

# INDIAN TRIBAL CONFLICT RESOLUTION AND TORT CLAIMS AND RISK MANAGEMENT ACT OF 1998

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## HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

**S. 2097**

TO ENCOURAGE AND FACILITATE THE RESOLUTION OF CONFLICTS  
INVOLVING INDIAN TRIBES

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JULY 15, 1998  
WASHINGTON, DC



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# **INDIAN TRIBAL CONFLICT RESOLUTION AND TORT CLAIMS AND RISK MANAGEMENT ACT OF 1998**

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**WEDNESDAY, JULY 15, 1998**

**U.S. SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
Washington, DC.**

The committee met, pursuant to other business, at 10:05 a.m. in room G-50 Dirksen Senate Office Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Gorton, Burns, Inouye, Reid, and Akaka.

## **STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN COMMITTEE ON INDIAN AFFAIRS**

Good morning and welcome to today's hearing on S. 2097, the Indian Tribal Conflict Resolution, Tort Claims and Risk Management Act.

This year, the committee has held a series of hearings on Tribal Sovereign Immunity.

We know that Sovereign Immunity, which is held in varying degrees by the Federal and State Governments as well, is necessary because a government cannot operate if every action results in a trip to court. However, in these hearings we heard the other side.

Witnesses told of problems encountered by people living on or near reservations, including enrolled members of tribes who cannot sue their tribal governments. Some are old war stories and some are personal grievances that should not involve the legal system, but there are several real problems that we should address.

This legislation is proposed to resolve two of these problems: Collection of State taxes on sales to non-Indians and the ability to be compensated for an injury when a Tribal Government is responsible.

Beginning in 1980 and as late as 1991, the Supreme Court has ruled that tribes have a legal obligation to collect State sales taxes on sales to non-members and give those taxes to the States. There are now over 200 State-tribal tax agreements in place covering a wide variety of commodities. But in cases where a tribe and State do not have a tax agreement, Sovereign Immunity prevents the State from taking their case to court.

S. 2097 encourages negotiations between tribes and States. But if negotiations fail, the bill provides a mediation process with the Federal Mediation and Conciliation Service. States get what they are owed and tribal sovereignty remains intact.

This bill also addresses compensation for injuries when a tribal government is responsible. Many tribes are covered completely or in part through the Federal Tort Claims Act or private insurance coverage. But where there are gaps in the coverage there is the potential for wrongs not being compensated.

S. 2097 addresses this situation by directing the Secretary of the Interior to ensure that there is sufficient liability insurance in place for tribes that receive tribal priority allocations [TPA].

There have been attempts to resolve these issues by waiving Tribal Sovereign Immunity. I have opposed this approach—it solves one set of problems by creating another. But I must say to all the tribal representatives here—we must address these issues. Not just to keep the more drastic legislative solutions at bay, but because if people believe they cannot get justice on tribal lands, they will not do business there. Private sector investment on reservations has worked economic wonders in some areas and is a model for getting out of poverty. If these problems persist, that will all go away.

I want to make it clear from the beginning that S. 2097 is a work in progress. I welcome all suggestions on how to make it more effective. I am confident that working together in this committee, we can develop reasonable and responsible solutions to the issues before us.

[Text of S. 2097 follows:]

105TH CONGRESS  
2D SESSION

# S. 2097

To encourage and facilitate the resolution of conflicts involving Indian tribes,  
and for other purposes.

---

## IN THE SENATE OF THE UNITED STATES

MAY 20, 1998

Mr. CAMPBELL introduced the following bill; which was read twice and  
referred to the Committee on Indian Affairs

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## A BILL

To encourage and facilitate the resolution of conflicts  
involving Indian tribes, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Indian Tribal Conflict  
5 Resolution and Tort Claims and Risk Management Act  
6 of 1998”.

7 **SEC. 2. FINDINGS; PURPOSES.**

8 (a) FINDINGS.—Congress finds that—

1           (1) Indian tribal sovereignty predates the for-  
2           mation of the United States and the United States  
3           Constitution;

4           (2) a unique legal and political relationship ex-  
5           ists between the United States and Indian tribes;

6           (3) through treaties, statutes, Executive orders,  
7           and course of dealing, the United States has recog-  
8           nized tribal sovereignty and the unique relationship  
9           that the United States has with Indian tribes;

10          (4) Indian tribal governments exercise govern-  
11          mental authority and powers over persons and ac-  
12          tivities within the territory and lands under the ju-  
13          risdiction of those governments;

14          (5) conflicts involving Indian tribal governments  
15          may necessitate the active involvement of the United  
16          States in the role of the trustee for Indian tribes;

17          (6) litigation involving Indian tribes, that often  
18          requires the United States to intervene as a litigant,  
19          is costly, lengthy, and contentious;

20          (7) for many years, alternative dispute resolu-  
21          tion has been used successfully to resolve disputes in  
22          the private sector, and in the public sector;

23          (8) alternative dispute resolution—

24                 (A) results in expedited decisionmaking;  
25                 and



1 (B) is less costly, and less contentious than  
2 litigation;

3 (9) it is necessary to facilitate intergovern-  
4 mental agreements between Indian tribes and States  
5 and political subdivisions thereof;

6 (10) Indian tribes have made significant  
7 achievements toward developing a foundation for  
8 economic self-sufficiency and self-determination, and  
9 that economic self-sufficiency and self-determination  
10 have increased opportunities for the Indian tribes  
11 and other entities and persons to interact more fre-  
12 quently in commerce and intergovernmental relation-  
13 ships;

14 (11) although Indian tribes have sought and se-  
15 cured liability insurance coverage to meet their  
16 needs, many Indian tribes are faced with significant  
17 barriers to obtaining liability insurance because of  
18 the high cost or unavailability of such coverage in  
19 the private market;

20 (12) as a result, Congress has extended liability  
21 coverage provided to Indian tribes to organizations  
22 to carry out activities under the Indian Self-Deter-  
23 mination and Education Assistance Act (25 U.S.C.  
24 450 et seq.); and

1           (13) there is an emergent need for comprehen-  
2       sive and cost-efficient insurance that allows the  
3       economy of Indian tribes to continue to grow and  
4       provides compensation to persons that may suffer  
5       personal injury or loss of property.

6       (b) PURPOSES.—The purposes of this Act are to en-  
7       able Indian tribes, tribal organizations, States and politi-  
8       cal subdivisions thereof, through viable intergovernmental  
9       agreements to—

10           (1) achieve intergovernmental harmony; and

11           (2) enhance intergovernmental commerce.

12   **SEC. 3. DEFINITIONS.**

13       In this Act:

14           (1) **FEDERAL AGENCY.**—The term “Federal  
15       agency” has the meaning given the term “Executive  
16       agency” in section 105 of title 5, United States  
17       Code.

18           (2) **INDIAN COUNTRY.**—The term “Indian coun-  
19       try” has the meaning given that term in section  
20       1151 of title 18, United States Code.

21           (3) **INDIAN TRIBE.**—The term “Indian tribe”  
22       has the meaning given that term in section 4(e) of  
23       the Indian Self-Determination and Education Assist-  
24       ance Act (25 U.S.C. 450b(e)).

1           (4) PANEL.—The term “Panel” means the  
2 Intergovernmental Alternative Dispute Panel estab-  
3 lished under section 103.

4           (5) SECRETARY.—The term “Secretary” means  
5 the Secretary of the Department of the Interior.

6           (6) STATE.—The term “State” means each of  
7 the 50 States and the District of Columbia.

8           (7) TRIBAL ORGANIZATION.—The term “tribal  
9 organization” has the meaning given that term in  
10 section 4(l) of the Indian Self-Determination and  
11 Education Assistance Act (25 U.S.C. 450b(l)).

12 **SEC. 4. DECLARED POLICY OF THE UNITED STATES.**

13 It is the policy of the United States—

14           (1) to continue to preserve and protect Indian  
15 tribes, Indian people, and trust resources and prop-  
16 erty of Indian tribes; and

17           (2) that the settlement of issues and disputes  
18 involving Indian tribes and States or political sub-  
19 divisions thereof, through negotiation and accommo-  
20 dation, may be advanced by making available full  
21 and adequate governmental facilities for fact finding,  
22 conciliation, mediation, and voluntary arbitration to  
23 aid and encourage Indian tribes, States, and political  
24 subdivisions thereof—

25           (A) to reach and maintain agreements; and

1 (B) to make reasonable efforts to settle  
2 differences by mutual agreement reached by  
3 such methods as may be provided for in any ap-  
4 plicable agreement for the settlement of dis-  
5 putes.

## 6 **TITLE I—INTERGOVERNMENTAL** 7 **AGREEMENTS**

### 8 **SEC. 101. INTERGOVERNMENTAL COMPACT AUTHORIZA-** 9 **TION.**

10 (a) IN GENERAL.—The consent of the United States  
11 is granted to States and Indian tribes to enter into com-  
12 pacts and agreements in accordance with this title.

13 (b) COLLECTION OF TAXES.—Consistent with the  
14 United States Constitution, treaties, and principles of trib-  
15 al and State sovereignty, and consistent with Supreme  
16 Court decisions regarding the collection and payment of  
17 certain retail taxes of a State or political subdivision  
18 thereof, the consent of the United States is hereby given  
19 to Indian tribes, tribal organizations, and States and  
20 States and Indian tribes may to enter into compacts and  
21 agreements relating to the collection and payment of cer-  
22 tain retail taxes.

23 (c) FILING.—Not later than 30 days after entering  
24 into an agreement or compact under this section, a State  
25 or Indian tribe shall submit a copy of the compact or

1 agreement to the Secretary. Upon receipt of the compact  
2 or agreement, the Secretary shall publish the compact or  
3 agreement in the Federal Register.

4 (d) LIMITATIONS.—

5 (1) IN GENERAL.—An agreement or compact  
6 under this section shall not affect any action or pro-  
7 ceeding over which a court has assumed jurisdiction  
8 at the time that the agreement or compact is exe-  
9 cuted.

10 (2) PROHIBITION.—No action or proceeding de-  
11 scribed in paragraph (1) shall abate by reason of  
12 that agreement or compact unless specifically agreed  
13 upon by all parties—

14 (A) to the action or proceedings; and

15 (B) to the agreement or compact.

16 (e) REVOCATION.—An agreement or compact entered  
17 into under this section shall be subject to revocation by  
18 any party to that agreement or compact. That revocation  
19 shall take effect on the earlier of—

20 (1) the date that is 180 days after the date on  
21 which notice of revocation is provided to each party  
22 to that agreement or compact; or

23 (2) any date that is agreed to by all parties to  
24 that agreement or compact.

1       (f) REVISION OR RENEWAL.—Upon the expiration or  
2 revocation of an agreement or compact under this section,  
3 the parties to such agreement or compact may enter into  
4 a revised agreement or compact, or may renew that agree-  
5 ment or compact.

6       (g) EFFECT OF RENEWAL.—For purposes of this  
7 title, the renewal of an agreement or compact entered into  
8 under this title shall be treated as a separate agreement  
9 or compact and shall be subject to the limitations and re-  
10 quirements applicable to an initial agreement or compact.

11       (h) STATUTORY CONSTRUCTION.—Nothing in this  
12 title shall be construed to—

13               (1) except as expressly provided in this title, ex-  
14 pand or diminish the jurisdiction over civil or crimi-  
15 nal matters that may be exercised by a State or the  
16 governing body of an Indian tribe; or

17               (2) authorize or empower a State or tribal gov-  
18 ernment, either separately or pursuant to agree-  
19 ment, to expand or diminish the jurisdiction exer-  
20 cised by the Government of the United States to—

21                       (A) make criminal, civil, or regulatory  
22 laws; or

23                       (B) enforce those laws in Indian country.

1 **SEC. 102. INTERGOVERNMENTAL NEGOTIATIONS-PROCE-**  
2 **DURES.**

3 (a) **GOOD FAITH NEGOTIATIONS.**—In negotiating a  
4 claim, the parties shall conduct full and fair good faith  
5 negotiations pursuant to this title, with the objective of  
6 achieving an intergovernmental agreement or compact  
7 that meets the requirement of this title.

8 (b) **REQUEST FOR NEGOTIATIONS.**—

9 (1) **IN GENERAL.**—An Indian tribe or a State  
10 may request the Secretary to initiate negotiations to  
11 address a claim covered under this title.

12 (2) **NOTIFICATION.**—The Secretary shall notify  
13 the parties of any request made under paragraph  
14 (1).

15 (3) **REQUESTS.**—Any request made to the Sec-  
16 retary under this subsection shall be in writing.

17 (4) **PARTICIPATION AS A PREREQUISITE TO IN-**  
18 **VOKE PROCEDURES UNDER SECTION 103.**—

19 (A) **IN GENERAL.**—A party may not file a  
20 claim under section 103 unless that party is  
21 available for, agrees to, and participates in, ne-  
22 gotiations under this section.

23 (B) **NOTICE.**—Upon receipt of any request  
24 made pursuant to paragraph (1), the Secretary  
25 shall, not later than 30 days after such receipt,  
26 send a notice by registered mail, return receipt

## 10

1 requested, advising the parties that are subject  
2 to a request made under paragraph (1), that no  
3 party may file a claim under section 103 with-  
4 out having participated in negotiations under  
5 this section.

## 6 (c) NEGOTIATIONS.—

7 (1) IN GENERAL.—The Secretary shall, in a  
8 manner consistent with section 103, cause to occur  
9 and facilitate negotiations that are subject to a re-  
10 quest under subsection (a).

11 (2) NON-BINDING NATURE OF NEGOTIA-  
12 TIONS.—Consistent with the purposes of this title,  
13 the negotiations referred to in paragraph (1) shall—

14 (A) be nonbinding; and

15 (B) be facilitated by a mediator selected in  
16 accordance with section 103.

## 17 (3) SELECTION OF MEDIATOR.—

18 (A) IN GENERAL.—The Secretary shall se-  
19 lect 3 mediators from a list supplied by the  
20 Federal Mediation and Conciliation Service and  
21 submit a list of these mediators to the parties.

22 (B) CHALLENGES.—Each party may chal-  
23 lenge the selection of 1 of the mediators listed  
24 by the Secretary under subparagraph (A).



1 (C) SELECTION.—After each party has  
2 had an opportunity to challenge the list made  
3 by the Administrator under subparagraph (B),  
4 the Secretary shall select a mediator from the  
5 list who is not subject to such a challenge.

6 (4) PAYMENT.—The expenses and fees of the  
7 mediator selected under paragraph (3) in facilitating  
8 negotiations under paragraph (1) shall be paid by  
9 the Secretary.

10 (5) REIMBURSEMENT.—If a party that files a  
11 claim under section 103 and that party is not the  
12 prevailing party in that claim, that party shall reim-  
13 burse the Secretary for any fees and expenses in-  
14 curred by the Secretary pursuant to paragraph (4).

15 (d) PROCEDURES.—Negotiations conducted under  
16 this title shall be subject to the following procedures:

17 (1) COMMENCEMENT.—Negotiations conducted  
18 under this section shall commence as soon as prac-  
19 ticable after the party that receives notice under  
20 subsection (b)(4)(B) responds to the Secretary.

21 (2) ADDITIONAL INVESTIGATION, RESEARCH,  
22 OR NEGOTIATION.—

23 (A) IN GENERAL.—Each party that enters  
24 into negotiation under this section and the Sec-  
25 retary may agree to additional investigation, re-

1 search, or analysis to facilitate a negotiated set-  
2 tlement.

3 (B) PAYMENTS.—The cost of the addi-  
4 tional investigation, research, or analysis re-  
5 ferred to in subparagraph (A) shall be borne by  
6 the party that undertakes that investigation, re-  
7 search, or analysis, or causes that investigation,  
8 research, and analysis.

9 (3) EXCHANGE OF RECORDS AND DOCUMENTA-  
10 TION.—Each party that enters into negotiations  
11 under this section shall exchange, and make avail-  
12 able to the Secretary, any records, documents, or  
13 other information that the party may have with re-  
14 gard to transactions within the scope of the claims  
15 alleged that—

16 (A) may be relevant to resolving the nego-  
17 tiations; and

18 (B) are not privileged information under  
19 applicable law, or otherwise subject to restric-  
20 tions on disclosure under applicable law.

21 (4) TERMINATION.—

22 (A) IN GENERAL.—

23 (i) TERMINATION.—Except as pro-  
24 vided in clause (i) and subparagraph (B),  
25 negotiations conducted under this section

## 13

1 shall terminate on the date that is 1 year  
2 after the date of the first meeting of the  
3 parties to conduct negotiations under this  
4 section.

5 (ii) MUTUAL AGREEMENT.—The pe-  
6 riod for negotiations under clause (i) may  
7 be extended if the parties and the Sec-  
8 retary agree that there is a reasonable like-  
9 lihood that the extension may result in a  
10 negotiated settlement.

11 (B) MUTUAL AGREEMENT.—At any time  
12 during negotiations under this section, the par-  
13 ties may mutually agree to terminate the nego-  
14 tiations.

15 (C) FULFILLMENT OF CERTAIN REQUIRE-  
16 MENTS.—A party shall be considered to have  
17 met the requirements described in subsection  
18 (b)(4) in any case in which negotiations are ter-  
19 minated by mutual agreement of the parties  
20 under subparagraph (B).

21 (e) NEGOTIATED SETTLEMENTS.—

22 (1) IN GENERAL.—A negotiated settlement of a  
23 claim covered by this title reached by the parties  
24 under this section shall constitute the final, com-  
25 plete, and conclusive resolution of that claim.

1           (2) **ALTERNATIVE DISPUTE RESOLUTION.**—Any  
2       claim, setoff, or counterclaim (including any claim,  
3       setoff, or counterclaim described in section 103(c))  
4       that is not subject to a negotiated settlement under  
5       this section may be pursued by the parties or the  
6       Secretary pursuant to section 103.

7 **SEC. 103. INTERGOVERNMENTAL ALTERNATIVE DISPUTE**  
8 **RESOLUTION PANEL—ESTABLISHMENT.**

9       (a) **IN GENERAL.**—If negotiations conducted under  
10      section 103 do not result in a settlement, the Secretary  
11      may refer the State and Indian tribe involved to the Panel  
12      established under subsection (b).

13      (b) **AUTHORITY OF PANEL.**—To the extent allowable  
14      by law, the Panel may consider and render a decision on  
15      a dispute referred to the Panel under this section.

16      (c) **TAXATION.**—Any claim involving the legitimacy of  
17      a claim for the collection or payment of certain retail taxes  
18      owed by an Indian tribe to a State or political subdivision  
19      thereof and shall include or admit of counterclaims,  
20      setoffs, or related claims submitted or filed by the tribe  
21      in question regarding the original claim.

22      (d) **MEMBERSHIP OF THE PANEL.**—

23           (1) **IN GENERAL.**—The Panel shall consist of—

24                   (A) 1 representative from the Department  
25                   of the Interior;

1 (B) 1 representative from the Department  
2 of Justice;

3 (C) 1 representative from the Department  
4 of the Treasury;

5 (D) 1 representative of State governments;  
6 and

7 (E) 1 representative of tribal governments  
8 of Indian tribes.

9 (2) CHAIRPERSON.—The members of the Panel  
10 shall select a Chairperson from among the members  
11 of the Panel.

12 (e) FEDERAL MEDIATION CONCILIATION SERVICE.—

13 (1) IN GENERAL.—In a manner consistent with  
14 this title, the Panel shall consult with the Federal  
15 Mediation Conciliation Service (referred to in this  
16 subsection as the “Service”<sup>1</sup>) established under sec-  
17 tion 202 of the National Labor Relations Act (29  
18 U.S.C. 172).

19 (2) DUTIES OF SERVICE.—The Service shall,  
20 upon request of the Panel and in a manner consist-  
21 ent with applicable law—

22 (A) provide services to the Panel to aid in  
23 resolving disputes brought before the Panel;

24 (B) furnish employees to act as neutrals  
25 (as that term is defined in section 571(9) of

## 16

1 title 5, United States Code) in resolving the dis-  
 2 putes brought before the Panel; and

3 (C) consult with the Administrative Con-  
 4 ference of the United States to maintain a ros-  
 5 ter of neutrals and arbitrators.

6 **SEC. 104. JUDICIAL ENFORCEMENT.**

7 (a) INTERGOVERNMENTAL AGREEMENTS.—

8 (1) IN GENERAL.—

9 (A) JURISDICTION.—Except as provided in  
 10 subparagraph (B), the district courts of the  
 11 United States shall have original jurisdiction  
 12 with respect to—

13 (i) any civil action, claim, counter-  
 14 claim, or setoff, brought by any party to  
 15 an agreement or compact entered into in  
 16 accordance with this title to secure equi-  
 17 table relief, including injunctive and declar-  
 18 atory relief; and

19 (ii) the enforcement of any agreement  
 20 or compact.

21 (B) DAMAGES.—No action to recover dam-  
 22 ages arising out of or in connection with an  
 23 agreement or compact entered into under this  
 24 section may be brought, except as specifically  
 25 provided for in that agreement or compact.

1           (2) CONSENT TO SUIT.—Each compact or  
 2       agreement entered into under this title shall specify  
 3       that the partner consent to litigation to enforce the  
 4       agreement, and to the extent necessary to enforce  
 5       that agreement, each party waives any defense of  
 6       sovereign immunity.

7       **SEC. 105. JOINT TRIBAL-FEDERAL-STATE COMMISSION ON**  
 8                               **INTERGOVERNMENTAL AFFAIRS.**

9       (a) IN GENERAL.—The Secretary shall establish a  
 10      tribal, Federal, and State commission (to be known as the  
 11      “Tribal-Federal-State Commission”) (referred to in this  
 12      section as the “Commission”).

13      (b) MEMBERS.—

14           (1) IN GENERAL.—The Commission shall be  
 15      comprised of representatives of Indian tribes, the  
 16      States, and the Federal Government.

17           (2) DUTIES OF THE COMMISSION.—The Com-  
 18      mission shall advise the Secretary concerning issues  
 19      of intergovernmental concern with respect to Indian  
 20      tribes, States, and the Federal Government, includ-  
 21      ing—

- 22                   (A) law enforcement;
- 23                   (B) civil and criminal jurisdiction;
- 24                   (C) taxation;
- 25                   (D) transportation;

1 (E) economy development; and

2 (F) other matters related to a matter de-  
3 scribed in subparagraph (A), (B), (C), (D), or  
4 (E).

5 (3) PERIOD OF APPOINTMENT.—Members shall  
6 be appointed for the life of the Commission. Any va-  
7 cancy in the Commission shall not affect its powers,  
8 but shall be filled in the same manner as the origi-  
9 nal appointment.

10 (4) INITIAL MEETING.—No later than 30 days  
11 after the date on which all members of the Commis-  
12 sion have been appointed, the Commission shall hold  
13 its first meeting.

14 (5) MEETINGS.—The Commission shall meet at  
15 the call of the Chairman.

16 (6) QUORUM.—A majority of the members of  
17 the Commission shall constitute a quorum, but a  
18 lesser number of members may hold hearings.

19 (7) CHAIRMAN AND VICE CHAIRMAN.—The  
20 Commission shall select a Chairman and Vice Chair-  
21 man from among its members.

22 (8) POWERS.—

23 (A) HEARINGS.—The Commission may  
24 hold such hearings, sit and act at such times  
25 and places, take such testimony, and receive



1 such evidence as the Commission considers ad-  
2 visable to carry out the purposes of this section.

3 (B) INFORMATION FROM FEDERAL AGEN-  
4 CIES.—The Commission may secure directly  
5 from any Federal department or agency such  
6 information as the Commission considers nec-  
7 essary to carry out the provisions of this Act  
8 section. Upon request of the Chairman of the  
9 Commission, the head of such department or  
10 agency shall furnish such information to the  
11 Commission.

12 (C) POSTAL SERVICES.—The Commission  
13 may use the United States mails in the same  
14 manner and under the same conditions as other  
15 departments and agencies of the Federal Gov-  
16 ernment.

17 (D) GIFTS.—The Commission may accept,  
18 use, and dispose of gifts or donations of serv-  
19 ices or property.

20 (9) COMMISSION PERSONNEL MATTERS.—

21 (A) COMPENSATION OF MEMBERS.—Each  
22 member of the Commission who is not an offi-  
23 cer or employee of the Federal Government  
24 shall be compensated for each day (including  
25 travel time) during which such member is en-

1 gaged in the performance of the duties of the  
2 Commission. All members of the Commission  
3 who are officers or employees of the United  
4 States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

7 (B) TRAVEL EXPENSES.—The members of  
8 the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Commission.

15 (c) REPORT.—Not later than 2 years after the date  
16 of enactment of this Act, and annually thereafter, the  
17 Commission shall prepare and submit to the President, the  
18 Committee on Indian Affairs of the Senate, and the Committee on Resources of the House of Representatives a report on the implementation of this title that includes any  
20 recommendations that the Commission determines to be  
21 appropriate.

23 **SEC. 106. FUNDING AND IMPLEMENTATION.**

24 (a) IN GENERAL.—With respect to any agreement or  
25 compact between an Indian tribe and a State, the United

1 States, upon agreement of the parties and the Secretary,  
 2 may provide financial assistance to such parties for costs  
 3 of personnel or administrative expenses in an amount not  
 4 to exceed 100 percent of the costs incurred by the parties  
 5 as a consequence of that agreement or compact, including  
 6 any indirect costs of administration that are attributable  
 7 to the services performed under the agreement or compact.

8 (b) ASSISTANCE.—The head of each Federal agency  
 9 may, to the extent allowable by law and subject to the  
 10 availability of appropriations, provide technical assistance,  
 11 material support, and personnel to assist States and In-  
 12 dian tribes in the implementation of the agreements or  
 13 compacts entered into under this title.

## 14 **TITLE II—TORT LIABILITY** 15 **INSURANCE**

### 16 **SEC. 201. LIABILITY INSURANCE, WAIVER OF DEFENSE.**

17 (a) TRIBAL PRIORITY ALLOCATION DEFINED.—The  
 18 term “tribal priority allocation” means an allocation to a  
 19 tribal priority account of an Indian tribe by the Bureau  
 20 of Indian Affairs to allow that Indian tribe to establish  
 21 program priorities and funding levels.

