²²⁸ Modern ranchers are struggling, in large part due to past government land allotment policies, which uncover weaknesses in the overall government trust relationship. The medicine for struggling ranches may involve larger shifts in federal policy, remedies out of the settlement of the *Keepseagle* and *Cobell* cases, and further economic investment by the federal government in Indian ranches.²²⁹ Ranching accounts for thirty-eight percent of Indian agriculture and thus presents an opportunity for the once most successful Indian agricultural program to be brought back to life.²³⁰ Regardless of the cause

224. See NABHAN, *supra* note 219, at 63.

225. See *Frequently Asked Questions About Biotechnology*, USDA, <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&navid=AGRICULTURE&contentid=BiotechnologyFAQs.xml> (last visited Sept. 25, 2012) (outlining the benefits and concerns of genetically modified organisms and the government's involvement in their research and regulation).

226. See, e.g., Press Release, USDA, Agriculture Secretary Vilsack Announces Funding to Increase Economic Opportunity in Rural, Native American Communities (May 26, 2010), available at <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2010/05/0286.xml> (providing examples of USDA investments in rural America).

227. See NABHAN, *supra* note 219, at 72–74 for an interesting story on a comparison of a modern genetically modified corn seed and native blue flour corn—the native seed vastly outperformed the modern seed.

228. See Raymond Cross, *Keeping the American Indian Rancher on the Land: A Socio-Legal Analysis of the Rise and the Demise of American Indian Ranching on the Northern Great Plains*, 49 WASHBURN L.J. 745 (2010).

229. See *id.* at 772–80.

230. 2007 CENSUS OF AGRICULTURE, *supra* note 220, at 58 tbl.54 (indicating that of the 34,706 farms operated by an American Indian or Alaska Native, 13,251—roughly 38.2%—are beef cattle ranches); see also Cross, *supra* note 228, at 767–69 (describing investments made in Indian-ranching through the BIA).

for the decline of Indian ranching, be it federal neglect, complicated land tenure, discrimination,²³¹ or a broader misguided approach to Indian country, only time will discover the proper remedy for Indian ranchers.

B. Government Programs and Investments in Indian Country

The revitalization, competitiveness, and prosperity of Indian farming and ranching will not likely occur on its own without a boost from the federal government. Funding measures are an indication of the change in how the federal government relates to tribes. The recent investments made through the American Recovery and Reinvestment Act and through other appropriations spring off the efforts of President Clinton.²³² In the modern era, tribal economic development has grown, despite the past assimilationist policies which set the tribes back for so long.²³³ The government now allows the tribes to determine how best to utilize their resources, set their own environmental standards, and compete in the marketplace.²³⁴ Development drives development, and just like anything else, tribes need resources to get started. While there are specific economic programs for Indians, many other non-Indian specific programs can be utilized by tribes.²³⁵

Some of the largest investments were described at the tribal conference hosted by President Obama in 2009. The President stated that the American Recovery and Reinvestment Act included three billion dollars for Indian nation programs.²³⁶ The DOI was allocated millions of dollars for “wildland fire management, improving habitat and watersheds that support rural subsistence, and capital improvements.”²³⁷ Millions were marked for the USDA’s Rural Development

231. See generally Cross, *supra* note 228, at 770–71 (summarizing various historical obstacles to economic growth and development in Indian agriculture).

232. See Joanna M. Wagner, *Improving Native American Access to Federal Funding for Economic Development Through Partnerships with Rural Communities*, 32 AM. INDIAN. L. REV. 525, 571–76 (2008) (describing the necessity of such investments).

233. BOBROFF ET AL., *supra* note 7, § 1.07, at 110 (describing modern inclusion of Native Americans in economic development initiatives).

234. See Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENV'T'L & ENERGY L. & POL'Y J. 188, 211 (2009).

235. Wagner, *supra* note 232, at 571–73.

236. Scott Wilson, *Obama Meets Native American Leaders, Vows to Help Community*, WASH. POST, Nov. 6, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/05/AR2009110504823.html>.