22 (b) INSURANCE.—

23 (1) IN GENERAL.—Except as provided in para-  
 24 graph (3), not later than 2 years after the date of  
 25 enactment of this Act, the Secretary shall obtain or

1 provide tort liability insurance or equivalent coverage  
2 for each Indian tribe that receives a tribal priority  
3 allocation from amounts made available to the Bu-  
4 reau of Indian Affairs for the operation of Indian  
5 programs.

6 (2) COST-EFFECTIVENESS.—In carrying out  
7 paragraph (1), the Secretary shall—

8 (A) ensure that the insurance or equivalent  
9 coverage is provided in the most cost-effective  
10 manner available; and

11 (B) for each Indian tribe referred to in  
12 paragraph (1), take into consideration the ex-  
13 tent to which the tort liability is covered—

14 (i) by privately secured liability insur-  
15 ance; or

16 (ii) chapter 171 of title 28, United  
17 States Code (commonly referred to as the  
18 “Federal Tort Claims Act”) by reason of  
19 an activity of the Indian tribe in which the  
20 Indian tribe is acting in the same capacity  
21 as an agency of the United States.

22 (3) LIMITATION.—If the Secretary determines  
23 that an Indian tribe, described in paragraph (1), has  
24 obtained liability insurance in an amount and of the  
25 type that the Secretary determines to be appropriate

1       by the date specified in paragraph (1), the Secretary  
2       shall not be required to provide additional coverage  
3       for that Indian tribe.

4       (c) REQUIREMENTS.—A policy of insurance or a doc-  
5       ument for equivalent coverage under subsection (a)(1)  
6       shall—

7           (1) contain a provision that the insurance car-  
8       rier shall waive any right to raise as a defense the  
9       sovereign immunity of an Indian tribe with respect  
10      to an action involving tort liability of that Indian  
11      tribe, but only with respect to tort liability claims of  
12      an amount and nature covered under the insurance  
13      policy or equivalent coverage offered by the insur-  
14      ance carrier; and

15          (2) not waive or otherwise limit the sovereign  
16      immunity of the Indian tribe outside or beyond the  
17      coverage or limits of the policy of insurance or  
18      equivalent coverage.

19      (d) PROHIBITION.—No waiver of the sovereign im-  
20      munity of a Indian tribe under this section shall include  
21      a waiver of any potential liability for—

22          (1) interest that may be payable before judg-  
23      ment; or

24          (2) exemplary or punitive damages.

1 (e) PREFERENCE.—In obtaining or providing tort li-  
2 ability insurance coverage for Indian tribes under this sec-  
3 tion, the Secretary shall, to the greatest extent practicable,  
4 give preference to coverage underwritten by Indian-owned  
5 economic enterprises, as defined in section 3 of the Indian  
6 Financing Act of 1974 (25 U.S.C. 1452), except that for  
7 the purposes of this subsection, those enterprises may in-  
8 clude non-profit corporations.

9 (f) REGULATIONS.—To carry out this title, the Sec-  
10 retary shall promulgate regulations that—

11 (1) provide for the amount and nature of claims  
12 to be covered by an insurance policy or equivalent  
13 coverage provided to an Indian tribe under this title;  
14 and

15 (2) establish a schedule of premiums that may  
16 be assessed against any Indian tribe that is provided  
17 liability insurance under this title.

18 **SEC. 202. STUDY AND REPORT TO CONGRESS**

19 (a) IN GENERAL.—

20 (1) STUDY.—In order to minimize and, if pos-  
21 sible, eliminate redundant or duplicative liability in-  
22 surance coverage and to ensure that the provision of  
23 insurance of equivalent coverage under this title is  
24 cost-effective, before carrying out the requirements  
25 of section 201, the Secretary shall conduct a com-

1       prehensive survey of the degree, type, and adequacy  
2       of liability insurance coverage of Indian tribes at the  
3       time of the study.

4           (2) CONTENTS OF STUDY.—The study con-  
5       ducted under this subsection shall include—

6                   (A) an analysis of loss data;

7                   (B) risk assessments;

8                   (C) projected exposure to liability, and re-  
9       lated matters; and

10                  (D) the category of risk and coverage in-  
11       volved which may include—

12                           (i) general liability;

13                           (ii) automobile liability;

14                           (iii) the liability of officials of the In-  
15       dian tribe;

16                           (iv) law enforcement liability;

17                           (v) workers' compensation; and

18                           (vi) other types of liability contin-  
19       gencies.

20           (3) ASSESSMENT OF COVERAGE BY CATEGORIES  
21       OF RISK.—For each Indian tribe described in section  
22       201(a)(1), for each category of risk identified under  
23       paragraph (2), the Secretary, in conducting the  
24       study, shall determine whether insurance coverage  
25       other than coverage to be provided under this title

1 or coverage under chapter 171 of title 28, United  
2 States Code, applies to that Indian tribe for that ac-  
3 tivity.

4 (b) REPORT.—Not later than 3 years after the date  
5 of enactment of this Act, and annually thereafter, the Sec-  
6 retary shall submit a report to Congress concerning the  
7 implementation of this title, that contains any legislative  
8 recommendations that the Secretary determines to be ap-  
9 propriate to improve the provision of insurance of equiva-  
10 lent coverage to Indian tribes under this title, or otherwise  
11 achieves the goals and objectives of this title.

○



The CHAIRMAN. We'll start with our first panel. That will be Kevin Gover Assistant Secretary for Indian Affairs; Eileen Hoffman, the Federal Mediation and Conciliation Service; Renny Fagan, the Colorado Department of Revenue; Timothy Columbus, the National Association of Convenience Stores, and Billy Frank, the Chairman of Northwest Indian Fisheries Commission.

I will tell the panel, as we do with all of our panels, that all of their complete written testimony will be included in the record, and we operate this committee with a little light system, which you can see ahead of you. When that little red light goes on, that means it's time to wrap up your verbal presentation and turn it over to the next person.

We'll start with Kevin Gover first.

**STATEMENT OF KEVIN GOVER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC**

Mr. GOVER. Good morning, Mr. Chairman.

We're wading into some broad and often murky waters here, and I think there are a few points that we would like to make. First, certainly, a process or a tribal State or tribal local agreement is always the best way to proceed in any sort of jurisdictional contest. What we have found, and certainly my experience as a private attorney over the years, was that these problems can be resolved at the local level and that in point of fact only very rarely is any Federal approval of that sort of thing required. So there is some question about the need for specific authorization to complete these sorts of agreements.

A second thing I'd like to point out is that we do encourage negotiated or even mediated resolution of these issues, and quite often they're less contentious than they at first seem. It's when we sort of find ourselves caught in the place of arguing positions and principles rather than practical outcomes that we find it difficult to agree.

The third thing I would like to point out is it seems to me we don't yet know the scope of the problems that we're trying to address. I testified at a hearing in the other body a couple of weeks ago on the issue of the collection of retail taxes on Indian lands, and there are many more subtleties and complexities to the issue than meet the eye. So, for example, the States do, in my judgment, have an effective remedy for tribes that fail to pay fuel taxes, and many States have adopted laws that collect the taxes prior to the fuels' entry into the reservation. If a State chooses to do so, so be it—that is a tax the Supreme Court has said can be collected.

Other States, however, have chosen not to do that, and I don't think we should assume that is not a deliberate choice. In the State of New Mexico, for example, there have been proposals for the last several years to amend the State laws so that those taxes can be collected on wholesale purchases by tribes on the reservations. The State could do that but it has chosen not to, and it has chosen not to, in my opinion, because the legislature has made the political judgment that they wish for the tribes to have that advantage, and we should be careful about assuming, again, that is not a deliberate choice or one that the State is unwilling to live with.

That brings us to the issue of cigarette taxation, and that's a difficult one because the States often do not have an effective remedy that is attractive—I mean, they do have the option of seizing shipments and that sort of thing, but I don't think the tribes or the States are particularly interested in that method of tax collection. To that I would say that it seems to me that we are occasionally asking the wrong question. It is true, as Senator Gorton points out, that the Supreme Court has said that tax can be collected, and, in fact, that the tribes can be required to collect it on sales to non-Indians. The question is whether we should require that.

One of the questions that remain unanswered in the debates that are taking place on the Hill is this—States have been authorized by the Supreme Court to tax on the reservations, but are they providing services to which reservation residents, Indian or non-Indian, are entitled? I believe that the balance of payment, if you will, in terms of State tax collection on the reservation and services provided by the States to the reservation is probably badly out of balance, and so some of the oddities that we see, like tribal smoke shops, are minimal compared to the impact of State taxation on the reservations. Because the States can tax and regulate on the reservations in at least some circumstances, the tribes are deprived of the ability every other government has to establish economic policy through taxation and regulation, and that is the great barrier to economic development on Indian lands.

Mr. Chairman, my time is up. Thank you very much for this opportunity.

[Prepared statement of Mr. Gover appears in appendix.]

The CHAIRMAN. Thank you.

We'll go on to Ms. Hoffman.

Senator GORTON. Excuse, Mr. Chairman. I certainly would like to hear Mr. Gover's opinion on the tort part, even if it requires him to have a little bit of extra time.

The CHAIRMAN. Do you have some comments dealing with torts?

Senator GORTON. It does certainly impacts BIA—do a lot of work on it.

Mr. GOVER. We have some thoughts on that matter, Mr. Chairman.

We do think that insurance is a likely vehicle for the resolution of many of these problems. We think, obviously, that persons injured by the tortious conduct of a tribal government need to be compensated. We think insurance is the better way to approach that, rather than waivers of sovereign immunity. We are not anxious, frankly, to become the insurer of tribal government activity or the insurance agent of the tribal governments. We think that the key provision in this bill is the requirement that we go out and look at the issue and try to understand with more specificity the degree of the problem.

There have been two excellent studies conducted under contracts awarded by the Department of Health and Human Services that I want to bring to the committee's attention where they look at the issue of access to private liability insurance for the tribes, and there are some very important observations and recommendations made in those studies, and I recommend them to the committee. I do believe this is an area worth pursuing.

I think it would be wise, however, for us to understand, again, the degree of the problem almost on a reservation by reservation basis before legislating on the matter, and we would be happy to work with the committee on defining the scope of an analysis to be carried out by ourselves and the Indian Health Service, I might add, to try to define the scope of the problem before we sort of go in with provisions, especially provisions that create some fairly burdensome requirements on the Bureau and on the Department to provide insurance or create some form of insurance coverage for the tribes.

The CHAIRMAN. Ms. Hoffman.

**STATEMENT OF EILEEN HOFFMAN, FEDERAL MEDIATION AND CONCILIATION SERVICE, WASHINGTON, DC**

Ms. HOFFMAN. Good morning, Mr. Chairman, Mr. Vice Chairman, and members of the committee.

My name is Eileen Barkas Hoffman. I'm the Director of Special Projects at the Federal Mediation and Conciliation Service. I'm submitting our testimony, for our Acting Director, Richard Barnes, for the record, and want to spend the next 5 minutes summarizing, and, of course, will answer any questions.

We applaud the committee's efforts, with S. 2097, which in its preamble says, "To encourage and facilitate the resolution of conflicts involving Indian tribes." Many of you may be familiar with the work of the Federal Mediation and Conciliation Service, but, briefly, we are a Federal agency that was established by Congress in 1947 to mediate labor disputes and provide facilities for arbitration to avoid interruptions in interstate commerce.

Our responsibilities and expertise however, have expanded over the years, as we've been called upon to use the techniques of dispute resolution in other fields—to provide training in conflict resolution to labor management and others, did mediation services abroad and to entertain foreign delegations looking at how Americans resolve conflict.

Today, not only does FMCS offer dispute resolution services to labor and management, our original jurisdiction in the Federal Government, to companies and unions involved with interstate commerce and to States where they don't have a mediation service, but increasingly we are being asked to offer our services in other fields—call it alternative dispute resolution. And this is especially so under the Administrative Dispute Resolution Act of 1996, and its predecessor legislation in 1990.

A brief account of some of our efforts are included in our testimony. We have more than 300 employees situated throughout the United States, five regional offices and 200 staff mediators who are working with the parties to design their own systems, to work on resolving problems and to avoid litigation, if possible, in the courts. We also have a roster of more than 1,500 arbitrators who are private citizens who render awards in contract formation and interpretation disputes.

I don't want to say that we are the only organization. I think we are the largest—and I'm prejudice—the best Federal organization in terms of dispute resolution, but we are looking outward and inward at ways to resolve problems. Congress looked at us as well.

In 1970 we were asked in—and one of our former directors actually mediated a land dispute involving the Navajo and Hopi Indian Tribes. Increasingly, we have been doing some work with Native Americans, and some of our experiences with the Indian tribes are included. We've been doing negotiated rulemaking involving Native American housing to produce by consensus a comprehensive regulation that deals with the implementation of the Native American Housing Assistance and Self-Determination Act of 1996. We've also done work with Indian self-determination regulatory negotiations.

In all of these efforts we tend to use a team of mediators who work throughout the United States and who have built up their expertise and experience looking at such issues as tribal self-determination, self-governance, housing and other issues. And what we've seen is that through negotiations first and then facilitation tribal leaders, concerned parties and those affected by the actions of tribal governments can find common ground and develop innovative solutions, rules and regulations.

Some general comments, though, on the legislation and the reason we're here. First, of course, we salute the use of ADR to resolve these issues, but we have some concerns, and I appreciate when you said it's a work in progress.

About the structures and the procedures in the proposed legislation—specifically, under section 101 of S. 2097 FMCS would provide the mediation and other dispute resolution services to assist the negotiations, and under section 103 would assist the newly formed intergovernmental ADR or alternative dispute resolution panel, and we have a few questions for clarification about this legislation, but, in general, as I mentioned, support its mission.

The nature of the negotiations—are they going to be binding or non-binding? We would hope but it seems a little confusing, but that may be just my reading of the text that in fact if there is no agreement it isn't binding, but, of course, every effort would be to have it binding if the parties agree.

The nature of the mediation—we also wonder if the mediation is going to be mandatory or optional and we would opt that it be optional, if possible. We believe if the tribes and all parties concerned can reach a resolution themselves, that's the most important thing.

On the period of negotiation we would like that clarified.

I see that my time is up—I had a few more moments, but it's up to you.

The CHAIRMAN. We'll get back to you during the questions.

Ms. HOFFMAN. Okay, thank you.

[Prepared statement of Mr. Barnes appears in appendix.]

The CHAIRMAN. We'll go on with Mr. Fagan.

#### **STATEMENT OF RENNY FAGAN, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE, DENVER, CO**

Mr. FAGAN. Thank you, Mr. Chairman, and members of the committee. My name is Renny Fagan and I'm the Executive Director of the Colorado Department of Revenue. Thank you for the opportunity to testify on the tax issues related to this bill.

Colorado's experience with the Southern Ute and Ute Mountain Ute Tribes is that negotiated settlements are an effective tool to both resolve disputes, and also to form long-standing economic

partnerships, and in that regard we see S. 2097 as an important means to bring parties together and establish a mediated settlement or a negotiated settlement, and, therefore, it can be an effective public policy tools for tribes and States.

It seems to me that there's some need for negotiated settlements that arise from the State of law itself regarding transactions taking place on tribal lands that involve non-Indians. As I understand the law, the courts really apply a balancing test between the tribal interests and self-government and self-determination versus the States' interest in collecting revenues for services provided to all, and that test is done on an individual fact-by-fact basis. In that kind of situation, obviously, either party has the risk of loss, and, therefore, a negotiated settlement seems like a negotiated settlement seems like a much better way to work things out. Even if the State wins, there are enforcement problems to the States, which have been touched on today.

A second main need is that there's a growing need for mutual economic success together, and that is better formed through negotiation and mediation rather than through conflict. I would like to briefly talk about an example of a tax compact in Colorado involving the Southern Ute Tribe, the county of LaPlata and the State of Colorado that dealt with oil and gas producing lands that were located within the Southern Ute Tribal Reservation, but the specific lands were reacquired by the tribe over time in their original origins in terms of allotment and whether they were alienated and whatnot was really at issue. The county was concerned that the reacquisition of lands by the tribes would lead to a loss of its tax base. The parties fought it out in court with the tribes winning in the Federal District Court and also that being reversed by the Tenth Circuit. So at that point the parties sat down. The Lieutenant Governor of the State came in as a party to negotiate, along with the former Director of Natural Resources for the State that was hired by the county, and the tribes showed great leadership and willingness to resolve the dispute.

The way it ended up was a classic compromise, I think, of the tribe retaining its sovereignty and with an explicit tax compact that says that the State and county may not assess the lands, but in return the tribe took the bold step of agreeing to pay, make voluntary payments, in the amount of the taxes that would be owed.

So it was a good win-win situation for an agreement, and it shows that negotiation can work based upon principled negotiations.

Another example would be in the gaming compacts that the State has with both the Southern Ute and Ute Mountain Ute Tribes that I was involved in that similarly involved successful negotiations based upon those issues of sovereignty and the issues concerning the State, which was to make sure that gaming conformed to what was legal in Colorado and did not exceed that. So our experience is that negotiated settlements can be effective tools and are good ways to form partnerships.

With respect to certain comments on this particular bill, I think the main concern I would see from the State's standpoint is that the language that ties together the claims to be mediated with the claims that go to the panel be narrowed so that it's clear that only

those claims that the parties agreed to put in mediation would be those claims that would be considered by the panel, and in my written testimony I've pointed out some suggestions regarding section 102(e)(2) and section 103(c), as they tie together. Obviously, at any given time, a taxing authority can have several different kinds of disputes going with any taxpayer in the area of tribal law. There are recent cases that have involved race tracks, hotel casinos, cigarette tax, the fuel tax, activities occurring on a recreational lake. All those seem similar but they are actually a little bit different in terms of how the State taxes come up. So I think from the State's standpoint they wouldn't want—if you're trying to mediate or negotiate on one of those particular issues, that you're not opening up every State tax issue there is for the panel to come in and resolve, and I think those can be taken care of by narrowing down the language in those two sections.

Another suggestion would be to change the composition of the panel that would resolve the disputes. The way it's structured now there are three Federal members—one State member and one tribal member. I think from the State's standpoint they want to be assured that this process is going to be fair and that the kind of nuances of State tax laws will be fairly considered.

So my recommendation would be to narrow that panel to three members—one Federal, one State and one tribal—or to somehow expand State membership on that.

Another suggestion would be to continue to have mediation services allowed in the bill, but also to allow the parties to select their own mediators. In our case in Colorado having an outside party has been effective to shed new light on particular disputes and resolutions but they haven't been formal mediators. They have been probably people that have been selected by the parties in their own cases, so I think adding an option that parties can select their own mediators.

That will conclude my comments, thank you.

[Prepared statement of Mr. Fagan appears in appendix.]

The CHAIRMAN. Thank you.

Mr. Columbus.

#### **STATEMENT OF R. TIMOTHY COLUMBUS, COUNSEL TO THE NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND THE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA**

Mr. COLUMBUS. Thank you, Mr. Chairman, and Mr. Vice Chairman. My name is Tim Columbus. I am a member in the law firm of Collier, Shannon, Rill and Scott and appear today on behalf of our clients, the National Association of Convenience Stores and the Society of Independent Gasoline Marketers of America. In the interest of time, Mr. Chairman, I'll summarize my statement.

At the outset, Mr. Chairman, both NACS and SIGMA's members want to commend you and the committee for holding this hearing and for your recognition of and efforts to resolve the problems arising from some Native American tribes of State, excise and sales taxes. All for the reasons I'll explain in a moment, NACS and SIGMA cannot support S. 2097. Both groups recognize its introduc-

tion as an important and positive first step toward getting this problem resolved.

NACS and SIGMA's members do not seek to limit tribal self-government, nor do they seek to deter tribes' legitimate economic development. Rather, SIGMA and NACS seek only to provide the States with an effective means to enforcing Native American tribes obligation to collect and remit to the States excise and sales taxes properly imposed by the State on non-tribal members with whom the tribe has business.

For at least three reasons, NACS and SIGMA cannot support S. 2097, at least with respect to the resolution of disputes regarding claims for the collection and remittance of State-imposed excise and sales taxes.

First, contrary to what I believe, the Chairman's intention was subjecting this type of dispute to the procedure set forth in S. 2097 will not, in our opinion, expedite or reduce the cost of resolving these disputes, but rather it will have exactly the opposite effect. Mr. Chairman, the law in this area is by now well settled. Simply stated, the States may not impose a tax on tribes and their members with respect on Indian land activity, but, likewise, the courts have resolved that the States can impose upon the tribes an obligation to collect and remit taxes lawfully imposed upon non-Native Americans with whom they're doing business.

Consequently, the only factual issues available for resolution in these areas, I believe, are whether or not the taxes are impermissibly imposed upon the tribe or its members. That issue is one of simple, straight-forward statutory construction for which the Federal courts are superbly suited. I will tell you that these cases come forward. They normally go off in the context of summary judgment procedures, and in a relatively short period of time. If we were to take one of these cases, for example, to the Federal Courthouse in Alexandria, I can assure you that we would be done and gone from that courthouse within 90 days.

In contrast, the procedures that I understand to be set forth by S. 2097 would require—could require a minimum of 13 months of negotiation before dispute could be submitted to the panel established under section 103 of the bill. The time then allowed the panel to resolve the issues submitted to it is undetermined. Second, nowhere can I find in S. 2097 a means by which a decision of the section 103 panel can be enforced. I may not understand what's going on here, but I see in section 104 enforcement mechanisms only with respect to agreements or compacts between the tribes and the States.

As a consequence, a party may have submitted to the negotiation process, may have grieved and argued its case before the mediation panel, may have obtained a favorable decision with respect to its position and still have its dispute unresolved because it has no effective means of enforcing that decision.

Third, I want to tell you that we perceive that the creation of a special panel to resolve this type of dispute is duplicative of the Federal courts and would unnecessary politicize this issue. We put individuals on the Federal bench for a life tenure for a reason—it's to depoliticize. Our perception is that the Federal courts are an im-

partial and expert panel, which would be a good place to resolve these disputes.

In summary, while the procedures which S. 2097 were established could be appropriate for the resolution of some State and tribal governmental disputes, we believe they would be inappropriate for the resolution of the type of tax disputes upon which I have focused today. In contrast, the mechanisms which would result from the enactment of S. 2300, which Senator Gorton introduced recently, would achieve a legitimate objective in providing the States and tribes with an efficient and cost-effective means of resolving tax disputes and remedying any impropriety that result from those disputes.

My clients certainly thank you for the opportunity to share their views with you this morning. I will gladly respond to any questions which my testimony may have risen.

[Prepared statement of Mr. Columbus appears in appendix.]

The CHAIRMAN. Senator, would you like to introduce our last panelist?

Senator INOUE. I would like to have this opportunity to say a few words about Billy Frank.

As I am certain Senator Gorton would agree, I know of no other person on Indian country who has spent so much time for so long to bring together diverse interests and parties to bring about amicable solutions. It is through his leadership that agreements among the State of Washington, local governments, private sector companies and individuals and Indian tribes have been forged addressing the management of fisheries, timber and protection of water quality.

I am reminded of one of the cases that Senator Gorton and I worked upon, the Puyallup settlement that now brings about the enhancement and expansion of the Port of Tacoma. Throughout that process I had the good fortune of having Billy Frank at my side to advise me on how to work together with Indian country.

Billy Frank, Mr. Chairman, has encouraged people not only in his State of Washington, but all over the Nation to look upon litigation as the last resort, and to instead explore ways to resolve disputes in a harmonious manner. So I am extremely pleased to have Billy Frank, Chairman of the Northwest Indian Fisheries Commission in Olympia, with us today.

The CHAIRMAN. Thank you.

#### **STATEMENT OF BILLY FRANK, CHAIRMAN, NORTHWEST INDIAN FISHERIES COMMISSION, OLYMPIA, WA**

Mr. FRANK. Thank you. Thank you, Mr. Chairman, and thank you, Senator, for those kind words. I hope we all continue to work together to better all of our lives.

I am Billy Frank, Chairman of the Northwest Indian Fisheries Commission. I've been elected Chairman over the last 20 years by the tribes, the 20 sovereign tribes in Western Washington. I wish that there was a kind of a conflict resolution in my time. I was arrested when I was 14 years old for fishing in front of my house on the Nasqually River, the lower part of the river, and when I was 14 years old, continued to be arrested up until 1974. In over 6 years, 70 times jailed, contempt of court in the State of Washing-



ton, ended up to be the *United States v. Washington*, confirmed by the United States Supreme Court in 1979 that we did indeed have a right to fish where I was fishing.

If we had a conflict resolution at that particular time, maybe we would all be better off here in this setting and start working on the real problems of the water sheds. The water sheds are in trouble in our State of Washington and throughout our nation, as everyone knows. In my testimony I talk about living on the water shed.

Over 10 years ago the city of Tacoma and the Nasqually Tribe, my tribe—and I was the leader of the tribe at that time—was in court for 15 years on the water shed. The city of Tacoma owns two hydroelectric dams on the 40-miles of the Nasqually River. The city of Sencreli owns a diversion dam on the 26 miles of the Nasqually River. For 15 years we fought over that water; in 15 years we never got anything done and the salmon died on that water shed. We got to the Ninth Circuit Court of Appeals and we decided to sit down in this conflict and solve it. We did so—we backed out of the Ninth Circuit Court and down to our local district, and came out with an agreement today. We've living with in-stream closed, we've got enhancement programs and the water shed is breathing and living 24-hours a day over that dispute.

But there's all kind of disputes in our land, throughout our country, that we've been addressing and getting to an end and working every day for a better day.

Timber fish and wildlife is an example of what we accomplished over the last 25 years on dispute resolutions with the timber industry. It's a forum that is not going to settle all the problems on the water shed, but it's a forum that will address problems on the water shed. It's a high level forum of the CEOs of the timber industry, the little forest people, the tribes, the environmentalists, the State of Washington, agencies, environmentalists and so on that sit on this Board.