237. WHITE HOUSE DOMESTIC POLICY COUNCIL, 2010 TRIBAL PROGRESS REPORT, *supra* note 64, at 15; see American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 137, 166–68.

office to improve water and wastewater infrastructure, community facilities, housing,²³⁸ and upgrading facilities and equipment for food safety and distribution.²³⁹ Clean energy development using new technology is being promoted on tribal lands in order to build new infrastructure, creating new clean energy accessibility and related jobs.²⁴⁰ Resources have been distributed under the Recovery Act to implement a “comprehensive energy efficiency strategy” which will train workers and modernize the way tribal lands use energy.²⁴¹ The government has committed over three quarters of a billion dollars and the private sector has pledged nearly a quarter of a billion dollars toward taking the internet to rural communities across the United States.²⁴²

Besides looking to the Recovery Act, which for many projects is one-time money, regular fiscal year federal budgets include money for numerous other programs and agency initiatives.²⁴³ Although the exact number of programs available specifically for farming and ranching is difficult to ascertain, the USDA has a guide for programs available to Indians which is over one hundred pages long, and contains individual sections focusing on farming related programs.²⁴⁴ Various other agencies also assist in managing this area but the USDA plays the primary role.²⁴⁵ Programs specifically targeted at Indians are still a somewhat

238. American Recovery and Reinvestment Act of 2009, div. A, 123 Stat. at 117–18; WHITE HOUSE DOMESTIC POLICY COUNCIL, 2010 TRIBAL PROGRESS REPORT, *supra* note 64, at 14.

239. American Recovery and Reinvestment Act of 2009, § 101, 123 Stat. at 121; WHITE HOUSE DOMESTIC POLICY COUNCIL, 2010 TRIBAL PROGRESS REPORT, *supra* note 64, at 15–16.

240. American Recovery and Reinvestment Act of 2009, § 405, 123 Stat. at 143; WHITE HOUSE DOMESTIC POLICY COUNCIL, 2010 TRIBAL PROGRESS REPORT, *supra* note 64, at 14–15.

241. American Recovery and Reinvestment Act of 2009, 123 Stat. at 140; WHITE HOUSE DOMESTIC POLICY COUNCIL, 2010 TRIBAL PROGRESS REPORT, *supra* note 64, at 14.

242. American Recovery and Reinvestment Act of 2009, tit. 2, 123 Stat. at 128; Press Release, Rural Broadband Projects, *supra* note 187; Press Release, USDA, Agriculture Secretary Vilsack Announces a Recovery Act Broadband Initiative to Bring Economic Opportunity to the Fort Berthold Indian Reservation and Parts of Two States (Mar. 30, 2010), *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2010/03/0156.xml>.

243. *See, e.g., 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 People*, U.S. ST. DEP’T, 6–9 (Dec. 16, 2010), <http://www.state.gov/documents/organization/153223.pdf> (describing several recent initiatives to protect Indian Lands and redress problems in its approach to tribal resources); *see generally* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (describing the rights of indigenous peoples, including the right to participate fully in the economic life of the country).

244. USDA, AMERICAN INDIANS AND ALASKA NATIVES: A GUIDE TO USDA PROGRAMS, *supra* note 167.

245. *See, e.g.,* U.S. GEN. ACCOUNTING OFFICE, GAO-02-193, ECONOMIC DEVELOPMENT: FEDERAL ASSISTANCE PROGRAMS FOR AMERICAN INDIANS AND ALASKAN NATIVES 5, 6 tbl.1 (2001)

recent development. It was not until the 1990s that these targeted programs began.²⁴⁶ The BIA also offers some guidance on programs through the use of an online handbook and manual.²⁴⁷ The General Accounting Office has offered a few instructive reports regarding program availability.²⁴⁸

C. Changes for Indian Country

Despite the seemingly wide availability of federal programs to benefit tribes, the programs are being under-utilized.²⁴⁹ The solution to the challenge of accessibility may lie in broadband access, Congressional legislation opening programs to Indians (including a Farm Bill Title), legislation to remedy land fractionation, marketing and advertising to agricultural stakeholders in the United States, investments and improvements in 1994 Land College agriculture programs, and tribal consultation.

First, possibly the most important investment the government has made both toward America generally, but most importantly for rural America, in considering Indian tribal prosperity, is the investment in broadband internet access. Greater internet availability allows greater access to government information, eases the burden of filing documents, and eliminates some barriers to government-to-government communication.

Second, a lot of legislation and many administrative rules have been drafted in a manner which makes it ambiguous as to whether the program is available to Indians. Legislation and rules should be written so as to make it clear that the program is available to Indians. Additionally, Congress should consider drafting blanket legislation which will amend previous statutes and rules to clearly state that programs are open to Indians.

Third, it is essential that Congress once again address the challenge presented by Indian land fractionation. Fractionation is a legal result of the Allot-

[hereinafter GAO, FEDERAL ASSISTANCE PROGRAMS], *available at* <http://www.gao.gov/assets/240/233213.pdf>.

246. See BOBROFF ET AL. *supra* note 7, § 21.03[4][c].

247. *The Indian Affairs Manual*, U.S. DEP'T INTERIOR, INDIAN AFF., <http://www.bia.gov/WhatWeDo/Knowledge/Directives/IAM/index.htm> (last visited Sept. 25, 2012); *IA Handbooks*, U.S. DEP'T INTERIOR, INDIAN AFF., <http://www.bia.gov/WhatWeDo/Knowledge/Directives/Handbooks/index.htm> (last visited Sept. 25, 2012).

248. See GAO, FEDERAL ASSISTANCE PROGRAMS, *supra* note 245; U.S. GEN. ACCOUNTING OFFICE, GAO-06-294, RURAL ECONOMIC DEVELOPMENT: MORE ASSURANCE IS NEEDED THAT GRANT FUNDING INFORMATION IS ACCURATELY REPORTED (2006), *available at* <http://www.gao.gov/assets/240/233213.pdf>.

249. Wagner, *supra* note 232, at 580; GAO, FEDERAL ASSISTANCE PROGRAMS, *supra* note 246, at 7, 8 tbl.2.

ment policy.²⁵⁰ A large amount of land remains in federal trust and when a landowner that holds an interest dies, the interest splits and descends to others, but that interest is not physically divided.²⁵¹ Therefore, a parcel of property today may have thousands of Indians with interests in the land, rendering the property difficult or impossible to administer and in some instances worthless to individual land holders. Legislation should authorize the Bureau of Indian Affairs to purchase and transfer interests to help alleviate the problem of fractionation.²⁵² To the extent possible, tribes should be able to administer the legislation and transfer the property to individuals or the tribe itself.²⁵³

Fourth, Congress should invest more resources in the 1994 Land Colleges and create programs tailored specifically to agriculture. When a student from one of the 1994 colleges graduates, they should have the tools to be able to fully participate in all aspects of American life. Agriculture is particularly important given the economic and cultural opportunities it provides. As previously mentioned, Indian agriculture has a deep and rich heritage. Tribes should both take advantage of government programs available as well as develop ways to best utilize agricultural resources unique to the tribes' region and tradition. Tribes should be consulted on how to improve tribal colleges and universities, and funding should provide greater stability so schools can develop their programs.

Fifth, tribes may encounter an American public that does not understand the legal issues surrounding tribes and how business in Indian country can and does work. It is important for the American public to understand that tribes are sovereign nations and pursuant to tribal self-governance, tribes and members can determine what they choose to do with their lands. They can develop their lands and enter into agreements with whomever they see fit. Therefore, the Federal government, state governments, individuals, and businesses can all interact with tribes. Educating the public as to some fundamental points about tribes should help bridge areas of uncertainty and benefit all. The federal government can undertake efforts to work with tribes to educate the public through marketing, advertising, and outreach, but states, individuals, and businesses can also play a key role in improving life for tribes and themselves.

Finally, meaningful executive agency tribal consultation policies will provide a greater understanding of tribal needs and concerns and will compile information which will help bring federal economic development dollars to Indian tribes. The USDA's new Beginning Farmer and Rancher Development Pro-

250. *Fractionated Ownership of Indian Lands*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/fractionated_ownership.htm (last visited Sept. 25, 2012).

251. *Id.*

252. *Id.*

253. *Id.*

gram may prove to be a good resource and example for the government's new efforts to consult and work with Indian tribes involved in agriculture.²⁵⁴

The take-away points regarding government funding and policy toward Indians include the need to strengthen the relationship between tribes and the government, the need to gain and analyze greater amounts of information on how to best allocate federal resources to tribes, and the need for the government to utilize, to a greater degree, programs which help support Indian farming and ranching projects that work. The innovations in relationships between the governments should likely yield positive results for both and possibly provide a model of effective government for Indians and U.S. agriculture in the future.