We address all kinds of problems on the water sheds, and we make it better every day in that forum. We work with the State of Washington, The Forest Practice Board and recommend laws that are wrote.

Over the years in my lifetime I've seen us come to the table, a place at the table for Indian people and Indian tribes, and it was hard getting to the table at first because a misunderstanding and the misinformation about us people, about the Indian people. The Indian people are like anybody else—their needs are the same as anybody else, and to get to the table was one job, but after we got to the table, this Congress has implemented laws to keep us at the table—the Magnuson Act and other Acts that we have in the Northwest, the Power Planning Act is another example.

But these are laws and very positive steps that's been taken for Indian people to sit at the table and try to work on problems in our own homeland. These are very positive things, and we have to continue to do that.

I am happy to be here today, along with this panel, to try to work on this bill to make it better. Our tribal chairmen are here in the room that will address a lot of the tort and different laws that we have to talk about within the boundaries and adjacent to our reservation, working with our States and working with the

Federal Government as partners and the local counties and the ports at the mouths of our rivers.

Our salmon is gone in the Northwest, as we all know. We have to—we cannot fight anymore. We have to sit and work these problems out for the future of our generation and our next, and next and next generation.

So, thank you, Mr. Chairman.

[Prepared statement of Mr. Frank appears in appendix.]

The CHAIRMAN. I thank this panel.

Billy, let's see if I've got this right. Your tribes had an aboriginal right to fish for probably 1,000 years up in that part of the country, is that right?

Mr. FRANK. Yes.

The CHAIRMAN. And maybe perhaps less than 100 years ago the large fisheries began to develop, develop political clout, legislative clout, superior numbers?

Mr. FRANK. Yes.

The CHAIRMAN. And we're primarily responsible for the depletion of fish because you sure didn't do it as a tribal group for hundreds of years before that?

Mr. FRANK. Yes.

The CHAIRMAN. Now, suddenly, you become the perpetrator of a crime when you didn't deplete the fish?

Mr. FRANK. Right.

The CHAIRMAN. There's sure something wrong with that.

Mr. FRANK. Yes.

The CHAIRMAN. I understand 18 of the 26 tribes in Washington have cigarette agreements with the State. Does your tribe have an agreement with the State?

Mr. FRANK. Yes.

The CHAIRMAN. You never had any problem with the taxes you've paid from the State?

Mr. FRANK. The Nasqually Tribe, I don't think so. I'm not in government right now. I've moved over to the Chairman of Natural Resources in the Northwest Indian Fisheries Commission.

The CHAIRMAN. Okay.

Mr. Columbus, I might—

Mr. FRANK. There is, Mr. Chairman, arrests going on in the State of Washington on cigarettes, interceptions, that are happening, and tribes are being held up on the interstate at gun point, and it seems like we're going backward. It's very sad.

The CHAIRMAN. Thank you.

I might point out that the intent of this legislation, by the way, is not to make a final judgment. The intent was to try to avoid expensive litigation and time-consuming problems that we have to resolve here, but it was never intended to be the determinant. If they can reach an agreement, the intent was to have them negotiate and reach an agreement, and if they couldn't, the intent was to pass their judgment on or their opinion on to the courts or here, but it was kind of a measure to try to not go forward with more contentious and expensive ways of resolving conflict.

Mr. COLUMBUS. If I may, Mr. Chairman, it was not my intention to suggest that that's not a good thing to have happen. I think it's great if the parties can sit down and get these things resolved vol-

untarily. The question you had is two-fold—one, what is the inducement? I mean, Mr. Frank's story is a great story and I'm glad it worked out. I wish it could work out that well everywhere. What happens when it doesn't work out and what's the inducement for people to come to the table and make it work out? It should never get to the point where the parties have the kind of inducement that Mr. Frank in the State of Washington and the other folks had to work something out. I mean, 15 years is a long time.

The CHAIRMAN. You referred in your statement about our March hearing stating "undisputed evidence" of tax evasion was presented. We did a little research on that because at the time I asked some of the people who were bandying about some pretty big numbers about States who were not being paid their fair share of taxes where they got their information, and we were provided a number of letters from different States. And a study of California, Oklahoma, New York, Michigan, Wisconsin, New Mexico and others—let me just read a couple of things. There were statements made in that March 11th hearing, and one of the statements was:

California is losing between \$30 million and \$50 million a year in cigarette taxes, according to the Deputy Director of the Special Tax Department of the State of California.

In a letter dated April 30, 1998, about 1 month before that statement was made, the Director indicated, and I quote,

There is currently no significant revenue loss due to sales of fuel or cigarette taxes to non-Indians, as Indian reservations in California are generally not located near major metropolitan areas.

Every one of the States that we checked with, including Oklahoma and New York, Michigan, Wisconsin and so on, the statements about how much taxes the States were losing that were made March 11, every single one of them is disputed by the States themselves who say in fact they are not losing very much taxes.

How do you respond to that.

Mr. COLUMBUS. Mr. Chairman, to the best of my knowledge, the representatives of my clients that day, the National Association of Convenience Stores and the Society of Independent Gasoline Marketers of America, made none of those statements.

The CHAIRMAN. No; they were made by independent—well, some of them, in fact, were made by Congressman Istook.

Mr. COLUMBUS. And what I can tell you, Mr. Chairman, is, therefore, with respect to the validity of those statements I know that at least one of my clients has been involved in litigation in the State of New York over the collection of excise taxes on tobacco for over a decade, and it is my understanding that the Department of Finance and Revenue in papers filed in Court estimated at one point that the State was losing over \$100 million a year on such taxes. But as to the statements made with respect to these other States, I can't support them or deny them, Mr. Chairman.

The CHAIRMAN. Well, we don't have all the States, but I mentioned some, and some I think may be misunderstood—maybe it's semantics. New York is an example, and one of the statements was,

Currently the State of New York estimates tax losses at \$65 million for untaxed cigarettes and \$35 million for untaxed motor fuels.

But the fact is the State of New York chose not to collect it. It wasn't that the tribes were not trying to get out of paying it; it was a State decision not to collect it.

But I just wanted to point those out. Sometimes we hear a lot of testimony here in the committee, but when we go back and try and research it, we find that it doesn't—

Mr. COLUMBUS. I would point out that there were efforts made within the last 6 months, I believe, in the State of New York to actually enforce those taxes—it was either this year or last year. Governor Pataki actually did try to enforce motor fuel taxes and cigarette taxes in the State, and met with substantial non-passive resistance in the western part of the State as a result.

If a State chooses not to enforce its taxes, that is clearly the option of the State, but in those cases where the State would seek, would like to collect those taxes, and has no effective means by which to enforce the right that it has recognized by the Supreme Court, we believe Senator Gorton's legislation would in fact offer the States, as well as the tribes—going back the other way—an effective means of resolving that dispute and enforcing the decision.

The CHAIRMAN. Okay, thank you.

Mr. Fagan, coming from Colorado, I think I know probably the answer to some of the things, but let me ask you—have you gotten any kind of a ball park estimate of the things that you have negotiated with the Tribes in Colorado of how expensive it would have been to the State if you would have had to litigate some of these disputes that you've been able to negotiate out?

Mr. FAGAN. I couldn't give you a number, Mr. Chairman, but I think the key thing here is that both the tribe and the local communities, they wanted to get on with the things that were important to them—in the case of the tribe, the oil and gas production and with the county to have the revenues they needed to do basic services. So I think that while I can't give you some exact numbers, I think our idea is why go through all that? We really need to sit down and work out things for the long run.

The CHAIRMAN. I think any comments you might have to improve this bill we would certainly appreciate it.

Ms. Hoffman, thank you for appearing too. I found your testimony particularly interesting, and I would just say the same thing to you. If you have some suggestions—you did offer a couple but you might put those in writing too, some suggestions as to how we might make this bill a little bit better.

Mr. Gover, in lieu of insurance, has the Department considered extending the FTCA to all tribal activities as an alternative?

Mr. GOVER. No; we've never considered that.

The CHAIRMAN. Do you have enough information on the Federal Torts Claims Act and private insurance, to begin to determine whether tribes are adequately insured? We seem to have a great deal of success with the Menominees, and that was an initiative that they did themselves.

Mr. GOVER. That's right—

The CHAIRMAN. We could base this on their model.

Mr. GOVER. The answer is no. We do not have all the information that we would need to give you a clear picture of what's going on in insurance. I would just add that the tribes are going to be better at this than we are in terms of obtaining insurance. They know the

market; they've been doing this for years, and if we are required to do that, we will turn primarily to the tribal governments for their advice on how to proceed because, as I said, they know more about it than we do.

The CHAIRMAN. We'll, we don't have all the I's dotted and T's crossed, but I would hope that the Administration would support at least a framework of the direction of this bill.

Mr. GOVER. Well, I think we do in two respects. First of all, we think negotiated resolutions are most appropriate here; and, second, identifying a means for guaranteeing that the victims of torts are compensated is arrived at and the Administration shares those goals.

You know, one thing that I failed to mention before is we just don't know enough about some of these issues. We know that there are incidents taking place out there. We know that there are at least some circumstances where the victim of a tribal tort cannot be compensated. We don't know how often that happens as opposed to how often it is resolved appropriately. We know there are at least some circumstances where State taxes that have been determined to be lawful are not being collected. What we don't know is how big is that problem.

As you indicated, a lot of the numbers being thrown around are a little bit beyond my ability to believe, and what we really ought to do is spend some good time understanding the problem because I think that will get us a lot closer to a solution that the tribes, as well as the Administration and the States and everybody else involved in this issue, will find appropriate. But I'm a little bit afraid of legislating by anecdote, and we're sort of driving in the dark here on broad legislation when we really don't understand the scope of the problem.

Now, we would be happy to be charged with collecting information of this type and doing these sorts of surveys, and that is actually what is recommended in this HHS report is that the Bureau and IHS go out and do that sort of information-gathering and that information dispersal to the tribes. But we're not prepared at this point to sign on to the particulars of this bill, but we certainly are willing to work with it and work with you to find something we all agree on.

The CHAIRMAN. Okay, thank you.

Senator Inouye, do you have some questions?

Senator INOUE. Just a few, sir.

Mr. Secretary, as you may be aware at this moment, tribal leaders throughout the land are gathering to organize and establish in the United States a bank of major proportions, a national bank.

Would you encourage the establishment of a major insurance company run by Indians for Indians?

Mr. GOVER. I'm trying to think—you know, this is one of those things where what I tell the tribes is that's none of our business. You guys do your thing. Certainly, if that is something that tribes want to go forward with, we would assist them in any way that's reasonable that we have the ability to do, and so I guess the answer is that we would support a tribal initiative of that sort.

Senator INOUE. And you have—you would be willing to assist them?

Mr. GOVER. Yes; I should point out, again, tribes know more about that than the Bureau of Indian Affairs does. We may be of some marginal assistance, but they have more expertise than the Bureau of Indian Affairs does.

Senator INOUE. Ms. Hoffman, I have been impressed with the services that your agency has provided over all these years.

Do you believe that this measure should structurally and legislatively include your service?

Ms. HOFFMAN. Yes; I do. I actually—I do. It's something that our agency believes in and we've been working with Indian tribes, and it would be something that we would be interested in pursuing. I guess, the short answer is yes.

Senator INOUE. In the involvement that you have had so far was your service requested by the Indians?

Ms. HOFFMAN. In some instances, yes; in others, it was the Department of the Interior, and occasionally we've actually had Congress ask us to look into certain things. I should explain we don't go in unless we do have consensus on our services. Mediation doesn't work unless the parties, all of them want us.

Senator INOUE. And would you say that your services have been successful in bringing about the results?

Ms. HOFFMAN. For the most part. The definition of a mediated result sometimes is sweet and sour and both sides—everybody around the table believes that they've been heard and they can live with the resolution. The jury is out on some of our projects because they're still going on, but I think for the most part if you were to talk to our colleagues and constituent groups, they would say, yes, they are relatively pleased with what we've been doing.

Senator INOUE. Thank you.

Mr. Fagan, I must add that I am very much impressed with the enlightened approach that the State of Colorado has taken to dispute resolution. I would hope that other States would look upon your store as a model.

Could you provide this committee with a little memorandum on how this all began and the suggestions that you would make to other States because I am certain that other States will be calling upon us to find out how you did it?

Mr. FAGAN. Yes, sir; I would be happy to do that, and I appreciate your comments. I think our Governor, Governor Romer, has worked hard with the tribes to make things work out for everybody, and has taken that as a consistent approach. I'm not as familiar as Senator Campbell is with some of the more contentious issues like water development projects and whatnot, but I think in general we really work hard to have partnerships for our mutual benefit because that's the best long-term solution.

Senator INOUE. Mr. Columbus, listening to you and your presentation and your response to questions I feel much assured that there is some room for agreement here. I think that if we all sit down and try to work this out, something will come out of this.

Mr. COLUMBUS. From your lips to God's ears, Senator. That would be a great result.

Senator INOUE. I think we can work out something.

Mr. COLUMBUS. We would be very, very happy to work with you, your staff and anybody else who wants us to.

Senator INOUE. Well, that is step number one.

Mr. COLUMBUS. There you go.

Senator INOUE. I see your hand going up, Billy.

Mr. FRANK. Yes, Mr. Chairman, I just wanted to comment on the Federal mediation.

In 1976 right after the *United States v. Washington* the tribes and the counties and the State used the Federal mediation, not on particular disputes but just the situation was very bad out there in 1976 after the bulk decision. And we started to put the bays and a lot of the neighbors' misunderstanding on net pins that the State had out in front of these houses along the bays, and Indian fishermen, as well as non-Indian fishermen, and all of this was coming to a boil, a boiling point. People didn't have a lot of information, and we brought in the Federal mediators and they did a great job. I mean, we're still continuing on with these forums within our bays and coves and a lot of creeks and tributaries that are running into the bays, but we're on a recovery. We're cleaning it up and doing a lot of positive things, so all of that works.

Senator INOUE. So from your experience, Mr. Frank, you would be in favor of including the Federal agency as part of the law?

Mr. FRANK. Yes; we need everybody's help.

Senator INOUE. Thank you.

The CHAIRMAN. Senator Gorton.

Senator GORTON. Billy, you made no comment on the tort claim part of this bill.

Do you have any thoughts on it?

Mr. FRANK. On the what?

Senator GORTON. Having to do with torts and insurance and the like?

Mr. FRANK. Well, one of the things that we have to do is we have to somehow stay out of court, and, like you've read some of the language in the past U.S. Supreme Court decision, there's a big question mark out there always on Indian tribes and the sovereign right and what we do within our own country, in our own backyard. And, as you know, Senator, we've all tried to say let's take care of it ourselves, in our own backyard. We need tools to do that, we need the U.S. Congress to step up and try to give us the opportunity to settle our problems with the State of Washington or any other State, with the counties, with the local governments, the ports, the cities, the industry, the agriculture people, everyone that's on these water sheds and along these bays, private property citizens. We have a lot of issues out there, and there's a lot of misinformation going around about Indian people, that they're the bogeymen.

An example is private lands and shellfish—there is no shellfish on private lands. They've all been destroyed and they're gone. We won't even walk on the land, but that's an issue, and it's in the newspaper all the time. And that bogeyman, the Indian, is going to come onto your property.

Well, he don't want to go onto your property. What would he go on the property for? But these cases, all of a sudden they take on another thing and all of a sudden we're sitting in front of a judge, and I think that's wrong. I think we have to have some tools here at this level to allow us to settle a lot of our things. A lot of things

are not going to be settled overnight, but for the next 10 or 20 years, and 30 and 50 out, the tribes are going to look better and a lot of this—actually, we feel it in our own backyard, our children feel it; anything that we do together. We can do positive things together or we can do negative things together, but we feel the positive things that we do whether it's health programs, whether it's decisions that we work out in some type of an agreement. If it's compacts over there, that makes our day—compacts. We understand that the treaties that we signed, the peace treaties that we signed, are treaties. It allows us Indian commerce; it allows us to trade with our neighbors.

Now, we do understand that there are roads out there that have to be built, that there's traffic that is passing by. We don't need all that traffic to come into our stores or our gas stations, or our game and casinos. But we need to work together to understand that part of that traffic and part of these people out here pay their way. The U.S. Congress pays their way today, but it's not enough. We have more people out there that are starving, they don't have health benefits. We have a long ways to go, and I hope that this forum and to make this bill better and working with our Senator, Senator Gorton as well as all of our Congressional people, that we can sit down together and find a way to resolve anything that we have in front of us. There are emergency things happening everyday. We have forums to address those, and let's start doing it. We don't have time to sit and fight one another.

Thank you.

Senator GORTON. Mr. Chairman, just for the record the figures and statistics that Congressman Istook used in the earlier hearing came from the Federal Bureau of Alcohol, Tobacco and Firearms and were the result of a survey, and some of them were more than half of the States in the mid-1990's.

The figures I used for the State of Washington \$60 million in cigarette taxes came from the State Department of Revenue, and Mr. Frank testified quite negatively—and I tend to sympathize with him—on cigarette seizures.

Of course, in the absence of being able to enforce taxes in the regular fashion one of the ways the court said that it can be done by States is when they get good information, they simply seize contraband cigarettes on the highways that are bound for Indian reservations without taxes because in fact they are contraband, and there have been a significant number of those seizures on the highways in the State of Washington this year, and they create a great degree of unhappiness. Far better is the situation in which the taxes are collected just exactly as the taxes are collected on any other kind of taxation, and not in that episodic fashion, which, of course, hit some tribes and probably doesn't hit others, and I think that's what Mr. Columbus was talking about. Some States, as in New Mexico, may decide as a matter of State policy that they don't want to collect, don't want to impose them, for that matter, and I don't see any reason that we should interfere in that choice. But to say that when the Supreme Court of the United States has said that a tax is imposed that just begins negotiations over it is something quite different that happens elsewhere.



Mr. Fagan, does Colorado impose both a general retail sales tax and a State income tax?

Mr. FAGAN. Yes; we do, sir.

Senator GORTON. If an ordinary citizen of Colorado feels that they don't get enough in the way of services from Colorado for the taxes they pay, do you negotiate with them to lower their taxes on an individual basis?

Mr. FAGAN. No; but I'm not sure that that's a parallel situation.

Senator GORTON. Well, it seems rather parallel to me.

Mr. Gover, you made—so much of what you said I agree with it. You're very straight-forward with this, but one part of your opening statement seemed to me to be curious.

What services provided by States as a general matter through their taxpayers are unavailable to Indian citizens of those States? Don't the vast majority of Indian kids go to State schools?

Mr. GOVER. Yes; they do.

Senator GORTON. Aren't Indians entitled to whatever Welfare payments or public assistance payments that the State has for all other citizens?

Mr. GOVER. I believe that they are, but quite often they are not able to get them because the States take the attitude that you're on an Indian reservation; there's a BIA program for that, and they make it very difficult for an individual applicant, and I think that's one of the issues we have to look at.

Senator GORTON. I think it is too because I think that's clearly unconstitutional.

Mr. GOVER. Let me clarify my point, though. My statement actually assumed that the States do provide all of those services and was not an accusation that they do not. What I was saying is that I believe that on balance when you look at the amount of taxes that are drawn by the State out of the reservations, and compared to the amount of State services provided to the reservation, that the balance of that exchange strongly favors the States, and that I think that is a reason for—that's a subject that ought to be inquired because it helps to account for the depressed conditions of reservation economies. But I was not actually suggesting that the States do not provide services.

Senator GORTON. And I'm speaking about individuals. An individual citizen of the State is entitled to equality and treatment without regard to whether that individual is Indian or non-Indian. Is that not the case? This is just a general proposition.

Mr. GOVER. Yes.

Senator GORTON. Let me ask you I find some force behind your statement that certainly those tribes that have looked into insurance and have obtained insurance know more about it than the Bureau of Indian Affairs does.

What kind of role is applicable there? If we were to determine that we wanted to make certain that every tribe had tort claim insurance for the normal run of torts—automobile accidents and the like, the kind of liability policies that most of us have as individuals and that most business undertake—in your view would the best way to do that be that each individual tribe should look for, whether required not, its own insurance? I'm certain you don't want the insurance—but do you suppose the Bureau might have

the ability to create, say, groups, particularly of the smaller tribes together, under one blanket policy?

It's one thing for a large tribe that's sophisticated in its business acumen to go out and get a good deal on an insurance policy. We all know with our automobile insurance there's a wide variety of premiums for pretty much the same coverage, but in the case of small and unsophisticated drivers, would they not be better off with some way to do that collectively, rather than some kind of requirement that each of them have it and use their TPA's to buy it?

Mr. GOVER. That's a good point and one that I had not considered. That actually holds a lot of promise to create these—to create groups instead of having, especially the small tribes, go out and try individually to get decent policies.

My experience, again, in representing tribes in the private sector was that, as you point out, there's a wide disparity in these policies, and quite often I thought that tribes were being taken advantage of by insurers because it's not that easy to understand a liability policy.

I keep coming back to this HHS study because I think they make a number of good points. One role that clearly the Federal Government can play through the BIA and the IHS is to do a couple of things—one, show the tribes where the gaps in their coverage are. The Tort Claims Act does cover a considerable amount of tribal activities. What many tribes may not know is that it does not cover everything, and we ought to, and should, be helping them to identify the gaps in any coverage so that when they go to an insurer, they can say, "We don't need a comprehensive policy; we need this policy," and that's a role that I think is appropriate for us to play. And, certainly, with the committee's endorsement we would do so, but that's the kind of analysis that needs to be done, and if we can help put together groups to reduce the costs of these policies, then I suppose we're willing to do that.

Senator GORTON. And what distinctions are there as a matter of fact between a proposal that simply requires a tribe to have an insurance policy and have the insurer as the defendant against one that allowed a suit to be brought against the tribe but with a limitation of liability co-extensive with such insurances they had?

Mr. GOVER. What's the difference between them?

Senator GORTON. Yes; isn't that a distinction without a difference?

Mr. GOVER. I suppose the difference would be in—it's not a distinction without a difference because it does matter who the party defendant is and what this Congress chooses to do with the doctrine of sovereign immunity. Sovereign immunity, obviously, is meaningful to the tribes. It is not meaningful to insurance companies, and I think that it is—it creates no difference in the outcome, which ideally is that the victim of tortious conduct is compensated, but it does make a great deal of difference, I think, certainly, as a matter of principle and precedentially speaking, that the tribe not be subjected to those suits.

Senator GORTON. One other question on this subject that we haven't covered here—what justification is there for exempting

tribes from suites under Federal environmental laws that give an individual cause of action against State or local governments?

Mr. GOVER. That create an individual right—

Senator GORTON. A number of our Federal environmental laws, of course, allow units of government to be sued for violations of Federal environmental laws. Why should Indian tribes be exempt from such lawsuits?

Mr. GOVER. I apologize, I'm having some trouble with the question.

First of all, my understanding is that Federal environmental laws, the substantive requirements of the Federal environmental laws, do apply to tribes—

Senator GORTON. Yes; that is correct.

Mr. GOVER. That they are enforceable by the United States, at least, against the tribes.

Senator GORTON. But many environmental laws—many environmental organizations don't think the United States does a very good job in bringing those lawsuits, and they are permitted to sue States and local governments under the statute, but a State—an individual who can sue a State or local government will be prevented from suing an Indian tribe on the same environmental cause of action.

Is there a justification for that?

Mr. GOVER. I think there absolutely is, and it is that these individuals, these environmental groups and the plaintiffs that they find to bring these actions have no trust responsibility to these tribes, and it is much better that a Federal agency that is charged with, No. 1, a government to government relationship; and, No. 2, a fiduciary responsibility regarding tribal trust assets to be the one that makes the determination whether an enforcement action is the appropriate method, and that is the difference. I mean, there's a vast difference between the EPA having acknowledged its trust responsibility to the tribe bringing an action against it, and an individual who believes he or she has been wronged in some way through some alleged violation of the environmental laws.

The difference between the United States and an individual is vast, in my view, and I don't mean to be trite, but there are many millions of individuals, each of whom would have a right of action, presumably under some circumstances.

The CHAIRMAN. Senator Gorton, we're going to have to move on.

Senator GORTON. I've just got one question for Mr. Columbus, if you don't mind?

The CHAIRMAN. Go ahead.

Senator GORTON. Mr. Columbus, one thing—you're here advocating the quality of taxation against businesses run by Indian tribes and the members of the organizations that you represent. A large portion, however, of your justification or your rationale for this I take it is simply a fairness and equality of competition.

Is not the basic reason that you're here that many of your members just simply can't compete against people who aren't subject to rather substantial taxation right next to a member of one of your organizations who must pay those taxes?

Mr. COLUMBUS. Oh, no, Senator, that's absolutely true. The reality is, and most of you are familiar with State motor fuels excise

taxes, for example, or cigarette excise taxes. For example, the State of New York's State excise tax on tobacco, I believe is 54 cents a pack. It is impossible in a commercial sense to compete with someone who does not carry that same cost burden. I mean, that's an out-of-pocket per private retailer.

I should emphasize, Senator, that people who don't want to pay taxes includes my clients too. They don't want to. They didn't have to they wouldn't either. The problem is that there is a terrific commercial fall-out. It does cost my clients a lot of business and jobs, and it also costs the State a lot of money, at least.

Mr. Chairman, when the State of New York went to the U.S. Supreme Court and asked the Supreme Court to approve its taxation scheme for tobacco, the State was pretty insistent that it was costing the State of New York a lot of money, and that they needed that money to support the infrastructure of the State of New York. Money is a zero-sum system. If we don't get it from one place, we're going to get it from another, and what you see is a death spiral for the commercial enterprises who are competing with people who don't carry the same tax burden because while the State has an increasing demand for money, the tax base is shrinking because it's carrying an ever greater share of the State's needs because the folks who are competing with us don't carry any. That doesn't make them bad people; that makes them business people—

The CHAIRMAN. We're going to have to move on or we're going to run out of time. Mr. Columbus, thank you for your testimony and thanks to this committee.