VI. CONCLUSION

The recent focus on the relationship between tribes and the federal government has been paired with large government policy initiatives in an effort to revitalize America's rural areas. Some of the motivation for change is born of necessity, and some a product of renewed consciousness. President Obama has noted that the greatest reason for a renewed focus between tribes and the federal government is the need to "[get the] relationship right."²⁵⁵

One of America's first presidents, Thomas Jefferson, was also conscious about getting the fundamentals of government correct. During his first inaugural address, he outlined basic principles for the new government including the "encouragement of agriculture, . . . commerce . . . , diffusion of information, and arraignment of all abuses at the bar of the public reason . . ." ²⁵⁶ Should the country wander from our principles, which has been shown to have occurred—especially regarding Indian policy—he advised that we should "hasten to retrace our steps, and to regain the road . . ." ²⁵⁷

254. See Press Release, USDA, Agriculture Deputy Secretary Merrigan Announces Efforts to Provide Training to Beginning Farmers and Ranchers (Oct. 18, 2010), *available at* http://www.csrees.usda.gov/newsroom/news/2010news/10181_beginning_farmers.html; *see also* Press Release, USDA, Farm Serv. Agency, USDA Introduces an Online Tool to Assist Beginning and Socially Disadvantaged Farmers and Ranchers (Dec. 13, 2010), *available at* http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=ner&newsrel&type=detail&item=nr_20101213_rel_0648.html.

255. Remarks at the Opening of the American Indian and Alaska Native Tribal Nations Conference and a Discussion with Tribal Leaders, 2009 DAILY COMP. PRES. DOC. 886 (Nov. 5, 2009).

256. THE PAPERS OF THOMAS JEFFERSON, VOLUME 33: 17 FEBRUARY TO 30 APRIL 1801 (Barbara B. Oberg ed., 2006), *available at* <http://www.princeton.edu/~tjpapers/inaugural/infinal.html>.

257. *Id.*

Jefferson provides an example of the federal government's position of virtuous American ideals in words but not in practice. Much of the work in the government after President Clinton's tribal consultation order is about regaining the correct road of allowing Indians greater autonomy, full participation in America life, and greater justice against the backdrop of the last two hundred years.²⁵⁸ In addition to the initiatives of Presidents Clinton, Bush, and Obama, the federal government has recently taken a few large steps in recognizing a long history of missteps, injustice, and fundamental and unique rights of First Americans.

In 2009, both houses of Congress, with bipartisan support, passed a joint resolution that offered an official government apology to Indian tribes for wrongful past policies, recognized the importance of a government-to-government relationship and gave respect for the thousands of years of stewardship of the land which is now the United States.²⁵⁹ In 2010 the Obama administration reviewed the United Nations Declaration on the Rights of Indigenous Peoples, and decided to sign on to the Declaration.²⁶⁰ The administration is further developing a statement on what it will mean in America.²⁶¹ President Obama repeatedly addressed the underlying importance of the tribal nation conferences and the relationship between governments by saying that the American people and the Indian tribes should move forward together so that we can achieve shared dreams and goals of the future while maintaining our cultures, heritage, and traditions.²⁶²

The federal government is a vast and complex machine with large powers and responsibilities at home and around the world. While the government does many things well, it is not a model of efficiency. Consultation may prove to be the piece of a productive model for governing which leads to efficiency through better short-term and long-term decision-making. For the federal government and Indian tribes in America, consultation will be crucial in the years to come, as a new relationship develops, new investments occur, and both governments, tribal and federal, work to adapt and succeed in a changing world. American Indians play an important role in the history of America, and we need to enlist their help in defining what the next one hundred years is going to look like.

The reality for America in the twenty-first century is that there will be continuing rapid changes, and the need for creativity has never been greater. Utilizing our resources in the smartest manner possible will be a challenge for all

258. See Exec. Order No. 13175, 3 C.F.R. 304 (2001).

259. S.J. RES. 14, 111th Cong. § 1(a) (2009) (enacted).

260. Remarks at the Opening of the American Indian and Alaska Native Tribal Nations Conference and a Discussion with Tribal Leaders, 2009 DAILY COMP. PRES. DOC. 886 (Nov. 5, 2009).

261. *Id.*

262. *Id.*

countries this century. The strain on resources will only become greater. Tribes control great cultural and economic resources, and in order for those resources to be utilized, the country has an interest in closing the gap between opportunities available to tribes and those available to other segments of America. Tribes may also be able to provide models for long-term efficiency. In areas like agriculture, land use, and renewable energy resources, tribal knowledge could prove to be invaluable for America's future prosperity and stability.

Accepting and embracing the diversity of this country has always been a source of strength for moving the country forward. In the case of Indians, the federal government has a great need to have the government-to-government relationship be productive. In an increasingly complex modern society, providing environmental, economic, and social justice and prosperity seems perplexing. As the government plays its role in this effort and searches for answers, it may indeed prove prudent to consult with the country's First Americans along the way.