Senator Burns, do you have—

Senator BURNS. I have no questions.

The CHAIRMAN. Okay, and because of the time constraints, we're going to limit the panel to 5 minutes and the questions of the Senators too from now forward.

If you have any further comments or recommendations for this bill, we would certainly appreciate your turning those in.

Thank you so much.

Mr. COLUMBUS. Mr. Chairman, thank you very much.

Ms. HOFFMAN. Thank you.

Mr. FRANK. Thank you.

Mr. FAGAN. Thank you.

Mr. GOVER. Thank you.

The CHAIRMAN. We're going to combine panels 2 and 3. That will be William Canby, Jr., U.S. Circuit Judge from Phoenix; Apesanahkwat, Chairman of the Menominee Tribe; Ron Allen, President of the National Congress of American Indians; Sam Deloria of the American Indian Law Center; and Phyllis Borzi from the Center of Health Policy Research.

We will start in that order with Judge Canby first with the same time constraints that I mentioned, but all of your testimony will be included in the record.

Judge Canby, if you'd start please.

**STATEMENT OF WILLIAM C. CANBY, JR., U.S. CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PHOENIX, AZ**

Judge CANBY. Thank you, Mr. Chairman.

I appreciate the opportunity to speak with you today. I used to teach Indian law, and for the last 18 years I've been on the Ninth Circuit Court of Appeals in the West and I am Chairperson of that Court's task force on tribal courts, which was organized 6 years ago to open lines of communication between the Federal and the tribal courts.

I speak, however, as an individual. I can't speak for my court or for the judiciary as a whole.

I've been asked to comment on section 105 of S. 2097, which would establish a joint tribal-Federal-State commission on inter-governmental affairs, and I'll confine my remarks to that section.

The commission is to be established by the Secretary and would have representatives of all three governments and would deal with matters of law enforcement, civil and criminal jurisdiction, taxation, transportation, economy development and other matters. It would be advisory; it would be established by the Secretary of the Interior and would advise the Secretary and would report to this committee, to the other body and to the President.

The experience of a task force in the Ninth Circuit, which encompasses the nine western most States, is that tripartite negotiation and agreement could work very well. We stimulated the establishment of groups within the States in the Ninth Circuit. We found in some States that State-tribal organization forums had already been set up, and we prevailed upon them to add Federal representation, and that happened in Arizona, my home state.

An example of a couple of things that happened informally at the local level. As Senator Gorton said, the States—the Indians are entitled to State services and they were entitled to the State mental hospital, but the State mental hospital would not honor civil commitments when they were issued by a tribal court. The tribal judges raised this in the State-Federal-tribal forum. As a temporary matter, some of the State judges in there agreed to honor State commitments and issued—to honor tribal commitments and issued State commitments on the basis of them, but for a long-term solution legislation was purposed to the State and with the cooperation of all three groups it passed easily, and now the State, as a matter of State law, regularly honors tribal court civil commitments to the State mental hospital.

Another example occurred with misdemeanor enforcement on the reservation. As I think this committee knows very well, criminal jurisdiction is highly fractionated on the reservation; civil jurisdiction is too. This creates great enforcement problems.

What was discovered was that non-Indians would come on to the reservation and would commit misdemeanors against Indians or against Indian property, and the only authority on the scene were the tribal police and the tribal courts, but they do not have jurisdiction over non-Indian committing crimes.

The Federal Government has jurisdiction, exclusive jurisdiction when there's an Indian victim, but the FBI and the United States Attorneys are usually after bigger crimes and can't handle misdemeanors. The solution that was worked out by agreement with the help of Attorney General Reno was that the United States Attorney in Arizona would authorize as a special assistant United States attorneys tribal prosecutors who could then bring offenders

before U.S. Magistrates and prosecute misdemeanor crimes. That system is working well; it's being copied in other States.

Well, my point is that these local efforts are very effective but they're necessarily sporadic, they're unfunded and they often face systemic problems that could be negotiated on a much wider level. There is also a need for somebody to help stimulate continued local efforts because many solutions still should be done at the local level, but some are national and the proposed commission I think would be a very good step in the direction of having a tripartite body to come up with recommendations, solution, negotiated solutions.

We know the process works. We only need an instrument at the national level, and the key is that the decisions be voluntary and arrived at by the parties who are concerned, and with that kind of an arrangement I think many problems can be solved.

Thank you.

[Prepared statement of Judge Canby appears in appendix.]

The CHAIRMAN. Chairman Apesanahkwat.

#### **STATEMENT OF APESANAHKWAT, CHAIRMAN, MENOMINEE INDIAN TRIBE, WISCONSIN**

APESANAHKWAT. That's close enough. [Laughter.]

Mr. Chairman, Vice Chairman Inouye, Dr. Zell, I am Apesanahkwat, Chairman of the Menominee Tribe, and this indeed is a good part of our proposal that we submitted to Senator Gorton's bill last year.

I am a little disappointed that the Senator from Washington, as well as Montana, did not stay for our testimony because this is the first opportunity I have had to explain why it is that the Menominee people have decided to make this overture to demonstrate that we are willing to address egregious actions, such as a child being killed in a parking lot of a tribally-owned facility, and it's one of the reasons why we are bringing this proposal forward as inevitable to other tribes where we have already arrived at the precipice of having to enter the 21st Century in this third millennium and all of that. We feel it is necessary to cause a mechanism where tribal agents and employees who have committed tortious acts toward individuals that there be a process for them to have relief, to find relief, and, as a result, we have done this, and basically kept in tact the concept of sovereign immunity for tribal nations, just as State governments, city governments and Federal Governments have in certain instances waived their immunity from suits for certain instances.

I applaud the Senator from Colorado for introducing, but, more importantly, I want the committee and I want Senator Gorton and I want Congressman Istook, and I want Senator Enzi to know that one of the reasons why we demonstrate this is because myself personally I've been the Chairman five times in the last 25 years, and I grow weary of coming to Washington every Congressional session to combat anti-Indian legislation. I find it more difficult to tell it to my 24-year old Marine daughter why it is critical to remain patriotic and honorable to this country, to this body, why it is I have difficulty in convincing our youth to do the same.

Mr. Chairman, while I'm a combat veteran of the U.S. Marine Corp. and Vietnam in 1969, I perhaps have a greater expectation of men of honor to fulfill their obligations to this unique relationship we as Indian nations have with this country, and I hold to them to that charge. Just as we as Indian nations have a responsibility in some of these instances where the Supreme Court says we have a duty to collect these taxes, we have pioneered intergovernmental agreements with the State of Wisconsin that are now coming on to 10 and 15 years. In many areas we collect taxes through a tribal levy of taxes on everybody who buys cigarettes, including tribal members, and we have an arrangement where we split that tax money at the end of the year, and the State Revenue Department sends us a check.

Many of these concepts embodied in your act we support, including new additions to our proposals, including the ambiguity or the lack of specificity with regard to court of competent jurisdiction being confined to the Federal District Court. We are accustomed to holding concurrent jurisdiction with tribal courts. We also have, as Judge Canby alluded to, we have instituted a full faith and credit reciprocal agreement with the State of Wisconsin some—maybe 20 years ago. In my first term as chairman we did that to honor civil actions rendered in tribal court to be fulfilled in a State court and State court judgments to be brought into tribal courts to be authenticated and instituted. We have many agreements that other tribes and States can use as models and examples, and while this committee is well aware that the act prohibits for many years States from engaging in commerce and business with tribes, this has been a historically hostile venture between tribes and States. We've tried very hard and sometimes with difficulty, but we've achieved great progress in the past years, and we continue to offer this committee or any committee of this great body to assist in helping us work out the issues of exercising our Constitutional and sovereign abilities.

[Prepared statement of Apesanahkwat appears in appendix.]

The CHAIRMAN. Thank you. That's as fine a testimony as I've heard in expressing the Indian position on the bills that we hear. Thank you for appearing.

Mr. Allen.

#### **STATEMENT OF W. RON ALLEN, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS**

Mr. ALLEN. Thank you, Mr. Chairman, Mr. Vice Chairman. It's always an honor and a pleasure to be able to be here to testify on behalf of the National Congress of American Indians. We have testified before you on similar issues, as you well know, but here in the Senate and over in the House. We provided you testimony that captures what we believe are a lot of the views and issues of our members.

Our membership has not deliberated explicitly on this particular proposed legislation that you have proposed; yet, we have enough guidance to provide you some views and concerns that we know our membership in Indian country is concerned about with regard to your proposal.

We think you are looking for very constructive solutions to issues that are being raised by Senator Gorton and others regarding the fairness of the laws and regulations, the fairness of competition within Indian reservations and their economies and their communities.

I want to note that it always is as a matter of overall observation quite frustrating for Indian country against the backdrop of a nation that is built to protect the poor and the disadvantaged and the minorities, a country that has fundamental principles designed to elevate the poorest of the poor and to assist them, but yet the issues that we are being raised with today, the issues we are addressing, are issues that are really intended and targeted as suppressing the most disadvantaged communities in America, and the Indian communities clearly as reflective of that.

So when we talk about your proposals and the issues that they're intending to address, the issues of fairness really does not apply across the Nation. For example, we would ask Senator Gorton why is he not working with such diligence with regard to the application of liability coverages against the States, the fairness of the State's application, consistent with the tribes? We note the Shakopee paper. When you look at the Shakopee paper presented to you on May 6, it gives you countless examples of States and local governments claiming waivers of immunity from suits by citizens that have been wronged by actions of their citizens and employees.

So there's a lot of inconsistencies here in regard to what we're dealing with and we're quite frustrated with that.

We would like to make a quick observation that this bill has two key areas that it's trying to address—the dispute resolution process, and then secondarily the full liability coverage. One of the suggestions we would throw at you is you may want to separate this bill into two different bills so that it does not become a vehicle for unfriendly amendments because of one section versus another section, so that we may want to methodically chip away at each of these areas and they don't confused among themselves.

We are, obviously, very disturbed over the idea and the notion that the tribes are evading taxes and that there's unfair competition out there when you can look around the country and see unfair advantages all the time. Right here in the District of Columbia the taxation for cigarettes is 55 cents a pack. Across the border, just a few miles away, is Virginia, and the taxation is four cents. So are we looking at unfair tax advantages for the companies in Virginia as opposed to the companies in the District of Columbia?

The issue for us is when you look at the economies of Indian reservations, we do have to have some price disparities to provide some opportunities for our depressed economies. America provides these price disparities all the time, and they're all the time trying to create new kinds of laws, and tariffs and what have you to create equities, but the fact is we're trying to enhance economies. We're trying to provide an opportunity for tribal governments in order to assure them that they would be able to become truly self-sufficient, which is a goal that this goal set out for us.

So we point out one thing that is not recognized by the Congress so far is that the court has provided opportunities such as the *Potawotami* case that has shown that States do have remedies out-



side of negotiation with the States. Those remedies are available to them. They can collect those taxes at the wholesalers; they can work out agreements with the States that would work out very effectively.

What we want to point out is that we do not want to see a forum that would create a disadvantage to the tribes—that is a major issue to us, and we know that you have heard some suggestions that may bring that into reality. But one of our points is if we bring a resolution board together, if it became a reality, it has to be managed or it has to be administered by people who understand Indian law. They have to understand the history of tribal-State relationships and the ongoing clash over control and jurisdiction. That is critical for anyone to even understand what's going on, and we're very fearful of whether or not it is going to be administered fairly for the tribes or to the disadvantage of the tribes.

One last point I would like to make on the torts claims issue. You have a couple of sections in there that we think merits emphasize. One is the analysis of who would pay for this insurance. Both this committee has recognized we do need to study and assess what the situation is out there and how we would pay for it. Would additional burdens be put upon the tribes with an already limited budget that it would also take away from direct services to tribal communities that are already depressed? That is a major issue. So we would encourage you to look at that study in section 202 to find out exactly what the coverage and what the risk is.

One last point in conclusion—we are very concerned about any kind of legislation that has a notion that one size fits all. It doesn't work with insurance and there are some solutions, and Assistant Secretary Gover had suggested that the tribes can contribute to what the solution should be. With regard to taxation issues, that have been raised before this committee, in our judgment, it is a local intergovernmental concern between the tribes and States. You need to provide incentives to provide that opportunity.

And last but not least, this Congress has a long-standing historical and moral obligation to protect the tribes and their rights because we are at such disadvantages in our political system.

Thank you.

[Prepared statement of Mr. Allen appears in appendix.]

The CHAIRMAN. Mr. Deloria—Professor Deloria, I apologize.

#### **STATEMENT OF PHILIP S. DELORIA, DIRECTOR OF THE AMERICAN INDIAN LAW CENTER, ALBUQUERQUE, NM**

Mr. DELORIA. You were right the first time. In fact, that was the first thing I was going to say. I would like to thank you for inviting me to testify and I would like to beg the committee and its staff to stop calling me professor, which seems to be a habit. I am not a professor any place. I have free rent at the University of New Mexico Law School, but I am not part of the law school. I run an Indian-controlled organization that does policy studies.

I appreciate the opportunity to testify here today on this important legislation. I think everybody agrees that tribes should and do usually act responsibly in the tort area, and if there is a possibility—and I don't know if there are legal barriers for tribes to get some kind of group rate on their liability insurance. That certainly

should be pursued. I know that many tribes already have coverage, and I think it's very important to find out if there are any tribes that are actually having trouble getting coverage. I haven't heard of that, and I'd be interested to know the source of that information.

I also in trying to check out and prepare testimony I got very different information from tribal people and from attorneys who represent tribes as to what the actual practice is in terms of insurance companies trying to force tribes to claim sovereign immunity when a claim is made. If the insurance company forces a tribe to claim sovereign immunity, I don't know what the tribe is paying the premium for because that means they're walking away. Then it's legal insurance; it's not liability insurance. You're getting a free lawyer to go in there and claim sovereign immunity, and I hope that the premiums are adjusted accordingly.

I don't know, and have been unable to find out either from Federal or tribal attorneys, the relationship between the Federal Tort Claims Act and what happens after that when a claim is entered under that. One source told me that the Feds turn around and try to collect from the tribe and its insurance company, and somebody else said no they don't. So I think the factual background is pretty shaky here and we all need to go into that more deeply.

I think on a broader level, and I try to concern myself with the broader policy issues, I do think that we all have to get our act together on the Indian side of the table. We can't keep coming in here and telling the Federal Government, "We're taking care of it; it's none of your business," although that's our first impulse. I do think that the marketplace in general is what forces governments to waive their sovereign immunity, and I think that's what is happening with tribes. That does not mean that there won't be a few things to slip through the cracks, and I think we have an obligation, and I hope NCAI will take a stronger position in creating some kind of peer pressure so that any tribes that are really bad actors in this area, that there is some peer pressure because it hurts all the tribes.

If I could move to the State-tribal relationship where I do have some experience, Mr. Chairman. My experience since 1976 working with State-tribal relations is that either the State or the tribe, if they feel the Federal Government is going to tip the balance in their favor, they will not negotiate with each other. If they come to Washington looking for a Federal entity to win the battle for them and that Federal entity says, "Go home," or even better yet says, "Go home, we have a trust responsibility and we're going to tend to be on the Indian side," they'll go home and they'll negotiate it. That's why we have several hundred tax collection agreements—because they decided to negotiate. The Supreme Court said the tribes should collect the tax for the States. That's not self-executing any more than *Wurster v. Georgia* was self-executing. You still have to figure out how you're going to do it, and at that point the States needed to sit down with the tribes and negotiate, and that's what needs to be done. But as long as there is a perception that tribes are on the run politically in Washington, the States have no incentive to negotiate because they're going to think they can come in here and whine and the powers that be in Washington are going

to fix every little thing that goes wrong that some non-Indian doesn't like on the reservation.

As long as there's that perception, you're not going to get any improvement in State-tribal relations, and all the Federal commissions in the world aren't going to help.

My red light is on. [Laughter.]

[Prepared statement of Mr. Deloria appears in appendix.]

The CHAIRMAN. Yes, it sure is.

Ms. Borzi.

**STATEMENT OF PHYLLIS C. BORZI, CENTER FOR HEALTH POLICY RESEARCH, GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER, WASHINGTON, DC**

Ms. BORZI. Thank you, Mr. Chairman, Mr. Vice Chairman.

My name is Phyllis Borzi, and I am a senior research staff scientist at the Center for Health Policy Research of the Medical Center of George Washington University, and I'm very honored to be asked to testify this morning before you on this bill.

Last year our center conducted the study that Secretary Gower referred to, and I was the primary author of the study. The study was on assessment of the access to private liability insurance for tribes and tribal organizations with self-determination contracts—almost as big a mouthful as the name of your bill.

I provided the committee with a copy of the entire study. I want to say before I continue my testimony that my remarks today are my own, and, obviously, don't reflect the views of the Federal Government that funded the study or the members of our technical advisory group from the various Federal agencies that assisted us in making sure that the study stayed on track.

As you know, the Federal Tort Claims Act coverage is not like real insurance, but it sort of operates for tribes like insurance because what it does is it immunizes tribes and tribal employees who may have committed negligent acts in the course of carrying out their 638 contracts as long as that's what they're doing. The activities, they give rise to the potential tort liability have to part of the activities that they're required to perform under their 638 contract, and the individuals who may have committed these allegedly negligent acts have to be employees of the tribe carrying out the contract or the compact.

We were asked by the Department of Human Services in conjunction with the Department of the Interior and the Department of Justice to look at this interaction between the coverage for self-determination activities that the tribes have under the Federal Tort Claims Act, and the private liability insurance that many of them have chosen to buy.

When we started the study, we had lots of questions, and I've listed them in my testimony. They're the same questions that you have and that your legislation suggests we need the answers to, like how many tribes have private liability insurance? What kind of insurance do they have? Is it comprehensive insurance? Is it gap coverage? Is it designed to be coordinated with the immunity they have under the Federal Torts Claims Act? What do they pay for it? What happens with this insurance?

We had lots of questions, and I can tell you that after 16 or 17 months of research, we didn't really have the answers to those questions. So I think it's very important and more work needs to be done in this area.

But let me just give you a sense of some of the issues that we think are difficult here. The way the bill is structured really the Secretary of the Interior in order to provide this liability insurance is going to have to make some assessment on a tribe by tribe basis of whether the private insurance that tribes have already is adequate.

Well, it seems to me that there are a lot of problems with making that assessment. The first is finding out initially whether the tribes really do have private liability insurance. Ours was a study in which notices were sent to all the recognized tribes and invitations were issued to come and participate in the study. Obviously, that had its limitations. We were only able really to get 22 tribes to participate in our study, and so I would hope that to the extent that there is a much broader study you would have some mechanism for having everybody in.

Since my time is quickly running out, let me just go to what I think is a really critical issue, and that's the issue of sovereign immunity. As I've sat here this morning, I've listened to a variety of witnesses and senators talking about this issue. It was our experience in terms of the tribal representatives that we dealt with that in every case their desire to purchase private insurance was because they felt a commitment to people who might be injured as a result of their activities or their employees' activities on tribal lands to make them whole, and the types of insurance policies that they were able to buy in the market place varied considerably in terms of the coverage that they got.

One insurance company that insured a fair number of tribes had as part of its policy no description at all of how this sovereign immunity issue was to play out, but what they told us when we met with them in our site visits was that they routinely asserted the tribes' sovereign immunity as a way to defeat every claim legitimate or not.

When we inquired about the pricing of their product, it seemed clear to us that those products that they sold to tribes were priced no differently from the other kinds of insurance that other companies were selling, which made it clear that the insurance company would not assert sovereign immunity as a way of defeating claims, except with the express written consent of the tribe.

So the provision in your bill that says that sovereign immunity can't be used by the insurance company to defeat the claims we think is very important. We try to talk—because we guarantee confidentiality to all the participants in the study, we certainly couldn't go back to the tribes that purchase coverage from this one insurance company and specifically tell them about this, but I tried to test whether or not they did not that that's what they were doing. And when I raised the issue with the tribal representative, he said to me,

Well, why do we need insurance? If the point of this is to always assert our tribal sovereign immunity, we could do that. We don't need to pay some insurance company to do that.

So I think that's a very important point, and I just want to say in closing that I certainly, and the members of our staff, would be willing to help you in any way we can to refine this legislation.

[Prepared statement of Ms. Borzi appears in appendix.]

The CHAIRMAN. Well, I think this committee looks, actually, to all of our panelists to help us refine the legislation. This may not be the total answer, but it's—basically, it's an alternative to what we've been doing, fighting it out in court and seeing a constant erosion of tribal sovereignty through amendments to every kind of a bill that you can imagine here in Congress.

I come from the southwest, as Mr. Deloria does and Judge Canby does, and we have a term out there when we face all consuming forest fires that eat good plants and the bad plants too, and everything in its path, and we call it backfire. It's a method to prevent getting run over by something that's getting out of control, and I'm sure you're aware of that term. Maybe in some respects this bill is kind of a backfire to try and stop the momentum that seems to be developing, at least in some circles here in the Senate and in the House too that are continually eroding tribal rights.

I just simply think that if we can find a way that we can negotiate our differences, it's better than fighting it out and starting to lose more and more here.

Mr. Allen mentioned that tribes do not want to be on the run. There's no question that they don't but they are on the defensive. If you're here 6 days a week, or at least 5 days a week, as we are, I think you would probably recognize that they are on the defensive. And there's more and more legislation coming up, unfortunately, that's directed against Indians, and much of it is done without any background, much of it is done without any knowledge of Indian people, and some of it is done mean-spirited—it's as simple as that, and we want to try and stop that and that's why we're here today trying to look for alternatives.

With that, Senator Inouye, do you have some comments? I would be happy to defer to you.

Senator INOUE. I thank you very much.

I agree with you, sir, that though we have used words such as tort liability, Federal income taxes, dispute resolution, we should not forget that the issue before us is pure and simple—sovereignty. And I couldn't help but recall that we would not for a moment consider levying a tax against the State of Washington, the Federal Government, nor would be consider levying a tax against Montgomery County here in Maryland, nor would be consider levying real property taxes against the French Embassy. They have all the services—police protection, special police protection, incidentally, their children attend public schools, they receive all the benefits that all the residents here receive, but yet when they go to Saks Fifth Avenue, they do not have to pay a sales tax, State, county or Federal, and none of them pay income taxes. That is sovereignty. No one fusses about that. No one fusses about not taxing the States.

Do you think we could ever consider or debate taxing the State of Nevada for gaming income? But we do for Indians, and so I hope we don't lose track of that and lose sight of the fact that what is involved is sovereignty.

Indians have experienced many vacillations in our Federal policies and notwithstanding the fact that we have gone through Indian wars and termination and allotments and extermination, reorganization, and self-determination—one thing has remained constant—the Constitution has not been amended. The commerce clause still stands, the Supreme Court decisions are still standing, and they all proclaim that there is a special government-to-government trust relationship between the United States Government and Indian Nations and they all proclaim that there is sovereignty, but with each passing year the forces here somehow have been exerting everything they can to either dilute it, diminish it, or completely wipe it out.

There was a time when I first began serving here when the Congress would act up, and the Supreme Court was there as the buffer and the great protector of Indian country. But today the Supreme Court is no longer a protector of Indian rights, nor is the Congress, and so I say that this is a very crucial moment in the history of Native Americans. And I hope that this committee will be strong enough to stand up against the forces that are now massed against sovereignty.

Thank you.

The CHAIRMAN. I thank you.

No one has ever questioned Senator Inouye's commitment to doing the right thing, and I'm just honored and delighted that he serves on this committee.

Well, I think what we'll do is we're going to have any questions from the Senators—since we're the only two here—sent to you directly, and if you would answer those in writing in the days ahead so that we can put those into the full testimony, I would appreciate that.

And I appreciate this committee being here, as with the other committees. We certainly value and look forward to your recommendations on how we can bring this bill to fruition in a fair and impartial manner.

This committee hearing for the purposes of anyone who has additional information or comments will remain open for the next 10 days.

With that, this committee is adjourned.

[Whereupon, at 11:50 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

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## APPENDIX

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### ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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#### PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Thank you for the invitation and opportunity to be a part of this hearing. The bill before us today is of critical importance all of the people of Montana.

Recently I conducted a series of Town Meetings across Montana and the culmination of those hearings was a field hearing of the Senate Committee on Indian Affairs conducted by Senator Campbell. Testimony taken during all of those forums clearly demonstrated that there are significant and continuing jurisdictional problems associated with the dependent, sovereign nation status of the Indian tribes of Montana and their relationships with the State and non-members living within the external boundaries of the reservations.

The bill before us today, the Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998, represents a measured step in the direction of resolving some of the conflicts that exist between the tribes and States. As such, it represents the beginning of a long journey that will hopefully lead to resolving conflicts not only between the tribes and States, but to the conflicts that exist between the tribes and non-members living within the external boundaries of reservations throughout Montana and throughout the entire United States.

This bill, S. 2097, acknowledges and encourages continued dialog and agreement between tribes and government. I applaud Senator Campbell for his recognition of and response to conflicts that are negatively impacting all citizens of Montana and the United States. I support this important first step in developing a framework for understanding between members of the tribes and all other citizens of the United States.

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#### PREPARED STATEMENT OF HON. PAUL WELLSTONE, U.S. SENATOR FROM MINNESOTA

Mr. Chairman, I am glad we are having this hearing today because I think it is important that we consider alternatives to the legislative initiatives we considered earlier this year that were proposed by Senator Gorton. All governmental entities are endowed with immunity to protect their official actions from undue judicial interference. For this reason, I do not think it is prudent for us to impose across the board limits on tribal sovereign immunity from suit. The bill we are considering today addresses many of the issues considered earlier this year, however, it does so in a more moderate way without undermining tribal sovereignty and self-determination efforts.

I have long supported alternative dispute resolution as a way to resolve difficult situations through good faith negotiation. I believe we need to do more to promote dialog between states and tribes. By providing a mechanism for tribes and States to work together to come to agreement on outstanding issues, Senator Campbell's bill would help tribes and states work out excise tax agreements and other jurisdictional issues, while benefiting all of the parties, avoiding drawn out litigation battles and promoting mutual respect and understanding.

In addition, I believe that the idea to use liability insurance as a tool to remedy persons injured or otherwise harmed by the actions of tribal governments or employees moves us in the right direction. We may find that this idea could address the needs in Indian country, protecting tribes and allowing them to voluntarily waive their sovereign immunity in individual cases from time to time, at the same time as we protect Indian sovereignty.



**Statement of Kevin Gover  
Assistant Secretary - Indian Affairs  
United States Department of Interior  
Before the on Indian Affairs,  
United State Senate on S. 2097,  
A Bill to Encourage and Facilitate the  
Resolution of Conflicts Involving Indian Tribes**

July 15, 1998

Good morning, Mr. Chairman and members of the Committee. My name is Kevin Gover, Assistant Secretary for Indian Affairs at the Department of the Interior (Department). I am pleased to offer the views of the Department on S. 2097, a bill to encourage and facilitate the resolution of conflicts involving Indian tribes.

It is our policy to encourage tribes, states, and local communities to work together on matters of mutual concern. To this end, we also encourage the resolution of disputes through intergovernmental agreements. Therefore, we support the general concepts of S. 2097 regarding the encouragement and facilitation of intergovernmental agreements among tribes, states and local communities.

While we support these general concepts, the bill raises other issues that deserve consideration. The bill addresses only the issue of retail taxation of transactions occurring on Indian lands by state and local governments. This is only one of several potential areas for disagreement between tribes, states, and local governments. Section 105 (b)(2) recognizes that there are other areas of possible conflict, including law enforcement, civil and criminal jurisdiction, taxation generally, transportation, and economic development. The Department's position is that legislation designed to encourage and facilitate intergovernmental agreements and cooperation should be applicable to all areas of potential disagreement.

Interior shares the view of Federal Mediation and Conciliation Service that modest technical changes could eliminate potential confusion and uncertainty regarding the operation of the dispute resolution process. We would encourage the Committee to work with staff at the Departments of Interior and Justice, where ADR has been given a great deal of prominence. We are confident that the DOJ would be pleased to assist the Committee in insuring that effective, voluntary and consensual dispute resolution services can be created in this legislation.

Looking at the issue from another perspective, we believe it unfortunate that so much time and attention is being paid to the issue of retail taxation. Just last month, I testified before the House Resources Committee on H.R. 1168, a bill that would prohibit the Secretary from taking land into trust for tribal governments or individual Indians unless the tribe enters into a binding agreement with state and local governments for the collection and payment of state and local sales and excise taxes on retail purchases made on that land by non-Indians. In opposing that legislation, I pointed out that according to the 1995 Arizona Legislative Council Report, at least 18 different states have entered into agreements with over 200 Indian tribes regarding the issue of retail taxes on goods sold

to non-Indians from Indian lands. I also pointed out that states can enact legislation that provides alternative means for collecting taxes on goods sold to non-Indians, and that a variety of states, including Oklahoma, California, Michigan, New York and Wisconsin, have already done so.

Given the number of existing, voluntary tribal-state agreements in this area, and given the ability of state legislatures to enact state tax laws that can virtually ensure the collection of this type of tax, the Department believes those processes should receive more deference. Perhaps a more fruitful and enlightening line of inquiry for all of us --the Administration, Congress, state governors legislatures and attorneys general-- would be to consider why so many tribes and tribal members pursue retail sales of items such as petroleum and tobacco products as a means of economic development. I think the simple answer to that question is that there are few other avenues for economic development and entrepreneurship in tribal communities. The more difficult question that faces us is what we can do to provide more opportunities for tribal economic development and self-sufficiency.

Tribes are also governments and have the same responsibilities for providing services to their communities as do states and local governments. Yet most tribes do not have a significant tax base, and they must, therefore, enter into commercial-type businesses in order to raise governmental revenues. The goal of both the Federal government and state governments should be to foster tribal self-sufficiency, not to prevent it. In this regard, it bears remembering that most tribal communities do not have a comprehensive economic structure, and that tribal dollars are generally spent in non-Indian communities where they support non-Indian businesses and the tax base of these local communities and the state as a whole. However, while both Congress and the Administration regularly proclaim to the tribes the goal of self-sufficiency, we often forget that, due to jurisdictional conflicts with states, tribes are deprived of the ability to use tax aide or regulatory policy to encourage specific economic activity. These tools are used by local, state, and even the federal government to encourage economic activity deemed desirable, but tribes are unable to use these tools.

We offer the following additional comments on S. 2097. We support the creation of the Joint Tribal-Federal-State Commission on Intergovernmental Affairs under section 105 of the bill. The Commission's duties should be clarified to include the identification and consideration of (1) areas of conflict between tribes, states and local governments, (2) obstacles inhibiting the negotiation and implementation of intergovernmental agreements to address conflicts in these areas, and (3) possible measures to encourage and facilitate the successful negotiation of such agreements. As presently anticipated by section 105 (c), the Commission should be charged with the responsibility of preparing and submitting a report on these issues to the President, this Committee, and the House Resources Committee within two years. The findings of the Commission can be used to determine if further legislation is needed to encourage and facilitate intergovernmental agreements, and if so, what steps Congress should take to best accomplish this objective.

Currently, tribes can enter into intergovernmental agreements with state and local governments. The existing agreements on tax issues that I referred to above are examples of this authority. Nonetheless, we would agree that more disputes between tribes and state and local governments can

be resolved through agreements than are currently being resolved through this method. The reason that more disagreements are not resolved in this manner is not because tribes, states, and local governments are not aware of alternative dispute resolution (ADR) or because there is a lack of forums offering ADR. For example, a tribe and state wishing to resolve an area of disagreement without resorting to litigation can utilize the services of the Federal Mediation and Conciliation Service to assist them in negotiating and entering into an intergovernmental agreement. No change in the law is necessary for this to happen. However, the focus on ADR in society generally, and the availability of organizations such as the Federal Mediation and Conciliation Service do lead one to wonder why tribes, states and local governments do not pursue this option more frequently. We believe that this question must be answered before legislation is enacted that establishes mechanisms for fostering intergovernmental agreements. We must have better insight into the problem in order to know how to fix it.

We appreciate the interest of the Chairman and this Committee in promoting agreements between tribes and state and local governments. We share that interest and support the enactment of S. 2097 in a modified form that would provide for a two-year study of intergovernmental disputes among tribes, states, and local governments and alternative means for resolving those disputes.

With regard to Title II of this bill, we agree that liability insurance is an important issue and we support the position that DOJ has set forth within their statement on the bill, especially that obtaining liability insurance is a function best left to Tribal governments. The maintenance of such insurance can help to protect tribal treasuries while also offering a meaningful remedy to those who are harmed by tribal activities and operations. More information is needed to assess the extent to which tribes utilize insurance; however, some excellent work has already been done in this area. For example, a study entitled, "Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations with Self-Determination Contracts/Compacts," was prepared in February 1998 under a Department of Health and Human Services' contract. That study contains extensive findings, recommendations, and conclusions that bear further analysis. We also provide a handbook for tribes and tribal organizations that was prepared under the same contract, a "how to" guide for tribes to reduce private liability insurance costs. This information would enable us to better understand the nature and scope of any problems in this area, and also provide valuable insight into how best to address whatever problems may be found to exist.

We look forward to working with the Committee on the important issues addressed by S. 2097. Should the Committee decide to move forward in considering the bill in its current form we would like to have an opportunity to provide a more detailed analysis of its provisions.

I will be happy to answer any questions you may have.

**Statement of**  
**Charles R. Barnes, Acting Director**  
**Federal Mediation and Conciliation Service**  
**before the**  
**Committee on Indian Affairs**  
**United States Senate**

Mr. Chairman and Members of the Committee:

Good morning, Mr. Chairman and members of the Committee. Thank you for the invitation to comment on Title I of the recently introduced legislation, S. 2097, *to encourage and facilitate the resolution of conflicts involving Indian tribes*. The Federal Mediation and Conciliation Service is a federal agency which was established by Congress in 1947 to mediate labor disputes and provide facilities for arbitration to avoid interruptions in interstate commerce. Its responsibilities and expertise, however, have expanded over the years as we have been called upon to use the techniques of dispute resolution in other fields, to provide training in conflict resolution to labor, management, and others, to help form mediation services in other countries and host visits by foreign delegations to see how disputes are resolved here. Today, not only does FMCS offer dispute resolution services to labor and management in the Federal government, to companies and unions in the private sector (except railroad and airline industries which have their own special board), and to states which do not have their own mediation services but to government agencies for the resolution of contract, Equal Employment Opportunity, personnel, and other disputes. It was under the Administrative Dispute Resolution Act and the Negotiating Rulemaking Acts of 1990, and their successor legislation, the ADRA of

1996, that FMCS provides mediators to facilitate disputes and assist in the formulation of rules and regulations through negotiations. A brief account of some of these experiences is attached to this statement.

**Description of FMCS Dispute Resolution and ADR Services**

FMCS has 300 employees situated throughout the United States, five regional offices, and 200 staff mediators who are available to facilitate and mediate labor disputes, provide training in partnerships and labor-management cooperation, as well as a form of "systems design" to help parties analyze their conflict mechanisms and see how they can be improved. FMCS also administers a roster of 1500 arbitrators who are private citizens who render awards in contract interpretation and formation disputes.

Dispute resolution by the government is not a new idea, the FMCS provided some of these services when its conciliators were part of the U.S. Department of Labor in 1913 and became independent in 1947 by the Taft-Hartley Act. The National Mediation Board provides some of these services for the railroad and airline industry; and the Community Relations Service (CRS), a part of the U.S. Justice Department, provides mediation of certain race and ethnic conflicts. FMCS, however, has increasingly been asked to assist in the expansion of mediation and dispute resolution to other fields. FMCS has been involved in alternative dispute resolution services (ADR) programs for nearly three decades. Indeed, In 1970, Congress, through ad hoc legislation, asked FMCS to appoint a mediator to assist in the resolution of a long-standing land dispute between the Navajo and Hopi Indian tribes. FMCS moved into the arena of regulatory negotiations in the early 1980s working with the Federal Aviation Administration and since then has become increasingly involved in this activity.

Through the FMCS alternative dispute resolution (ADR) program, mediators assist federal agencies and others in institutionalizing mediation and other forms of conflict resolution as an alternative to costly litigation. After consultation with federal agencies, FMCS provides such services as conflict resolution systems design and evaluation, education, training, and mentoring. Through our "train the trainer" programs, FMCS educates agency personnel in conflict resolution skills so they, in turn, can train others. FMCS mediates disputes both within agencies (e.g. age discrimination and other fair employment complaints, whistleblower complaints) and between agencies and their regulated public (e.g. public policy, regulatory, or environmental disputes). FMCS has even helped design "peer mediation" programs for school children and teachers to assist in reducing violence in school. It has also assisted Congress in providing public policy dialogues about controversial issues.

Besides mediating labor disputes which may involve Indian tribes, FMCS has extensive experience in working with Indian tribes on a number of ADR projects. In twenty months, through facilitated negotiations, Indian tribes and the federal government were able to resolve issues that had been unresolved for over twenty years. The Indian Self Determination Regulatory Negotiation in 1996 involved 63 people representing 48 Indian tribes over ten federal agencies and offices, and resulted in the largest negotiated rulemaking every conducted. By adhering to a consensus process, the participants designed a regulatory framework that years of typical negotiating had failed to accomplish. The process became a model for future dialogues with Indian tribes. The result was an easy to understand set of procedures for tribes and tribal organizations who wish to contract with the federal government to provide health services, education, and construction projects. A detailed account of this project is attached to this statement. Another example of a negotiated rulemaking involved Native American Housing, to

produce, by consensus, a comprehensive regulation that deals with the implementation of the Native American Housing Assistance and Self-Determination Act of 1996, which changed the method of providing housing assistance to Indian families living on reservations and in other traditional Indian areas by providing grants directly to Indian tribes or their tribally designated housing entities.

In those efforts, we have used a team of mediators, who have worked throughout the United States—and have built up some experience and expertise in this area. Indeed our agency's efforts with tribal self-determination, self-governance, housing, and other issues, shows that through negotiations and facilitation, tribal leaders, concerned parties, and those affected by the actions of tribal governments, can find common ground and develop innovative solutions, rules, and regulations.

#### **General Comments and Recommendations on the Legislation**

We salute the application of alternative dispute resolution to resolving the issues of state/tribal negotiations and federal mediation of tax disputes. We have seen the increase use of these processes to avoid costly litigation, come out with better solutions, and enhance the negotiation process. FMCS generally supports the model proposed for establishing intergovernmental negotiations procedures and the establishment of an intergovernmental alternative dispute resolution panel. We do, however, have some concerns about the structures and procedures as proposed in the legislation which we have articulated below. Our recommendation for creating an appropriate design would be to convene a body of affected stakeholders (tribal, state and federal representatives) to jointly create both the process and the

structures needed for resolving these issues through negotiated rulemaking, or some similar process. FMCS would certainly be willing to facilitate such proceedings.

Under Section 101 of S.2097, FMCS would provide the mediation and other dispute resolution services to assist negotiations, and under Section 103, would assist the newly formed Intergovernmental Alternative Dispute Resolution Panel. We have a few questions for clarification about this legislation but in general support the goal and mission and would look forward to working on this project.

Specifically, there should be some clarification in the negotiation process; is it binding or non-binding in nature? It appears that negotiated agreement would be binding if the parties so agreed, but the language in Section 102 (c)(2)(A) and Section 102(e) may be confusing. We also wonder if the mediation in the negotiation stage mandatory or optional? We recommend mediation remain optional because mandatory mediation tends to be ineffective. We also recommend that other processes such as fact finding and early neutral evaluation be made available in the negotiation stage. Clarification is also needed on how the process of negotiation is actually convened. We recommend the parties notify the Secretary of Interior of the dispute, and the Secretary would then inform the parties of the options available under the negotiation phase including mediation/facilitation. If the parties so choose to use mediation, then the Secretary would request a panel of three mediators from FMCS. If the parties chose alternatives, FMCS would assist in securing those services.

Clarification is also needed in the process of mediator selection by the Secretary. It appears that each party may strike one candidate, thereby leaving only one remaining for the Secretary to choose. However, the language is ambiguous in that it states the Secretary will then



choose a remaining mediator from the list. This implies more than one mediator is left to choose. FMCS recommends the wording be changed to "...the Secretary shall *appoint the remaining unchallenged mediator?*" Section 102(c)(3)(C).

We have a concern over the period allowed for the negotiation process to continue. Currently, the proposed legislation allows for a one year period followed by extensions at the parties discretion. Should a maximum length be instituted? FMCS recommends limits be placed on how many extensions should be allowed, otherwise parties have no incentive to settle in a timely fashion, and mediators ability to leverage deadlines is compromised.

As to the Panel process, it appears the process as described would allow for mediation to occur both in the negotiation phase and the panel phase of the process. Mediation is most effective when it is offered at an appropriate and timely moment in the life of a dispute. However, because every dispute is different, the most appropriate timing for mediation may vary from situation to situation. If the parties are required to go to mediation prior to approaching the panel, it may render mediation in-effective. We recommend the process be flexible enough to allow the parties to choose the appropriate time for mediation to occur, and then for it to be offered once. On a case by case basis, the Secretary could then determine if a second attempt would be appropriate.

Clarification may also be needed on how long panel members would be expected to serve. We would also ask, is it mandatory that a case at impasse in the negotiation phase go before the panel? FMCS would recommend that parties be allowed to present before the panel only those issues which the parties could not agree on in negotiations. Also, the process for making panel decisions is unclear. How would they make a determination? Is this by majority

vote? Consensus process? Is it envisioned that the panel would request FMCS to provide mediation services for their own deliberations?

Lastly, for clarification purposes, all references to the Administrative Conference of the United States (ACUS) should be stricken as it no longer exists.

### **Conclusion**

FMCS would be pleased to assist in this dispute resolution effort and would be pleased to work with the committee to deal with any dispute systems design issues. We think that there should be some clarification about the finality of the decision of the Panel and the role of the new Commission. Since our Agency primarily provides mediation and has a roster of arbitrators, we would need to create an internal mechanism to oversee the services of factfinders, early neutral evaluators, and others to provide the full panoply of dispute resolution services. I am enclosing materials about our work for the benefit of the Committee and would be pleased to answer any questions now or at a future time.

**APPENDIX A****Alternative Dispute Resolution Services**

FMCS has been involved in alternative dispute resolution (ADR) programs for nearly three decades. The agency was first involved in an ADR program in the early 1970s when it was asked to mediate a land dispute between the Navajo and Hopi Indian tribes. FMCS moved into the arena of regulatory negotiations in the early 1980s working with the Federal Aviation Administration and since then has become increasingly involved in this activity.

Through the FMCS alternative dispute resolution (ADR) program, mediators assist federal agencies in institutionalizing mediation and other forms of conflict resolution as an alternative to costly litigation. After consultation with client agencies, we provide such services as conflict resolution systems design and evaluation, education, training and mentoring. Through our "train the trainer" programs, we educate agency personnel in conflict resolution skills so they, in turn, can train others. We mediate disputes both within agencies (e.g., age discrimination and other fair employment complaints, whistleblower complaints) and between agencies and their regulated public (e.g., public policy, regulatory or environmental disputes).

**ADR SERVICES TO CLIENTS****Consultation**

Initial assessment of a client agency's needs.

**System Design**

Analysis of existing mechanisms and design of appropriate methods and strategies for implementing ADR.

**Education, Training, Mentoring**

Programs for educating the general user of ADR Services, training in mediation skills for potential mediators, and actual mentoring of mediator trainees through active cases.

**Mediation/Facilitation and Convening Services**

Available on contract to agencies to provide mediation, facilitation and convening services for all types of disputes, depending on FMCS resource availability.

**Evaluation and Follow-up**

Assessment of ADR programs and continuing involvement to improve ADR initiatives.

## **APPENDIX B**

### **Examples of some of the major ADR projects FMCS has undertaken involving tribes and others:**

#### **1. Indian Self Determination Regulatory Negotiation**

In 1996, 63 people, representing 48 Indian tribes and over 10 federal agencies and offices, completed the largest negotiated rulemaking ever conducted since that time. By adhering to a consensus process, the participants designed a regulatory framework that years of typical negotiating had failed to accomplish. In addition, the process became a model for future dialogues with Indian tribes.

#### **Historical Background**

In 1975 Congress passed the Indian Self-Determination and Education Assistance Act, Pub.L. 93-638. This Act gave Indian tribes authority to contract (known as "638 contracts" after an abbreviation of the Act, Pub L 93-638 (emphasis added)) with the federal government to operate federal programs such as schools, health facilities, construction projects, etc. serving their tribal members and other eligible persons. The Act's purpose was to gradually shift the responsibility of delivery for such services from the government to each tribe or tribal organization so that they would have improved service and also become more independent. However, by 1988 Congress determined that instead of 638 contracts improving services to the tribes, the federal government had created a complicated bureaucratic maze, making it more efficient for the government to continue to operate contractible programs. For example, the government took an average of 6 months to processing a "638" contract proposal, instead of the 60 days required by the Act. To correct these problems, Congress revised the Act and directed the Departments of the Interior and Department of Health and Human Services to develop regulations over a 10-month period with the active participation of tribes and tribal organizations.

Despite the 10-month deadline, the two Departments and the Indian tribes did not reach agreement on draft regulations until 1990. During this time, the Departments sponsored several regional negotiation sessions throughout the country. Tribal representatives were offered an opportunity to present their issues to a panel of federal employees. However, these employees did not always have the full negotiating authority of their agencies. In several instances, agreements the federal team reach with the tribal representatives were overturned by superiors in Washington, DC. More importantly, after the 1990 compromise had been reached, the Departments continued to work on the proposed regulations without tribal input. When a new administration took over in 1993, a decision was made to publish the draft regulations. On January 20, 1994, 5 years after the original deadline, the draft regulations were published. In the preamble, the new administration noted the lack of tribal participation since 1990.

Tribal reaction to the proposed regulations was extremely negative. Tribes, tribal organizations and national Indian organizations criticized both the content of the 1994 proposed regulations and its length, running over 80 pages in the Federal Register. In response to this criticism, the Departments began holding regional meetings. Because the tribes had been excluded from the decision making process leading to the proposed regulations, the Departments agreed to form a formal advisory committee under the Federal Advisory Committee Act of 1990.

While the tribes and the Departments discussed formation of the committee, Congress began its own investigation into the rulemaking and administration of the Act. In October of 1994, Congress, skeptical of the Departments' rulemaking efforts and management of the 638 contract programs, decided, again, to amend the Act. However, this time, Congress severely limited the areas subject to regulation and required the Departments to develop any regulations jointly and with the active participation of Indian tribes under the guidance of the Negotiated Rulemaking Act of 1990. In addition, Congress required final regulations to be published within 18 months or the Departments would lose their rulemaking authority. The deadline was May 25, 1996.

By the time the October 1994 amendments passed, the two Departments and the tribes had come to agreement on the membership process for the Advisory Committee. Because of the Act's recent amendments, the tribes and the Departments agreed that this committee would be responsible for recommending to the Departments what regulations, if any, should exist. To ensure that the tribes had adequate representation on the Committee, the Departments and the tribes agree to allow two tribal representatives from each Bureau of Indian Affairs and Indian Health Service Area (organizational subunits of the Departments) for a total of 48 tribal representatives. To avert past negotiating problems with federal officials, the Departments agreed that it would be represented by individuals with full and binding negotiation authority for their agency or office. The Department of the Interior chose 9 negotiators and the Department of Health and Human Services chose 6 negotiators. In late January 1995, pursuant to the Federal Advisory Committee Act (FACA), the Departments published the proposed list of tribal and federal negotiators in the Federal Register.

#### **Outcomes of the Indian Self-Determination Negotiated Rulemaking**

*These negotiations achieved in twenty months, what tribes and the federal government had tried unsuccessfully for over twenty years to accomplish.*

The negotiations ended on time with all but four issues resolved. The four issues did not hold up the overall implementation of the regulations. The entire Committee of 63 members had successfully consented to thirty-four pages of very detailed regulations written in "Plain English" that would now guide tribes and tribal organizations and federal contractors in negotiating contracts between the Departments of Interior and the Health and Human Services. Tribes and tribal organizations who wished to contract with the federal government to provide health services, education, and construction projects for Native peoples would now have an easily comprehensible set of procedures to follow that was consistent for two federal agencies and clear both to novice Indian contractors as well as to new federal administrators.

### **Significant Outcomes:**

- Largest negotiated rulemaking to date. Sixty-three committee members—each with full veto power.
- First negotiated rulemaking binding two Departments (Department of the Interior and Department of Health and Human Services) to the same regulations.
- Full consensus used on all decisions.
- Created a model for future dialogues with the tribes
- Became the benchmark against all future negotiated rulemaking for Department of the Interior and Department of Health and Human Services.
- Positive relationships between the negotiators has persisted, which affect the resolution of other problems that they face as advocates for tribes and tribal organizations and Federal agencies.
- In interviews with tribal and Federal agency representatives using these regulations, overall satisfaction is expressed with the clarity and usefulness of the document.

## **2. Native American Housing Negotiated Rulemaking**

In 1996, Congress enacted the Native American Housing and Self-Determination Act as part of the U.S. government's move to give Indian tribes and Alaska Native Villages more autonomy in administering their housing programs. The implementation of this legislation and other measures requires the development of regulations and procedures to govern tribal oversight.

The negotiating committee included 48 tribal members representing 570 Indian Tribes and Alaskan Native Villages, and 10 representatives from the U.S. Department of Housing and Urban Development. The committee successfully negotiated more than 200 separate issues involving the administration and distribution of \$600-million in federal funds.

Through ten months of negotiations, FMCS Commissioners facilitated, mediated and coordinated 49 general meetings, 600 work group sessions and countless sidebars. Working with committee co-chairs, mediators helped establish protocols, set meeting agendas, chaired caucuses and made arrangements for meeting facilities.

Working in partnership through long, tedious hours of work, the committee resolved the 216 identified issues, each with its own history and rationale, to produce by consensus a final comprehensive regulation that departs dramatically from the past while carrying out the federal government's responsibilities to Native American citizens.

## **3. Tribal Self Governance Negotiated Rulemaking**

FMCS was also engaged in the Tribal Self Governance Rulemaking which had its origins in the The Indian Self-Determination Act Amendments of 1988 (Pub. L. 100-472). This act authorized the Tribal Self-Governance Demonstration Project for a 5-year period and directed the Secretary to select up to 20 tribes to participate. The purpose of the demonstration project

was to transfer to participating tribes the control of, funding for, and decision making concerning certain federal programs, services, functions and activities or portions thereof. In 1991, there were 7 annual funding agreements under the project, and this expanded to 17 in 1992. In 1991, the demonstration project was extended for an additional 3 years and the number of tribes authorized to participate was increased to 30 (Pub. L. 102-184). The number of Self-Governance agreements increased to 19 in 1993 and 28 in 1994. The 28 agreements in 1994 represented participation in self-governance by 95 tribes authorized to participate.

After finding that the Demonstration Project had successfully furthered tribal self-determination and self-governance, Congress enacted the "Tribal Self-Governance Act of 1994," Public Law 103-413 which was signed by the President on October 25, 1994. The Tribal Self-Governance Act of 1994 made the Demonstration Project a permanent program and authorized the continuing participation of those tribes already in the program.

A key feature of the 1994 Act included the authorization of up to twenty tribes per year in the program, based on their successfully completing a planning phase, being duly authorized by the tribal government body and demonstrating financial stability and management capability. The Act was amended by Public Law 104-208 on September 30, 1996, to allow up to 50 tribes annually to be selected from the applicant pool. In 1996, the Act was also amended by Public Law 104-109, "An Act to make certain technical corrections and law related to Native Americans". The number of annual funding agreements grew by one to 29 in 1995 and grew to 53 and 60 agreements in 1996 and 1997, respectively, to include 180 and 202 tribes, respectively, either individually or through consortium of tribes.

The Act also authorized the formation of a negotiated rulemaking committee if so requested by a majority of the Indian tribes with Self-Governance agreements. Such a request was made to the Department of the Interior and a rule making committee was formed. Pursuant to section 407 of the Act, membership was restricted to federal and tribal government representatives, with a majority of the tribal members representing tribes with agreements under the Act. Eleven tribal representatives joined the committee. Seven tribal representatives were from tribes with Self-Governance agreements and four were from tribes that were not in Self-Governance. Formation of the rulemaking committee was announced in the Federal Register on February 15, 1995.

To date, FMCS has facilitated dozens of meetings of the full committee which were held in different locations throughout the country, with two more scheduled in July and September, 1998. In addition, FMCS mediators facilitated numerous workgroups and other meetings during this period that were used to develop draft material and exchange information in support of the full committee meetings.

FEDERAL MEDIATION AND CONCILIATION SERVICE  
UNITED STATES GOVERNMENT  
WASHINGTON, D.C. 20427

OFFICE OF THE DIRECTOR

July 10, 1998

The Honorable Ben Nighthorse Campbell  
Chairman  
Committee on Indian Affairs  
United States Senate  
Washington, DC 20510-6450

Dear Senator Campbell:

Thank you for your invitation to present testimony regarding Title I of S. 2097—Indian Tribal Conflict Resolution, Tort Claims, and Risk Management Act of 1998. Since I will be out of town all next week, I have asked Eileen Barkas Hoffman, FMCS Director of Special Projects to deliver this testimony and answer any questions you and your committee may have. As the agency's former General Counsel and a mediator, she is very knowledgeable about this area and has directed a number of FMCS ADR projects.

I had a very helpful visit with your Chief Counsel, Paul Moorehead yesterday. He was able to answer some questions about the legislation and testimony for me and my staff. Again, I wish to thank you for including FMCS as the provider of mediation services in this important legislation. We look forward to working with you and your staff to assist in any dispute resolution systems design.

Sincerely yours,



C. Richard Barnes  
Acting Director

Enclosure

cc: Paul Moorehead, Chief Counsel





**Charles Richard Barnes**  
**Acting Director**  
**Federal Mediation and Conciliation Service**

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Richard Barnes was appointed Acting Director of the Federal Mediation and Conciliation Service in April 1998. He oversees the work of 200 federal mediators in fifty states, the Panama Canal, Puerto Rico, the U.S. Virgin Islands and Guam. As Acting Director, he is responsible for the delivery of mediation and arbitration services to the United States labor-management community; alternative dispute resolution services to federal, state and local governments; and an international program which provides training and technical assistance in labor-management and conflict resolution systems to other nations.

Barnes had been Deputy Director for Field Operations since 1996. He played a key role in the Strategic Redirection of FMCS, a four-year reinvention process aimed at realigning the agency, its services and personnel with the changing needs of the collective bargaining and conflict resolution communities. As Deputy Director, he also led mediation teams in helping resolve some of the most significant labor-management disputes in recent years, including the 1997 strike by 185,000 Teamsters against United Parcel Service, and 1998 negotiations between Kaiser Foundation Hospitals and the striking California Nurses Association, affecting 30 hospitals in Northern California.

A native of Chattanooga, Tennessee, Barnes joined FMCS in August 1987. After serving as Coordinator for Alternative Dispute Resolution and for Preventive Mediation in his district, he was appointed District Director in 1994, and was selected Southern Regional Director in 1995.

Prior to joining FMCS, Barnes was an International Representative and District Council Business Manager for the Laborers' International Union of North America, assigned to the Atlanta, Georgia Regional Office. He is a Vietnam-era veteran of the U.S. Army, and served at the Medical Field Service School at Brooke Army Medical Center, Fort Sam Houston, Texas. He is an 1985 graduate of Antioch University, earning a Bachelor of Arts degree in Labor Studies.



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**Eileen Barkas Hoffman**  
**Director, Special Projects**

Since October 1, 1997, Eileen B. Hoffman has served as the Agency's Director of Special Projects, responsible for facilitation, mediation and training in a variety of sectors – including the federal sector where she represents FMCS on the National Partnership Council's Planning Committee and works with the U.S. Postal Service and its unions for their National Labor Relations Summit. She also provides outreach for the Agency's arbitration services and serves as chairman of the FMCS Arbitrator Review Board.

Before assuming this position, she served as the Agency's General Counsel and Director of Legislative Affairs from October 1991 until September 1997. Her career with FMCS began in 1975 when she joined the New York field office as a mediator; in 1978 she went to London for a special exchange with the British Advisory, Conciliation and Arbitration Service; in 1979 she was assigned to work in the Washington, D.C. field office and in 1985 was promoted to become a District Director for a 10-state area with a staff of 17 mediators; She was also in charge of coordinating the Agency's Federal Sector Program. Prior to joining FMCS she served as Research Director of the Massachusetts Labor Relations Commission in Boston, MA, and as a Labor Relations Research Specialist for the Conference Board, Inc. in New York City.

She has designed ADR programs and facilitated negotiated rule-making proceedings for a number of federal agencies, represented FMCS at the Independent Mediation Service of South Africa (IMSSA), participated in a special US Department of Labor-FMCS Task Force on Polish labor law in Warsaw, and serves as liaison for FMCS to such labor and dispute resolution organizations as the Association of Labor Relations Agencies (ALRA), the Industrial Relations Research Association (IRRA), the American Bar Association's Labor Law Section, and the Society of Professionals in Dispute Resolution.

A graduate of the New York State School of Industrial and Labor Relations at Cornell University, she received her M.A. in Political Science from Columbia University, and her J.D. from Georgetown University Law Center, where she was awarded the John F. Kennedy Labor Law Prize. She has served as a past president of SPIDR, and on the Executive Boards of IRRA, ALRA, SFLRP, as a public member of the Federal Labor Law Committee of the ABA's Labor Law Section, and on the Advisory Boards of the Cornell ILR School and Rutgers University School of Management and Labor Relations. She has written in the fields of collective bargaining, dispute resolution and comparative labor relations, and developed training programs for EEO, labor, management, and government officials. She also teaches negotiations and ADR at the law school and business school levels. A member of the D.C. and Pennsylvania bars, she serves as a mediator for the Court of Appeals for the District of Columbia Circuit.

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Roy Romer  
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Renny Fagan  
 Executive Director

**Testimony of Renny Fagan, Executive Director of Colorado Department of Revenue  
 Before the United States Senate Committee on Indian Affairs  
 S.2097 The Indian Tribal Conflict Resolution and Tort Claims and Risk Management  
 Act of 1998.**

**July 15, 1998**

I am Renny Fagan, the Executive Director of the Colorado Department of Revenue. I appreciate the opportunity to present comments on Title I of S. 2097, concerning mediation of retail tax issues. Colorado's experience with the Southern Ute and Ute Mountain Ute tribes is that negotiated compacts can successfully resolve disputes. Therefore, the kind of mediation embodied in S. 2097 can be helpful to states and tribes. After giving some background about Colorado, I will comment on specific provisions of the bill and offer suggestions to improve the workability of the concept from the state standpoint.

**Colorado's Tax Structure and Tax Issues Involving Tribes**

The Department of Revenue collects over \$5 billion in income, sales, severance, estate, excise, fuel and motor vehicle taxes for the state of Colorado. We also collect about \$550 million of sales and use taxes for counties and certain cities. In addition to many other functions, the Department regulates limited stakes gaming, which Colorado voters authorized in 1991.

Colorado has a decentralized local government tax system. While the state constitution and statutes set forth property classification and assessment rules, local governments establish mill levies (except school districts) and local county assessors largely administer the property tax. In addition, Colorado has a somewhat unique constitutional provision establishing home rule cities which have sales tax authority independent from the state. Home rule cities may define their tax base, establish their tax rate, and collect and enforce their tax without state involvement. These features make Colorado's tax policy complex.

The Southern Ute and Ute Mountain Ute tribal lands are located in southwest Colorado. Over the years, the state, local governments and the tribes have dealt with tax issues. Under principles of tribal sovereignty, the state recognizes that transactions occurring on tribal land between tribal members are immune from state tax. However, we have debated whether the state and local governments can impose tax on transactions taking place on the reservation involving non-

tribal members or the operation of a business owned by a non-tribal entity.

In seeking to impose tax, the state's interest is to protect the local and state tax base from erosion and to establish fairness by ensuring that like transactions are taxed in like manner. The state wishes to avoid the existence of tax havens where a differential tax rate would significantly affect purchasing decisions. Both state and local governments seek revenue to fund services widely shared by all, such as education, transportation, and law enforcement.

In claiming immunity from tax, the tribes foremost interest is to exercise and obtain recognition of their sovereign authority. They also assert that state taxation can interfere with the federal policy of promoting tribal economic development and self-determination.

The convergence of issues such as sovereignty, competition for economic development, state constitutional restrictions on state and local tax policy and federal law make this area of tax policy complex, and one where the need to form partnerships is more important than ever.

### **S. 2097 Provides a Useful Method of Resolving Tax Disputes**

By establishing a formal means to negotiate and mediate tax disputes, S.2097 provides a useful public policy tool. When the state and the tribes cannot informally agree on whether certain transactions are taxable, the parties often resort to litigation. As a part of the court process, we often end up negotiating a solution, but only after expending time, money, and sometimes, good will. Therefore, we see this bill as a means to formalize dispute resolution, while avoiding protracted legal conflict.

### **Colorado's Recent Experience With Tribal Negotiations**

In recent years, the state and the Southern Ute and Ute Mountain Ute Tribes have used negotiated compacts to establish working partnerships which recognize the important interests of all parties.

#### **A. The Southern Ute Taxation Compact**

In 1996, the Southern Ute Tribe, the State and La Plata County successfully negotiated a taxation compact involving real and personal property and other taxes pertaining to oil and gas production. The dispute involved land owned or acquired in fee simple by the Tribe, and to a lesser extent, the taxation of non-Indian owned joint interests in the production wells. The State and County claimed that land previously subject to tax should continue to be taxable. The Tribe argued that the lands located within the reservation were tax exempt. The parties litigated in the federal district court for the District of Colorado. After a lengthy, complex analysis of federal allotment law and other federal statutes, the court found in favor of the Tribe. The Tenth Circuit Court of Appeals reversed, finding that since the previous non-Indian owner had paid the taxes due and since no assessment was pending against the Tribe, the case was not ripe for determination. In essence, after two years of litigation, the parties were back to the beginning.

In lieu of continuing the litigation, the parties decided to negotiate the compact. Lieutenant Governor Gail Schoettler represented the state, and the county retained Ken Salazar, the former director of the state Department of Natural Resources. They provided a view removed from the previous controversy and from the day-to-day application of tax matters. The parties set forth principles for negotiation. The Tribe's main interest was immunity from state and local taxation for the lands it owns or may acquire within the reservation regardless of whether it is held in trust. The county was concerned that tribal land acquisition would erode the county's tax base, affecting school funding and non-school services. All parties agreed that improved government-to-government relations were important for economic development, land use and environmental protection that could benefit all residents of the region.

For the duration of the compact, the state and county agreed to not to impose taxes on the real and personal property or the production activity. In return, the Tribe made a significant decision to make voluntary payments in the amount of what the taxes would be. The parties agreed upon an inventory and assessment procedure to calculate payments. The compact continues unless school or local government finance conditions change dramatically.

This taxation compact represents a good faith effort that serves the principles and financial needs of all parties. It recognizes that a partnership is more beneficial than an adversarial relationship. The compact also demonstrates that negotiation can be a successful form of dispute resolution.

#### **B. Gaming Compacts**

Since 1992, the state has also successfully negotiated two sets of gaming compacts with the Southern Ute and Ute Mountain Ute tribes. While S.2097 is not about gaming law, the Indian Gaming Regulatory Act requires a negotiated compact. The Department of Revenue represented Governor Roy Romer in negotiating with the tribes and their representatives. We successfully reached compacts without resort to a mediator, and did so through good faith negotiations based upon principles important to each party. For the state, Gov. Romer established the principle that tribal gaming activity and wagers should not exceed that which is permissible under Colorado's constitution or laws. For the tribes, sovereign authority and independent jurisdiction were key principles. The tribes also wanted to get the casinos open without the need for protracted litigation. These compacts also demonstrate that good faith negotiations when the parties agree upon mutually beneficial principles, can form effective partnerships between tribes and state governments.

#### **Recommended Changes to S.2097**

S. 2097 establishes a mediation-arbitration scheme of dispute resolution. If voluntary mediation efforts cannot reach settlement by using the process set forth in Section 102, then a party can invoke the Section 103 remedy which provides for a panel to form a solution for the parties. The whole process works only if parties are brought into it, and feel a compelling reason to negotiate

a solution. The following are some suggestions from the state standpoint that may increase meaningful participation and make the process work better.

1. The claims subject to Panel review should be clarified and limited. Tax law is always evolving, caused by the enactment of new statutes, court interpretations and the changing nature of the economy. A taxing authority may have several different kinds of issues to resolve with any given taxpayer. Because of this dynamic situation, the definition of claims involved in the S.2097 process is important. Section 102(e)(2), found on page 14, states that:

Any claim, setoff, or counterclaim (including any claim, setoff, or counterclaim described in section 103(c)) that is not subject to a negotiated settlement under this section may be pursued by the parties or the Secretary pursuant to section 103.

It appears that this paragraph refers to those issues which the parties agreed to negotiate and could not resolve. However, the words "not subject to a negotiated settlement" could also be interpreted to mean all issues existing between the parties, even those they did not even attempt to resolve through mediation. If a panel could decide matters not negotiated, states would be reluctant to participate in any mediation at all for fear of giving the panel wide control over matters the states are not willing to negotiate. If this construction is not the intent, we recommend on page 14, line 4, striking "is not subject to a negotiated settlement" and replacing this phrase with, "the parties included in negotiations but upon which they could not reach settlement. . . ."

2. Clarify the definition of taxation claims under Section 103(c). The application of this section is unclear, and could be interpreted very broadly. Consistent with the above reasoning, the scope of subsection (c) should be limited to those claims that the parties have agreed to place into mediation. We recommend on page 14, line 16, striking "Any claim" and inserting, "The panel may consider any claim the parties agreed to mediate, " and, on line 21, after "regarding the original claim" insert "subject to mediation."

3. Change the composition of the Panel. States will be more likely to become involved in mediation if they feel the end result will be fair. If the panel decides this result, the state must have confidence that the panel will understand and fairly consider their viewpoint. As currently written, the five member panel includes three federal representatives. States may perceive that this composition is predisposed to favor the federal interest in achieving tribal self-determination or that the federal members will not appreciate state tax law principles. To avoid this perception, we recommend eliminating the judiciary and treasury representatives, leaving a three member panel made up of one federal, one state and one tribal member.

4. In addition to federal mediation, allow the parties to negotiate without a mediator or to select a nonfederal mediator. The bill requires a federal mediator to be involved in the negotiations between a state and a tribe. In Colorado's experience, successful good faith negotiations can be

conducted without any mediator (as in the case of our gaming compacts) and when the parties choose their own representatives for negotiation (as in the Southern Ute Taxation Compact). Therefore, we recommend that Section 102(c) include a subparagraph that also gives the parties the option to negotiate without a mediator or to select their own nonfederal mediator or facilitator.

**5. Provide for local government involvement.** In most cases, the state establishes local government powers, and therefore, the state would be the appropriate party in most tax disputes. However, Colorado's tax structure has many decentralized features. Home rule cities have autonomous tax authority. In these cases, the state could not bind the city to any tax dispute resolution. Therefore, we recommend that the bill allow for local governments to have access to the mediation process when a state may not make binding tax policy decisions for the local jurisdiction. This type of inclusion of local government would broaden the use of the dispute resolution process for tax policy matters at more levels of government.

**6. The bill should define "retail taxes."** The bill should define "retail taxes" to avoid one party arguing that the tax in dispute does not fit the statutory definition, and therefore, the party has no obligation to respond to the Secretary's invitation for mediation. This definition should include not only sales and uses taxes, but also other types of consumption transaction taxes such as fuel, cigarette, alcohol or other transactions taxes levied by some states which include business privilege taxes or gross receipts transaction taxes. The committee should also consider expanding the bill to include real and personal property tax disputes. While property tax would add another dimension of complexity and necessitate local government involvement, it is also an area of contention that can be successfully mediated, as Colorado achieved with the Southern Ute tribe.

## **Conclusion**

In recent years, Colorado has forged stronger partnerships with the Southern Ute and Ute Mountain Ute tribes by negotiating compacts. By encouraging negotiated settlements of tax disputes to replace protracted litigation, S. 2097 provides a useful public policy tool. We hope the committee will consider some of the suggested changes to make this bill more workable from the state standpoint.

**TESTIMONY OF R. TIMOTHY COLUMBUS**  
**COUNSEL TO THE**  
**NATIONAL ASSOCIATION OF CONVENIENCE STORES**  
**AND THE**  
**SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA**  
**BEFORE THE**  
**SENATE INDIAN AFFAIRS COMMITTEE**  
**HEARING ON S. 2097**

**July 15, 1998**

**Introduction**

Good morning, Mr. Chairman and members of the committee. My name is Tim Columbus. I am a member of the Washington, D.C. law firm of Collier, Shannon, Rill & Scott. I am appearing this morning on behalf of our clients, the National Association of Convenience Stores ("NACS") and the Society of Independent Gasoline Marketers of America ("SIGMA"). Thank you for inviting NACS and SIGMA to appear before the Committee to express our views on S. 2097, the "Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998."

NACS is a trade association of over 2,300 companies that operate over 60,000 convenience stores nationwide with some 750,000 employees. Over 75 percent of NACS member companies are classified as small businesses. NACS member companies collectively sell over 55 percent of all gasoline and approximately 50 percent of all tobacco products sold at retail in the United States every year.

SIGMA is an association of over 260 independent gasoline marketers operating in all 50 states. Last year, SIGMA members sold over 30 billion gallons of motor fuel, representing over 21 percent of all motor fuels sold in the United States in 1997. SIGMA members supply over 28,000 retail outlets across the nation and employ over 200,000 workers nationwide.

NACS and SIGMA would like to thank the Committee for holding this hearing today and thank the chairman, Senator Campbell, for introducing S. 2097. The fact that Senator Campbell



introduced S. 2097 indicates to us that he acknowledges that a problem exists in the area of state excise and sales tax evasion by Native American tribes and that this problem should be addressed by Congress. While NACS and SIGMA may disagree with Senator Campbell on the precise methods of addressing this problem, we believe we share common ground on the problem's existence.

Witnesses representing NACS and SIGMA appeared before this Committee in March and testified on the issue of Native American state excise and sales tax evasion. At that hearing, undisputed evidence of Native American state excise and sales tax evasion was presented to this Committee. S. 2097 may have been introduced, at least in part, in response to the testimony this Committee heard at that hearing. NACS and SIGMA welcome Senator Campbell's active participation in the process to address this growing problem. However, we are not convinced that S. 2097 is the appropriate solution.

### **A Dispute Resolution Panel Is Redundant And Unnecessary**

This is true for several reasons. First, S. 2097 would set up an "Intergovernmental Alternative Dispute Resolution Panel" to consider and render a decision on a dispute between a state and a Native American tribe on, among other issues, the application of state excise and sales taxes on purchases by non-Native Americans of retail goods, such as gasoline and cigarettes, from a Native American retailer. The establishment of this panel through Section 103 of S. 2097 implies that the existing avenues of dispute resolution open to tribes and states are inadequate or in some way flawed. NACS and SIGMA find this implication erroneous.

The existing law on the issue of state/tribal disputes in the area of the imposition of state tobacco and motor fuels excise and sales taxes, as established by the United States Supreme Court, is clear. The Court has stated that such state taxes cannot be imposed by the state on tribes or their members. The Court also has stated that when the incidence of such state taxes is on a non-Native American, the tribe and its members have a duty to assist the state in collecting and remitting those non-discriminatory state taxes when a non-Native American purchases gasoline or cigarettes from a Native American truck stop or smoke shop.

Thus, the need for a new dispute resolution panel would be redundant with the role of the existing federal court system. The law in this area is not in dispute: if the incidence of the tax is on a non-Native American, then the state has a right to the revenues and the tribe has a duty to assist the state in collecting these revenues, just as all non-tribal motor fuels and tobacco retailers have such a duty. Instead of setting up a redundant alternative panel to the federal court system to adjudicate these disputes, NACS and SIGMA urge this Committee to explicitly vest federal courts with the authority to resolve these disputes and enforce their decisions. Any other action carries with it the implication that the federal courts cannot be trusted to dispense fair and impartial justice either to the state or to the tribe -- an implication that NACS and SIGMA do not support.

### **Counterclaims, Setoff, Or Related Claims**

Second, Section 103(d) of S. 2097 would require an alternative dispute resolution panel to consider any "counterclaims, setoff, or related claims" raised by a tribe in a dispute with a state over issues of state taxation. This subsection both ignores the Supreme Court's decisions on state/tribal tax disputes and potentially opens up the issues to be considered by the panel to any grievance or argument a tribe chooses to bring before the proposed panels. In the area of tax disputes, the Supreme Court decisions regarding state/tribal tax disputes do not mention the issue of setoff or related claims. Of course, if a tribe is sued by a state for the collection of state excise or sales taxes, the tribe may bring a counterclaim against the state as part of the same lawsuit for legitimate, related claims against the state..

Section 103(c) also gives no guidance to the proposed panel regarding the weight or attention it should give to such tribal counterclaims. Theoretically, under the language of this subsection, the panel would be required to give equal weight to the most absurd or tangential tribal counterclaim. Even more, the failure of a panel to adequately consider every and all tribal counterclaims -- no matter how unrelated to the underlying dispute -- could give rise to a tribal challenge of the panel's processes and decisions.

### **Panels Would Be Mired In Politics**

Third, Section 103(d) of S. 2097 provides that the proposed panel be comprised of five members, including three executive branch representatives. While this composition may be attractive to tribes under the current Administration, which tends to be sympathetic to many Native American issues, this situation could be reversed in the future under other Administrations of either party. In short, a panel composition that may be sympathetic to Native American claims in 1998 may turn hostile to these claims in 2002, leading to conflicting and/or contradictory panel decisions and inconsistent justice.

This potential political whipsaw also would undermine the authority of the proposed panel and weaken the faith of all potential parties to a dispute that they would get a fair hearing and a just decision from the panel. This potential underscores the redundant nature of such a panel. The federal judiciary was established to render impartial and unbiased decisions on matters such as intergovernmental disputes. The drafters of the Constitution established an independent judicial branch to avoid exactly the type of political influence to which these proposed panels will be subject.

### **Panel Decisions Lack Enforcement Authority**

Fourth, nowhere in S. 2097 is there an indication of how, if at all, the decisions of the proposed panel would be enforced against a party to a dispute. Section 104 of the bill expressly authorizes federal district court jurisdiction for civil actions for parties to a state/tribal agreement or compact. However, it is silent on the issue of the enforcement of a decision of the proposed intergovernmental dispute resolution panel. For example, assume that a state brings a claim against

a tribe for failure to collect and remit a lawfully-imposed, non-discriminatory state excise tax on cigarettes. After hearing the dispute, the panel finds that the state's claim is justified and orders the tribe to begin collecting and remitting the appropriate tax to the state.

There is no mechanism available to the state under S. 2097 to enforce the panel's decision against the tribe. Instead, the state would be faced with the same judicial remedies that are available to it now. And the tribe would be successful in defeating any lawsuit to enforce the panel's decision by asserting a defense of tribal immunity. Thus, under S. 2097 and the proposed dispute resolution panels, nothing is really resolved.

#### **Support For Certain Ideas In S. 2097**

NACS and SIGMA do support several of the concepts included in S. 2097. First, the active involvement of the Department of the Interior in convening non-binding mediation between a state and a tribe involved in a tax dispute is an important initiative that should be pursued. However, we are concerned that such mediation take place within the parameters of the Supreme Court's decisions on this subject and that Interior participants be familiar with, and bound by, these decisions.

In addition, we are concerned that the timetable for such mediation outlined in Section 102 of S. 2097 may prove too cumbersome both for states and for tribes. If the issues addressed in the mediation are confined to whether the state tax at issue is a lawful, non-discriminatory tax for which the incidence is on a non-Native American and whether the tribe has a duty to act as an agent of the state in collecting and remitting the tax, then the elongated timetable should be unnecessary.

Second, NACS and SIGMA are intrigued that Section 104 of the bill would require states and tribes to include a provision in any agreement or compact reached under Section 102 waiving both the state's and the tribe's sovereign immunity in order to enforce the provisions of the compact or agreement in federal district court. To date, Native American tribes have been unwilling under any circumstances to waive any portion of their tribal immunity to permit state enforcement of lawful state taxes. And yet, under Section 104, tribes would be required to waive their tribal immunity to the extent necessary to enforce a compact or agreement as part of any state/tribal agreement. If the tribes are willing to support legislation that would require them to waive a portion of their tribal immunity, then perhaps there are other circumstances in which the Congress could restrict tribal immunity without eviscerating the entire concept of tribal immunity -- a result some tribes have predicted from such a restriction in the past.

#### **NACS and SIGMA Support The "State Excise, Sales, and Transaction Tax Enforcement Act of 1998"**

Senator Slade Gorton recently introduced the "State Excise, Sales, and Transaction Tax Enforcement Act of 1998." NACS and SIGMA strongly support this legislation for many of the reasons that we have criticized S. 2097.

First, this legislation closely tracks the relevant Supreme Court opinions by stating affirmatively in federal law that tribes and their members are required to: (1) act as agents of the state when selling tobacco products and motor fuels to non-Native Americans; and, (2) collect and remit to the appropriate state lawfully-imposed state excise, sales, and transaction taxes on such sales to non-Native Americans. Second, in the event there is a dispute as to whether the state tax at issue is lawful, this legislation provides that a state may seek a declaratory judgment on this issue from an impartial federal district court. Third, if the appropriate federal district court decides that the tax is lawful, then the state is authorized under this legislation to bring an action against a tribe in federal district court to enforce the tribes' duty to collect and remit that tax to the state. Fourth, to the extent necessary to enforce this duty, tribal immunity is waived.

In addition, Senator Gorton's bill does not disturb any existing state law or state/tribal compacts or agreements that exempts a tribe from collecting and remitting state excise, sales, or transaction taxes. Thus, if a state has an existing compact with a tribe that exempts the tribe from its duty to act as an agent of the state, or if existing state law exempts the tribe from such a duty, then the legislation would not apply.

Senator Gorton's bill represents a more comprehensive and logical solution to the issue of state/tribal disputes over tax issues than S. 2097 for several reasons. First, it limits its application to lawful state taxes under which the incidence of the tax is on non-Native Americans only. Second, it respects existing state compacts and law. Third, it places enforcement authority in the hands of the impartial federal judicial system, not in the hands of a potentially politically-influenced panel. Fourth, as with S. 2097, it limits tribal sovereignty only to the extent necessary to enforce lawful, non-discriminatory state excise, sales, and transaction taxes.

### **Conclusion**

NACS and SIGMA are heartened by the introduction of S. 2097 and by the fact that our requests for congressional assistance in resolving the issue of Native American state excise tax evasion are being actively considered by this Committee and others in Congress. However, NACS and SIGMA will lend their strong support to Senator Gorton's legislation because it promises to provide more effective, comprehensive, and rapid relief to our members. We have attempted to be constructive in our criticism of S. 2097, and hope that our testimony has been taken in that light.

Thank you for this opportunity to testify, Mr. Chairman. I would be pleased to answer any questions you or your colleagues may have.



## Northwest Indian Fisheries Commission

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**TESTIMONY TO THE UNITED STATES SENATE  
COMMITTEE ON INDIAN AFFAIRS  
REGARDING S. 2097,  
THE "INDIAN TRIBAL CONFLICT RESOLUTION  
AND TORT CLAIMS AND RISK MANAGEMENT ACT OF 1998"**

**By Billy Frank, Jr., Chairman, Northwest Indian Fisheries Commission**

**July 15, 1998**

Chairman Campbell and other Honorable Members of the Senate Indian Affairs Committee, I am Billy Frank, Jr., chairman of the Northwest Indian Fisheries Commission. In this capacity, I am the elected natural resources management spokesperson for the treaty Indian tribes of western Washington. The Commission I represent is an outstanding professional organization, based in Olympia, Washington, which supports the natural resource management programs of 20 sovereign Indian nations. As confirmed in the *U.S. v. Washington* Federal District Court decision of 1974, and reconfirmed by the United States Supreme Court in 1979, the treaty Indian tribes in our state co-manage the great Pacific Northwest salmon resource with the state. In the capacity of co-managers we have amassed highly significant experiences which we feel can provide important insight and perspective relative to the legislation you are considering today.

Before I elaborate on these collective experiences, however, I would like to speak to you briefly about my own experiences as a tribal member from the Nisqually Tribe in the hope that my personal experiences will also provide some helpful insight. I have lived on the Nisqually River all my life, along with many of my closest relatives and fellow tribal members. The Nisqually River is a glacier-fed river with its origins at Mt. Rainier. It travels about 90 miles into the southern end of Puget Sound. My father was born in a long house on that river just before Washington became a state. He was only a boy when a treaty was established between the tribe and the state, but he remembered well what life was like before most of the land was taken over by farmers, ranchers, timber barons and the non-tribal government. He remembered when fish and game, giant cedar trees and a great variety of natural vegetables and other plants provided ample sustenance for the entire tribe. He also remembered being taken away from his family and placed in a government boarding school, forbidden to speak his native language or practice his culture. He ran away from that school and made his way back to his family, on the river of his birth. He grew up there, on the Nisqually, where he continued to practice the customs he had been taught. And, he taught me the values of our heritage, even as we witnessed the massive destruction of our ancestral lands, the damning and pollution of our river and the assault on our traditional way of life by big business, entrepreneurs and government agents. Over the years we have suffered extensive exploitation of

the natural resources and habitat upon which we had depended for our livelihoods and spiritual strength from time immemorial. In the 1960's, the invasion of our treaty-protected rights reached a pinnacle as the state began to arrest us on a frequent basis for exercising those rights.

That led to the U.S. v. Washington case, which the tribes won. In fact, we have won virtually every court case since then, and there have been many of them. Yet, the fish that my father and I have loved so much have stopped coming to the Nisqually River and, like many tribes, most of our tribe's fishermen are unemployed. Still, we have hope. We hope that the fish will return to the river and that our way of

life can go on. We hope that everyone who now lives in the state, and who chooses to do so, will be able to catch fish in the generations to come. We hope these things for good reasons. It is Nature's way for people to catch fish. They provide good nutrition and they culturally connect us with the planet that sustains us. By caring for the fish, teaching respect for them and building our lives around them, we retain a critical part of our past that can be passed on to the generations to come. That's why we devoted ourselves, on the Nisqually, to building positive relations with the people of various vocations who live up and down the river. Together, as a team, we have cleaned up the river. We have shared our thoughts, desires and dreams together: Farmers, Ranchers, Politicians and Tribal Members. We found commonality in the goal of restoring and protecting the salmon resource, realizing that none of us want the salmon to stay away forever.

My father is gone now, but his spirit is strong. The Indians of the Nisqually will not be put in government boarding schools. We will not tolerate assaults on our culture. We will speak our language if that is what we wish to do. And, we will remain devoted to the restoration of the salmon. The salmon has not returned yet, but we hope that it will, and we share that hope with our neighbors.

I come before you today specifically to support the conflict resolution portion of S. 2097, and particularly as it pertains to natural resource management. We appreciate the findings and purposes described in this bill, and we agree that alternative dispute resolution can result in more expedited, less costly and less contentious results than litigation. We have always seen court as a last resort, and have deferred to it only when it was the only path remaining to us. We appreciate the acknowledgment that, in such extreme cases, the United States government must get actively involved in the role of trustee for the Indian tribes. But we also appreciate the proactive involvement of the United States described in this legislation. We further welcome the acknowledgment in this legislation that disputes can rise, not only from the perspectives of non-Indian government toward the tribes, but vice-versa as well.

It has, after all, always been our opinion that disputes should be settled between people and governments short of court. The problem has unfortunately been that court has generally been the one and only way we could get their attention. Our efforts to be heard have generally fallen on deaf ears. The natural resources which have always brought us life have fallen victim to everything from canneries to the woodsman's ax through the years, and our objections summarily dismissed.

We, too, understand the great expense of litigation. We understand the wastefulness of conflict and polarization. But our history has too often been treated with disdain. Our culture has been too often misunderstood, and our treaties have been too often ignored.

Litigation has been our only edge as we have been surrounded by pollution-laden cities, as the spawning beds of our brother salmon have been filled with sediments and our life-giving waters diminished to a trickle.

Our hope is that S. 2097 will provide a legitimate alternative to many court cases. If it does, it is our hope that it will come with the force of Congress, standing up for the principles this bill conveys. If it does, it will be implemented as a tool to bring our voices to the table, as governments and co-managers.

Historically, the tribes have always opted to work with the Federal and state governments in natural resource management, as well as other facets of life. In some cases, such efforts were initially accepted with open arms, as European immigrants found they needed our support to survive in the wilderness. Then, as they needed more land and resources, they simply took what they wanted and, under the guise of manifest destiny, they continued to take land and resources until there was little left for the original inhabitants. Treaties were used as tools to take even more. Then the treaties were disavowed and the practice of taking from the tribes has continued ever since. Millions of Indians died in this process and human rights ignored from that day to this. The tribes finally learned to use the courts to protect their inherent rights, but have always done so as a last resort, consistently and persistently choosing instead to seek ways to live and work together. Following the U.S. v. Washington Decision of 1974, litigation, by necessity, became a way of life. Dozens and even hundreds of court cases took place, and the tribes nearly always won because the objectivity of court took precedence over the misinformation tactics and truth twisting that has always prevailed in the land and resources grabs of the past. About 15 years ago, however, the state of Washington and the treaty Indian tribes decided that they were both weary of litigation and determined, together, to opt toward the cooperative approach to natural resource management. The "New Era of Cooperation" was ushered in, and we became willing partners in natural resource management. The approach led to great mutual benefit. We all discovered that we could make far more progress toward common objectives through team effort than we ever could through confrontation. The cooperative management of the Pacific Northwest came into the national and even international spotlight. Government and non-government officials alike, came from across the continent and even the world to see for themselves how this concept worked. The frequent result was adoption of the process in other areas. From the Great Lakes region to Australia, cooperation and co-management were given new opportunities to function, particularly in the arena of natural resource management, and much good has resulted from these efforts in these regions.

In our own area, process after process developed, fashioned from the concept of cooperation and the principles of brotherhood. In Washington State's centennial year of 1989, the Governor of the state of Washington and the tribes even entered a *Centennial Accord*, which formally established a cooperative process for government-to-government relations across the board, with respect to all of our common objectives. Among other things, the *Accord* has resulted in the establishment of

many tribal liaison positions within the framework of state agencies and the Governor's Office, as well as cooperative entities, ranging from the Joint Natural Resources Council to the State Volunteer Initiative for Salmon Recovery ("People For Salmon").

The most far-reaching cooperative agreement developing from the Era of Cooperation in our state was the Timber-Fish-Wildlife Agreement, or TFW, which brought the state and the tribes, as well as other stakeholders in forest management to the table. For more than a decade, the state and tribes have participated in TFW along with the timber industry and recreational and environmental organizations. The agreement remains alive today, and has been responsible for many historic teamwork-oriented agreements, and no doubt saved millions of dollars that would have otherwise been wasted in the all-too-often bottomless pit of litigation. Tribal participation continues to be a critical component of TFW. The tribes offer a centuries-old tradition of resource stewardship, practice state-of-the-art technology and are strategically located to respond to the critical management needs of watersheds. For the tribes, one of the primary components in the success of TFW has always been the cooperative decision-making process. This consensus-based approach has empowered the tribes and acknowledged their government-level management authority regarding forest practices management. The five major goals embraced by all TFW participants are to:

- 1). Provide the greatest diversity of species and habitats for wildlife on forest lands;
- 2). Provide long-term protection of habitat productivity for wild fish stocks;
- 3). Protect the water quality needs of people, fish and wildlife;
- 4). Inventory, evaluate, preserve, protect and ensure tribal access to traditional, cultural and archaeological sites in forest lands; and,
- 5). Assure sustainable growth and development of the state's forest products industry.

The involvement of the tribes and the TFW cooperators in a common enterprise is a remarkable achievement, unprecedented in the history of natural resource management. The tribes are committed to TFW because it offers the best chance for the success necessary to sustain the viability of timber, fish and wildlife resources for the benefit of generations to come.

We support the dispute resolution components of S. 2097 for similar reasons. We see a distinct correlation between the principles of this legislation and TFW-type processes. For Indian and non-Indian governments to successfully pursue common objectives in natural resource management, or education, economic diversification, child welfare or any other facets of life, we must all choose to live in an era of cooperation. To avoid confrontation and litigation, we must choose to understand one another. Dispute resolution must be based on the principles outlined in this bill, beginning with acknowledgment of the sovereign rights of the tribes. With these principles as a foundation, tribal and non-tribal governments can enter the 21st Century as partners, working together with industry and environmental and other citizens' groups toward common objectives.

It is our hope that S. 2097 will bring us closer to the day when Indian children can never again be taken from their families or forbidden to be Indian, closer to the day when our sacred lands and resources are no longer open and fair game for non-Indian exploitation, and closer to the day when Indian and non-Indian people can work together--as brothers and sisters-- toward a better future.



**Statement of**

**Hon. William C. Canby, Jr.  
Senior Judge, United States Court of Appeals  
for the Ninth Circuit**

**to the**

**Senate Committee on Indian Affairs  
Hearing on S. 2097, A Bill to Encourage  
and Facilitate the Resolution of Conflicts  
Involving Indian Tribes  
July 15, 1998**

Good morning Mr. Chairman and Members of the Committee. I appear here as a former professor of Indian Law who has worked on technical assistance programs with tribal courts over the years. For the past eighteen years I have been a judge of the Ninth Circuit Court of Appeals, and am chair of that court's Task Force on Tribal Courts, whose work I will mention later. I preface all of my remarks with the disclaimer that the views I state are my own; I cannot and do not speak for my court or the federal judiciary in general.

I have been asked to comment on Section 105 of S. 2097, which would establish a Joint Tribal-Federal-State Commission on Intergovernmental Affairs. I confine my prepared remarks to that provision, and take no position on the other portions of S. 2097.

The proposed Commission is to be established by the Secretary of the Interior, and is to be comprised of representatives of Indian tribes, the States, and the Federal Government. The Commission's duties are to advise the Secretary concerning issues of intergovernmental concern to the tribes, the States, and the Federal Government. Included among those issues are (A) law enforcement; (B) civil and criminal jurisdiction; (C) taxation;

(D) transportation; (E) economy development, and other matters. In addition to advising the Secretary, the Commission would report periodically to the President, this Committee, and the House Committee on Resources.

In my experience, there is much to be gained by the establishment of a continuing body representing tribes, States, and the Federal Government, to suggest innovative solutions to unavoidable problems arising from overlapping jurisdiction in Indian country. Such efforts have proved to be very beneficial, at least, in ameliorating problems of criminal and civil jurisdiction and law enforcement in several States within the Ninth Circuit.

As I stated, I am chair of the Ninth Circuit's Task Force on Tribal Courts, which was established six years ago to open lines of communication between federal and tribal courts in the Ninth Circuit, which encompasses the nine westernmost States in the country. It soon became apparent that there were constant problems arising from the division of criminal and civil jurisdiction in Indian country, and that the State governments had become nearly as involved in them as the tribes and the Federal Government. Our Task Force decided to encourage the regular exchange of ideas between the three governments. At the same time, the Conference of State Chief Justices, the National Center for State Courts, and the State Justice Institute, were establishing tribal-state forums in several pilot states, including my home State of Arizona. Where those forums existed, our Task Force prevailed upon them to add representation from the

Federal Government. In States where there were no forums, we found existing state-federal judicial councils, which we prevailed upon to add tribal representation. In other States, we helped to found new tripartite groups.

The need for accommodation between these three governments, as this Committee knows, was great indeed. The division of criminal and civil jurisdiction in Indian country is incredibly complex. On the criminal side, tribal courts have jurisdiction over misdemeanors committed by Indians when the victims are Indians or the crimes are victimless. The Federal Government has jurisdiction over major crimes by Indians, which jurisdiction is at least theoretically concurrent with that of the tribes. The Federal Government also has exclusive jurisdiction over crimes by Indians against non-Indians, and crimes by non-Indians against Indians. The States have jurisdiction over crimes by non-Indians against non-Indians, and victimless crimes by non-Indians. Needless to say, with modern mobility and intermixture of Indians and non-Indians in Indian country, this division of jurisdiction leads to severe enforcement problems.

The division of civil jurisdiction is equally complex, but is far more uncertain and is changing rapidly. Tribal courts have general civil jurisdiction, but it does not apply in many instances against non-Indians on fee lands or state highways within Indian country. State and federal courts also exercise civil jurisdiction in Indian country. Regulatory jurisdiction may or may not be coextensive with civil jurisdiction. As the tribes develop their economies, regulatory problems increase. Pollution

control, for example, is a concern of all three governments and by its nature transcends geographical and jurisdictional boundaries. In addition, Indian treaties often guarantee rights, such as that of fishing, that may be exercised under tribal regulation outside of Indian country.

Against this backdrop of checkerboard jurisdiction, we have found that continuing tribal-State-Federal bodies can serve as catalysts for cooperative arrangements that ameliorate some of the problems arising from fractionated jurisdiction. A small example from Arizona will indicate what I mean. In Arizona, tribal judges who were members of the tribal-State-Federal forum pointed out that, although State resources were theoretically available for mentally ill Indians, the State Hospital would not accept civil commitments ordered by tribal judges. At first some state judges in the Forum agreed to accept tribal court orders as a matter of full faith and credit, and issue state court commitment orders based on the tribal orders. This informal arrangement solved the problem in the short run. The Forum then suggested State legislation to remedy the problem. With tripartite backing, the legislation easily passed and the State Hospital now accepts tribal court commitment orders directly, as a matter of state law.

Problems in enforcing federal law in Indian country in Arizona also have been addressed by the forum. In these matters we have enjoyed great assistance from Attorney General Reno. In Arizona, the United States Attorney, who is a Forum member *ex officio*, arranged to appoint tribal prosecutors as special assistant U.S. Attorneys so they could bring non-Indian offenders

before a federal Magistrate Judge when they committed minor crimes against Indians or Indian property. Neither the tribe nor the State had jurisdiction over such crimes, but federal enforcement officers were not available to police such misdemeanors; the tribal officers were the ones on the scene. The new arrangement is working well, and is being duplicated in other jurisdictions.

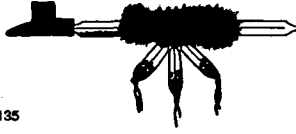
On another front, our Clerk of the Federal District Court in Phoenix has conducted several workshops for tribal court administrative personnel, to help in establishing efficient systems of docketing and case management in tribal court.

These and other such efforts have been successful, but they are modest and necessarily local. Staff and administrative support are lacking, and must be borrowed. Many of the jurisdictional and enforcement problems are systematic, and require cooperative solutions on a multi-State or multi-tribe scale. Some of the problems are caused by federal judicial limitations on tribal court jurisdiction, for which legislative solutions ought to be carefully considered. The national Joint Tribal-Federal-State Commission on Intergovernmental Affairs proposed by S.2097 would fill these needs. It would be a continuing body, able to acquire expertise and perspective in addressing jurisdictional and governmental problems arising among the tribes, the States, and the Federal Government. Those of us who have been working at the local level have seen what fine results can come from cooperation between these three groups. When the tribes, the States, and the Federal Government all address problems together, they can solve many intergovernmental

problems without ignoring or trampling upon the rights or interests of any of the three. The key is that the solutions are voluntary, they are worked out by the parties actually affected, and they are thought through. The process works; we have proved that. At the national level, we need only the instrument -- not just to propose national solutions but also to stimulate local ones on a continuing and consistent basis. The proposed Commission on Intergovernmental Affairs will serve that purpose admirably, and help to accomplish these worthwhile cooperative goals.

Mr. Chairman, Members of the Committee, thank you for giving me this opportunity to address you.

# Menominee Indian Tribe of Wisconsin



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**Statement of  
APESANAHKWAT, CHAIRMAN  
MENOMINEE INDIAN TRIBE OF WISCONSIN  
on S. 2097  
"Indian Tribal Conflict Resolution, Tort Claims,  
and Risk Management Act of 1998"**

**before the  
SENATE COMMITTEE ON INDIAN AFFAIRS**

**July 15, 1998**

Good morning Chairman Campbell and distinguished members of the Committee. I am Apesanahkwat, Chairman of the Menominee Indian Tribe of Wisconsin. It is an honor to be invited before the Senate Committee on Indian Affairs to present the views of the Menominee Tribe on S. 2097, legislation which would provide new methods for resolving conflicts between Indian tribal governments and others, and assure that there are adequate remedies for tort claims against a tribe.

I would like to begin by commending you, Mr. Chairman, for introducing this bill which, in our view, addresses the concerns that have been expressed about tribal sovereign immunity and the need for effective methods for resolving disputes between tribes and others in a manner that does not damage tribal interests. Unlike other proposals that have been made, your bill carefully avoids any invasion of tribal sovereignty and does not expose tribes to the dangers of unbridled litigation.

As you are well aware, Indian tribes have come under increasing attack for perceived "problems" resulting from tribal sovereign immunity. In several

hearings which the Committee conducted on tribal sovereign immunity, there has been testimony that Congress should subject tribes to suit on a variety of matters. These have included such matters as the collection and remittance of retail taxes on sales to non-Indians, remedies against tribes for tortious injuries, and jurisdictional matters related to law enforcement. It is inevitable that, as tribes exercise their rights under the Indian Self-Determination Act (25 U.S.C. § 450 et seq.) and strive to strengthen their self-government and economic determination, there will be more interactions with outside interests. Therefore, it is not surprising that conflicts may occasionally occur, and that they must be dealt with. While the Menominee Tribe believes that the problems portrayed at these hearings are grossly exaggerated, we appreciate the approach taken in your bill that addresses any problems that do exist in a manner that does not overturn the long-established federal policy of promoting tribal self-government and self-determination.

I would like to begin my detailed testimony by commenting on Title II of S. 2097 which would provide a new remedy in situations where a tort had been committed by a tribal employee or agent. Your bill would provide a compulsory tribal insurance program, with the insurance to be obtained or provided by the Secretary of the Interior, and a limited waiver of tribal immunity as to tort liability. These provisions would come into play in situations where the matter is not covered by existing liability insurance purchased by the Tribe or covered under the Federal Tort Claims Act, pursuant to the provisions of the Indian Self-Determination Act.

While it is our understanding that most matters involving tribal tort liability are already covered by liability insurance purchased by the Tribe or covered under the Federal Tort Claims Act, there are some gaps in this coverage. The Menominee Tribe firmly believes, however, that any legislation that attempts to fill these gaps must give due deference to our sovereign status and the need for continuation of



our basic immunity from suit. Thus, the Tribe supports Title II of S. 2097 as it provides relief for tortious acts committed by tribal employees or agents without endangering tribal governments by exposing them to unlimited liability in tort.

While S. 2097 incorporates many of the concepts the Menominee Tribe previously presented for establishing a compulsory tort claims remedy based on insurance, your bill contains a number of changes that we are pleased to support. One such change from the Menominee proposal, presented at the Committee's hearing on May 6, is that S. 2097 does not provide for exclusive jurisdiction over tort claims in federal district court. Because S. 2097 is silent on the jurisdictional issue, these claims could be brought in whatever court has jurisdiction under present law, thus preserving the existing jurisdiction of tribal courts in this area of law. We believe that this change is responsive to concerns expressed by a number of tribes on this point and support it.

Another significant difference under S. 2097 is that the insurance coverage would go into effect no later than two years after enactment of the statute rather than in 180 days, as we had proposed. Before implementing the compulsory insurance provisions, the Secretary is required to conduct "a comprehensive survey of the degree, type, and adequacy of liability insurance coverage of Indian tribes at the time of the study." The Secretary is also required to report to Congress not later than three years after the date of enactment the results of the study, along with recommendations as to any amendments that might be required to improve the insurance coverage mandated by the act. We think that these changes to our original proposal would provide important assurance that the new insurance program will provide necessary coverage in the most cost effective manner.

We respectfully request that the Committee consider a clarifying amendment to Section 202 (f) which gives the Secretary broad authority to establish a schedule of premiums that may be assessed against any tribe provided liability insurance under

this title. While most tribes will be able to afford the premiums--since most tribes now carry such insurance on their own--some tribes will need to obtain federal subsidy in order to pay the premiums required. We suggest that the following language be added to the end of Section 202 (f) (2):

Provided that in establishing a schedule of premiums the Secretary shall provide for forgiveness of such premiums, in whole or in part, on the basis of need.

With respect to the provisions of Title I of S. 2097, the Menominee Tribe strongly supports the broad new federal authority for resolution of conflicts between tribes and states established under this Title. We hope and expect that enactment of these provisions would lead to local resolution of disputes through avenues other than litigation, particularly with regard to the collection of taxes. Proponents of legislation to provide a mechanism for enforcing the collection of state retail taxes have increasingly sought a federal remedy to be imposed on tribes but have not demonstrated that the situation is a nation-wide problem that requires a federal legislative solution. The deliberative process contained in S. 2097 not only allows for developing solutions at the local level between tribal-state-local governments but also provides an alternative when local solutions are not possible. Our specific comments on the various sections of this Title follow:

Section 101: Compacting Authority. Section 101(a) gives the consent of the United States for states and Indian tribes to enter into "compacts and agreements in accordance with this title." While no specific definition is provided, we interpret this language to mean that, with certain limitations listed in Section 101(d) precluding the use of this authority to generally expand or diminish presently existing state or tribal civil and criminal jurisdiction, this compacting authority could be used to cover a wide variety of disputes. Section 101(b) gives specific authority to enter into agreements for the collection and payment of certain retail

taxes pursuant to existing law. We believe that enactment of this provision could provide an important new impetus to the resolution of disputes between states and tribes on a variety of issues.

Section 102: Non-Binding Mediation. This section provides a system for either a state or a tribe to initiate a process of mediated negotiations for the purpose of "achieving a nintergovernmental agreement or compact that meets the requirements of this title." (Section 102(a)) While this is not precisely defined, we interpret the language to mean that this process could involve any subject matter that is not specifically excluded in Section 101.

In the process established under this section, the Secretary of the Interior plays a key role, in selecting a mediator from a list provided by the Federal Mediation and Conciliation Service and in facilitating negotiations between the parties. While the language of the section is couched in mandatory terms, it is significant that there is no mechanism provided to actually make the negotiations mandatory: it is made clear in Section 102(c) that the process of negotiation provided is "nonbinding."

In our view, the establishment of this "nonbinding" process could lead to the resolution of many disputes without invading the sovereign immunity of tribes or states. We are pleased to support this concept.

Section 103: Intergovernmental Dispute Resolution Panel. The most sweeping part of this title is the establishment of an Intergovernmental Dispute Resolution Panel, comprised of one representative of each of the Interior, Justice, and Treasury Departments, state governments, and tribal governments. The bill does not specify how these representatives are to be selected or what term of office they will serve. Upon referral by the Secretary, the Panel is given broad authority to decide any dispute that was the subject of mediated negotiation under Section 102. (The reference in the bill is to "negotiations conducted under section 103" but we believe that the correct reference is section 102.) We are willing to support the

enactment of this broad authority because it is not made specifically enforceable in court and there is no procedure specified for implementing the decisions of the panel. In essence, this Panel will have the power to make nonbinding decisions that, hopefully, would lead the states and the tribes involved in any dispute to a voluntary resolution of those disputes.

Section 104: Judicial Enforcement. Federal district courts are given jurisdiction to enforce agreements entered under the authority of the act, but not to enforce decisions of the Intergovernmental Dispute Resolution Panel. We think that this is an appropriate limitation of the role of the district courts.

Section 105: Joint Commission on Intergovernmental Affairs. A special commission is set up with representatives of tribes, states, and the federal government. This commission would advise the Secretary of the Interior on a variety of topics of intergovernmental concern and would prepare periodic reports on the implementation of this title. We believe that the formation of a commission of this kind could be of great assistance in helping the Secretary to play a constructive role in the matters entrusted to the commission for study and report.

#### CONCLUSION

The Menominee Tribe firmly believes that the preservation of tribal sovereign immunity and the protection of the broader public interest are not inconsistent objectives. We offer to the Committee our assistance on further revisions to S. 2097 to address the concerns we have identified or others which may arise.

Thank you for the opportunity to provide our views on this legislation.

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**Testimony of W. Ron Allen, President**

**National Congress of American Indians**

**Before the United States Senate Committee on Indian Affairs**

**Regarding S. 2097, the "Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998"**

**July 15, 1998**

Good Morning, Chairman Campbell, Vice Chairman Inouye and distinguished Senators. It is an honor to be invited to provide testimony before the Senate Committee on Indian Affairs. I am W. Ron Allen, Chairman of the Jamestown S'Klallam Tribe and President of the National Congress of American Indians (NCAI). As the oldest and largest national Indian advocacy organization in the United States, NCAI is dedicated to advocating on behalf of our 250 member tribal governments on a broad range of issues affecting the health, welfare and self-determination of Indian Nations. I appreciate the opportunity to comment on S. 2097, the "Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998."

I would like to begin my testimony by thanking Chairman Campbell for his diligent work and oversight of this year's series of hearings on tribal sovereign immunity and Senator Slade Gorton's bill, S. 1691. The record created from these hearings clearly shows that S. 1691 is an excessively destructive bill intended to broadly waive all tribal immunity and place jurisdiction over tribal matters in state and federal courts rather than tribal courts. In this same vein, I would also like to commend Chairman Campbell for his work in developing S. 2097. NCAI is very appreciative of this initiative to find constructive solutions to the concerns about tribal immunity in a manner that protects the inherent right of tribal self-determination and self-governance and does not expose tribal governments to unbounded litigation. NCAI would like to continue to work closely with the Committee in this area to assure that any new federal statutes will address these issues in a thoughtful manner that recognizes the federal trust obligation to protect tribal sovereignty.

At the outset, I must note that the member tribal governments of NCAI have not formally taken a position on S. 2097 through our resolutions process. The topics at issue in S. 2097, the sovereign immunity of tribal governments and tribal-state taxation relationships, are weighty subjects with long histories in federal Indian policy. The legislation is less than two months old, and tribal governments have not yet had the time

and opportunity to come to a consensus position through close and comprehensive analysis of the bill in light of all the possible alternatives. My comments today are intended to further the discussion of the bill, and not to signify an NCAI position. This limitation, however, should fit well with the goals of the Committee to enable full consultation and deliberation on the bill with tribal governments.

S. 2097 is divided into two broad titles, the first creating an alternative dispute resolution mechanism for tribal governments and states governments on the issue of state retail sales tax collection in Indian country, and the second creating a program of insurance through the Department of Interior to assure that tribal tort liability is adequately covered. I will address each of these areas individually, but would like to begin with the suggestion to the Committee that these two titles be severed into separate pieces of legislation. We make this suggestion for two reasons.

First, we believe that the deliberations of Congress and the process of consultation with tribal governments will be greatly aided by having each of these substantial and largely unrelated topics considered on their own. In my discussions with tribal leaders, I have found that many have differing opinions about the two titles of the bill. We feel that there is too great a risk that good legislation in one area could be dragged down by less developed legislation in the other, or that in reverse, unripe legislation in one area could be buoyed up by support for the other. Second, NCAI and many tribal leaders are concerned about creating an "omnibus" bill intended to provide resolution to the sundry concerns raised in the sovereign immunity hearings. No matter how well designed and intentioned this legislation may begin, it will likely become a target for unfriendly amendments by any interest group with a gripe against Indian tribes.

NCAI would like to once again extend its sincere thanks to the Chairman and Vice-Chairman and many other members of the Committee for this hearing and their efforts to understand and convey the message of tribal self-governance. Like other forms of government, tribal governments are not perfect, but any solutions should be based on careful study of the true circumstances and guided by the principle that it is the federal government's role to protect tribal self-government. NCAI is looking forward to engaging in that process with the Committee.

#### **Title I: Intergovernmental Agreements**

Title I would create an alternative dispute resolution mechanism for tribal governments and states governments on the issue of state retail sales tax collection in Indian country. This is an issue that has received a great deal of attention recently, but has often been mischaracterized by those who refuse to recognize Indian tribes as governmental entities with the authority to set their own tax policies, and instead have chosen to cavalierly accuse tribal governments of "tax evasion" and "unfair competition."

While these accusations are unsupportable, it is fair to say that this area of law and federal Indian policy is often confusing and untidy. The Supreme Court has adopted a *per se* rule that, except where authorized by Congress, tribes and tribal members on reservations are exempt from state sales and other taxes.<sup>1</sup> The rule regarding state taxation of transactions between Indian sellers and non-Indian buyers is more complex. In these cases, the test is dependent on the specific facts presented in the case concerning the impacts of a state tax on federal and tribal interests and on the purposes of the particular state tax.<sup>2</sup> In sales of goods such as cigarettes and motor fuels, if the incidence of the tax falls on the non-Indian purchaser, the Supreme Court has held that the state tax is lawful, even though the sale took place on an Indian Reservation and that tribes may be required to make reasonable efforts to assist in collection of the tax.<sup>3</sup>

Tribal governments have fundamentally disagreed with this result, because it either eliminates their much needed ability to tax the transactions themselves, or results in double taxation by both tribes and states, which ends their ability to compete. It is important to note that states are not required to collect such taxes, but have the option to do so. As a result, a number of states have chosen to not collect the taxes out of respect for tribal self-governance, a desire to foster economic development or to support the tax base of tribal governments, sometimes with the requirement that the tribal government collect a similar tax in order to promote price parity.

Indian tribes also object to the imposition of state taxes because it exacerbates the flight of revenue from reservations to state coffers. On most reservations, there are few retail stores and tribal members go off reservation and pay state taxes on everything they buy. On an annual basis, hundreds of millions of dollars flow off reservations and into state governments coffers, yet the states provide very little in the way of services on Indian reservations. The Supreme Courts rulings on cigarettes and motor fuels exacerbate this exodus of revenues by requiring tribes to collect the state taxes when nonmember purchase these goods on the reservation. This system provides no parity for tribal governments and adds to the many structural pressures that keep Indian reservations among the poorest communities in the country.

Most states and tribes have resolved their disputes about application of state sales and other taxes by entering into intergovernmental agreements or compacts. According to

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<sup>1</sup> California v. Cabazon Band, 480 U.S. 202, 215, n. 17 (1987).

<sup>2</sup>White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

<sup>3</sup>New York Tax Dep't. v. Milhelm Attea & Bros., 512 U.S. \_\_\_, 129 L.Ed.2d 52 (1994); Confederated Colville Tribes v. Washington, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

a report issued by the Arizona Legislative Council,<sup>4</sup> more than 200 tribes in 18 states have created successful state-tribal compacts that are now in force and are mutually satisfactory to both parties. Most of these agreements follow the pattern of the major Supreme Court tax cases by either exempting all on-reservation sales to Indians from state tax, but agreeing to imposition and collection of taxes on sales to non-Indians, or agreeing on the part of the tribe to impose the same tax as that imposed by the state, and sharing this "single tax" between the tribe and the state on a prearranged basis, reflecting the percentage of the sales to Indians as contrasted to non-Indians.

State taxes on Indian lands have been effectively handled through negotiated agreements at the tribal-state level for many years because the states currently have adequate legal remedies to pursue in collecting taxes on sales to non-tribal members that occur on Indian lands. The Supreme Court has detailed the remedies available to a state in the event that it cannot reach an agreement with a tribe for the collection of retail sales taxes. In *Oklahoma Tax Commission v. Citizen Band of Potawatomi*, 498 U.S. 505 (1991), the Court identified a number of ways that a state can collect a lawfully imposed tax:

There is no doubt that sovereign immunity bars the state from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions by the state. And under today's decision, states may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to tribal stores. States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax.

As pointed out in the *Potawatomi* decision, state governments have the option to collect taxes from wholesalers of tobacco or motor fuels, and pre-collect any taxes before the product reaches the Indian retailer. Many states, even those without tribes, are shifting to this type of tax collection because of its efficiency and effectiveness. In addition, the federal government is now leading the states in a movement toward pre-collection of taxes at the highest levels of the distribution chain, at the "terminal rack" for motor fuels, and at the manufacturer for cigarettes. These methods of tax collection are extremely effective at stopping many forms of tax evasion, including interstate smuggling. In addition, these methods leave discretion in the hands of state governments and do not single out Indian tribes for disparate treatment. Because this movement is already well underway, it is highly likely that any remaining tribal-state tax issues will be resolved through this new tax collection framework without any intervention by Congress.

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<sup>4</sup>"STARTED: State-Tribal Approaches Regarding Taxation & Economic Development", Arizona Legislative Council, November, 1995 at 81. See generally, 81-105.



Because of the conflicting legal and policy considerations in this area, NCAI would like to respond to the alternative dispute resolution mechanism suggested in Title I of S. 2097 with great care and deliberation. Federal funding has never been adequate to fulfill the needs in Indian country, and Indian tribes generally do not have the ability to impose income and property taxes to raise revenue. As a result, many tribal governments have imposed retail sales taxes to provide governmental revenue, and a number also are engaged in tribal revenue generating ventures that retail commodities such as cigarettes and motor fuels. The revenues that accrue to tribes from these sources are absolutely critical to the provision of essential government services to some of the poorest communities in the United States.

Due to these conditions, tribal governments would be greatly concerned about the creation of a forum that would lead to greater state taxes on Indian reservations. In our review of S. 2097, we are unclear whether Section 103 is intended to create a tribunal, the Intergovernmental Dispute Resolution Panel, that can render binding decisions on tribal governments that would be enforceable in court. We are concerned that an inflexible application of federal law, overriding tribal immunity without regard to the concerns of dual taxation and tribal revenue streams, would lead states to forsake their current tax agreements with tribes. In the long run, this would result in greater state taxation of transactions on Indian lands and a continuing destabilization of tribal governments and delicate tribal economies.

Considering this background and overview of existing conditions, tribal governments are using negotiated dispute resolution on a more frequent basis as an alternative to litigation or legislation, and not only for tax issues. We believe that S. 2097 is generally headed in the right direction by exploring these concepts. Certainly, tribal governments have found themselves on the losing side of federal court decisions more frequently in recent years, and negotiated resolutions offer the possibility of achieving the desired outcomes without the risks of setting unfavorable precedents in federal case law.

In addition, NCAI has witnessed an increasing amount of negative federal legislation in Indian affairs that results from unresolved local disputes between tribal governments and local communities. The opponents of tribes then push these isolated disputes to the national stage as anecdotal evidence of a need for widespread reform of federal Indian law. Forums for negotiations and dialogue at the tribal/state/local government levels could help to resolve issues before they become national concerns and result in a more favorable climate in Congress.

As the Committee deliberates on the issues of negotiated dispute resolution, NCAI would like to make several suggestions. First, tribal governments and states are already engaging in a wide variety of negotiation processes, and these negotiations benefit from the complete freedom of the parties to set their own style of negotiation. Prescribed rules for negotiations may be counterproductive. NCAI believes that a great deal could be

achieved in this area by providing technical resources, training, models and expertise in alternative dispute resolution as well as general encouragement and validation of the process. Second, in our experience NCAI has found that it is critical that any facilitators of negotiated disputed resolution have a firm understanding of federal Indian policy. Facilitators who lack this knowledge will often discriminate against the tribal government viewpoint because they do not understand the underlying principles. Finally, NCAI believes that any dispute resolution process defined in federal law on the issue of state retail sales taxes should be non-binding and look to achieve its results through dialogue and mutual recognition of common interests.

## **Title II: Tort Liability Insurance**

Title II of S. 2097 would require the Secretary of Interior to obtain or provide tort liability insurance or equivalent coverage for each Indian tribe that receives a tribal priority allocation from the Bureau of Indian Affairs. This issue of tribal immunity for tort liability has also arisen in the midst of a good deal of misinformation. The opponents of tribes have repeatedly stated that tribes are the only entities in the U.S. to continue to exercise the "anachronistic" doctrine of sovereign immunity. The reality, however, is that tribal governments exercise a form of immunity that is similar in scope to that of states and the federal government.

Governmental immunity from suit is an inherent right of all governments, including the federal, state and tribal governments, for reasons of sound public policy. The purpose served by this policy is to provide special protection against loss of assets held for the performance of vital government functions. Since 1946, the federal government, most states and many tribes have provided limited waivers of sovereign immunity that allow these governments to be sued when the government functions in the same manner as a private individual, such as when a government employee gets in a car accident. However, the federal government, states and tribes have retained sovereign immunity in broad areas in order to protect governmental functions from lawsuits and limit the size of damages claims.

It is well known that in 1946 Congress passed the Federal Torts Claims Act (FTCA),<sup>5</sup> which exposes the United States government to limited liability for certain tort claims in the same manner as a private individual. The FTCA does not waive immunity for interest prior to judgment or for punitive damages, and in addition, any claim for money damages must first be presented to the appropriate federal agency. In 1988 amendments to the FTCA, Congress clarified and strengthened the federal government's right to any defense based upon judicial or legislative immunity. Under this statute, the federal government has retained its rights to sovereign immunity in broad areas, including those functions that are inherently "governmental."

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<sup>5</sup> 28 U.S.C. §§ 2671-2680.

What is less well known and understood is the degree to which many state governments have only recently begun to provide waivers of state immunity which are a great deal more limited than the FTCA. A common trend is for state governments to impose a ceiling on the amount of recoverable damages or to limit recovery to the extent of insurance coverage. Although the dollar amounts vary, many states have adopted a cap of \$100,000 for injuries arising from a single occurrence.<sup>6</sup> Some states set lower caps for property damage claims.<sup>7</sup> In this regard, NCAI would refer the Committee to the testimony of the Shakopee Mdewakanton Sioux Community on May 6, 1998 on the issue of the extremely limited state waivers. This testimony details the numerous states which continue to assert complete or near complete sovereign immunity for their tortious conduct.

In comparison, the exercise of tribal sovereign immunity is relatively generous to claimants. Most Indian tribes in this country provide appropriate remedies to those who may be injured by tortious conduct. Like the federal and state governments, many tribes have voluntarily provided for limited waivers of their immunity<sup>8</sup> and/or have insurance to cover their potential liability.<sup>9</sup> This is a growing trend evidenced by an increasing number of civil claims handled by tribal courts.<sup>10</sup>

Tribes and tribal officials also are subject to suit under various exceptions to tribal sovereign immunity recognized by the courts. For example, courts have applied the *Ex Parte Young* doctrine to tribal officials. This doctrine creates an exception to the general rule of sovereign immunity when an official acts outside of the government's authority. Tribal sovereign immunity also has been limited by various courts where allegations of personal restraint and deprivation of personal rights were raised.<sup>11</sup> In addition, pursuant to federal law, Indian tribes, contractors and employees are deemed to be agents of the

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<sup>6</sup> See, e.g., Ala. Code 11-93-2 (1992); Fla. Stat. Ann. 768.28(5) (Harrison 1992); Okla. Stat. Ann. Tit. 51, 154 (West 1993).

<sup>7</sup> See, e.g., Okla. Stat. Ann. Tit. 51, 154(A)(1) (West 1993) (\$25,000); Tex. Civ. Prac. & Rem. Code Ann. 102.003 (West 1986) (\$10,000).

<sup>8</sup> See, *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) (stating that tribal ordinance bars use of sovereign immunity); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980) (finding express waiver of immunity in severance tax ordinance).

<sup>9</sup> Joseph Calve, *Pequots Won't Gamble on Lawsuits at New Casino*, Conn. L. Trib., Mar. 2, 1992, at 1. NCAI's informal sampling indicates that a substantial proportion of tribal governments carry insurance.

<sup>10</sup> See, The Honorable Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, The Tribal Court Record, Spring/Summer 1996, at 12.

<sup>11</sup> *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 515 F.2d 926 (10th Cir. 1975).

federal government for the purposes of the FTCA when a tribal government program operates with federal dollars.<sup>12</sup>

The reason that so many states have only recently begun to waive their immunity, and some still exercise significant portions of their immunity against torts, is that governments amend their immunity doctrine only after achieving sufficient economic strength to withstand the legal and financial liability that accompanies a waiver. Without this ability to correlate the scope of exposure with the capacity to pay, state governments would face the risk of those who would raid the public fisc through litigation and threaten the existence of political and civic institutions. This rationale holds even greater relevance for tribal governments because they are just beginning to emerge as economically viable institutions. Because most tribes have limited resources, little ability to raise tax revenues, and still depend heavily on the federal government for much of their revenue, immunity from damage suits is tremendously important to their continued stability and development.

In considering Title II of S. 2097, NCAI would like to clearly note that each state government has had the freedom to waive its tort immunity in its own way and in its own time. Tribes should be allowed this same freedom to decide when a waiver of immunity is feasible, and when such a waiver could cripple a developing government. In our review of the record from the tribal immunity hearings, we could find little evidence of unbridled reliance on tribal tort immunity. In fact, there was a great deal more evidence of questionable state government use of the doctrine. Nevertheless, NCAI fully understands and recognizes the challenges that the Committee has faced in fending off the extreme attacks on tribal immunity embodied in S. 1691, and the desire to create legislation that will assure Congress that, where appropriate, parties who are harmed by tribal government activities do have an opportunity to be compensated.

NCAI would like to bring to the forefront tribal governments' concerns with correlating the scope of liability exposure with the capacity to pay. Section 201 of the bill is somewhat unclear in delineating who will pay for the insurance, but it appears that the bill intends to use existing federal funding for tribes from the BIA budget. For most tribes the existing federal funding is overwhelmingly inadequate, and adding the burden of insurance premiums of some unknown amount would simply exacerbate a situation of chronic under funding of tribal operations.

However, Section 202 of the bill contains provisions for what could be a very useful study of risk and coverage of tort claims against tribal governments. The study is not due to be completed for three years, while the insurance requirements take effect after only two years. NCAI would like to put the horse back before the cart and ask the

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<sup>12</sup> Indian Self-Determination and Education Assistance Act and related acts. Pub. L. No. 101-152, Title III, 104 Stat. 1959 (codified at 25 U.S.C. § 450).

Committee to gather further information on the expense of coverage and its impact on federal funding before proceeding with a program of mandatory insurance. As noted above, most tribal governments already purchase insurance to cover a great deal of their activities and filling the gaps in coverage may be a very affordable prospect. A study that would identify those gaps and estimate the cost could provide the assurance to Congress and to tribal governments that Title II is within the means of existing tribal revenues.

NCAI is especially concerned with the impact on the many tribal governments with fewer resources, and requests that these concerns be studied in detail. If Section 201 does create a significant burden, there is a clear responsibility of the federal government to provide the necessary funding to alleviate this burden. Tribal governments have already had some experiences with skyrocketing medical malpractice insurance under Self-Determination Act contracting. An appropriate solution in that instance was to provide coverage for tribes under the FTCA, and this solution may also be appropriate in some instances under the scheme envisioned in S. 2097.

### Conclusion

NCAI would like to extend its sincere thanks to the Chairman and Vice-Chairman and the many other members of the Committee for this hearing on matters that are so critical to tribal self-governance and the cultures and futures of Indian people. As the work continues for solutions to the issues that have been raised today, NCAI would encourage the Committee to bear three points in mind.

First, one-size-fits-all solutions have proven to have disastrous effects when applied among the diversity of Indian Nations in this country. NCAI is particularly concerned about the impact of an insurance requirement on tribal governments with fewer resources. A comprehensive review of the variety of circumstances and specific issues is far more likely to lead to workable solutions.

Second, many of the issues that have been raised regarding state taxation on tribal lands involve matters of purely local concern that can be resolved on the local level among the tribes and states. The role of the federal government in these instances should be to encourage local negotiation and cooperation.

Third, and finally, any solutions should be guided by the principle that it is the federal government's role to protect tribal self-government. NCAI is looking forward to working on these challenges with the Committee.

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## TESTIMONY OF PHILIP S. DELORIA ON S. 2097

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JULY 15, 1998

Mr. Chairman and members of the Committee. Thank you for the opportunity to testify on this important bill. My name is Philip S. Deloria. I am a member of the Standing Rock Sioux Tribe and I am the Director of the American Indian Law Center, Inc., of Albuquerque, New Mexico, the only Indian-controlled policy studies organization in the nation, having been created in 1967. I am also the President of the Legi/x Corporation, a private lobbying firm with exclusively tribal clients. I am here today giving testimony that is entirely my own, however. I have been professionally involved in Indian affairs for the past 36 years and have considerable experience that might be of some use in these deliberations.

## CONTEXT

Let me first say that I appreciate the intention of this Committee to bring greater clarity to Indian affairs over the years and to bring about improvement in the conditions among Indian people, particularly through the Committee's efforts to realize the repeated promise of Indian tribal self-determination.

These are not easy times for a student of American politics to understand, if one gives credence to the professed principles of the great American political parties. We have on the agenda a number of bills in the past several sessions that would use the power of Congress to dictate policy at the most local level and to substitute for the wisdom of the local political processes the solutions dictated from Washington. The Congress has been presented with bills that would seriously distort tribal legal systems to virtually ensure - to be blunt - that non-Indians always win in tribal court. That is a privilege that we Indians are not accorded in state or federal court.

If one looks at the history of the doctrine of sovereign immunity, one can see that the real driving force which has limited sovereign immunity has been the marketplace - the place that I had always thought was a place of worship for the Republican party. The federal government and the states have limited their reliance on sovereign immunity in response to the political and economic pressures of the marketplace, as well as their notions of fairness. Have we identified a reason to think that Indian tribes will not do the same if left to that marketplace? Will investors put money into tribes where there is no recourse? Will gamblers visit casinos on a reservation where there is no way to vindicate the various rights that they consider important? If a bank is stupid enough to lend money where there is no recourse, is it the job of Congress to hold them harmless? And, once burned, will that bank ever again lend money to a tribe or other entity that burned them?

I am quite frankly amazed that a Committee of Congress - especially one with a Republican majority - is willing to put so much time considering legislation that would substitute a Washington-made and Washington-dictated solution to a problem - a problem that may not even exist - rather than allow the natural social processes to evolve a solution out of local conditions managed by the people who know the situation the best.

In the last few years we have seen a disturbing pattern to the Indian policy proposed by a member of this committee, who seems to be driving the agenda in this business not only here but because the Republican party saw fit to put the federal Indian budget in his hands. The pattern is that of reversing the thrust of the plenary Indian power of Congress from one which protects the Indians from the ravages of the states and their nearest neighbors to a power which makes the federal Congress the guarantor that a single non-Indian can win in every case. The power of Congress over Indian tribes is not morally justified if it is more often used to hamper them competitively and to force them to give advantages to non-Indians than it is to protect them from the overreaching by their neighbors which history amply demonstrates.

We have seen a parade of non-Indians in here to complain about tribal governments. Many of the members of this Committee have served in state and local government. Do they have any doubt whether the same or similar parade could be assembled to complain about municipal, county or state government - not to mention federal agencies - in any community in this nation? No sane person would take the position that tribal governments or tribal courts are flawless - nor would any sane person take that position as to their federal or state counterparts. The question really is: are the flaws of tribal governments so egregious that federal action is warranted to limit their powers or to dictate their policies? And underlying that question is: is the same energy put into hearing Indian complaints about state government; into ensuring that Indians will always win in state courts? We know the answer.

Many Indian people do not like the notion of the plenary power of Congress on the subject of Indian affairs, in large part because they have been misled as to the meaning of that legal doctrine. The "Plenary Power of Congress" does not mean that Congress can do anything it wants to Indians. It merely means that when the subject of legislative consideration legitimately falls within the aegis of "Indian affairs", Congress has the power to legislate without relying on one of the enumerated Constitutional powers. It does not mean that there is no limit on the powers of Congress.

This doctrine of "Plenary Power" was most clearly enumerated first in the case of Kagama v. United States, where the United States Supreme Court identified as the rationale for this plenary power the fact that the states and the Indians' neighbors are usually the Indians' most deadly enemies. Indian affairs, in the view of the Supreme Court, must be broadly federalized to protect the Indians. Here we have a Congress that is seriously considering using this power - which implicitly limits Indian self-government - to protect non-Indians who may be affected by tribal governments and indeed to give them greater protection than they have against the federal government or against their own state and local governments. I urge this Committee that if we are to be stuck with this plenary power of Congress to at least return it to its doctrinal roots, that of protecting the Indians from overreaching by their more powerful neighbors.

We have a number of legislative proposals and positions of individual members of Congress on legislation which are obviously and in many cases admittedly based on the desire to protect local non-Indian business interests from Indian competition. Several years ago the United States Supreme Court held that state taxes imposed and collected on Indian reservations did not infringe on the right of Indians to make their own laws and be ruled by them. This Congress and the American people who elect them have been urging our Indian tribes to become economically self-sufficient and to rid themselves of dependency on the federal government. But when the Supreme Court allowed state taxation on the reservations, where was Congress to correct the mistake? The fact is, the Congress doesn't have an Indian economic development policy other than this misbegotten gambling craze. If a tribe wants to encourage the growth of a healthy mixed economy on the reservation, it must choose between imposing a tax on top of the state tax - thereby discouraging private investment on the reservation - or declining to tax - thereby continuing its dependency on the federal government. The idea that this tax situation does not interfere with tribal self-government is breathtaking.

S.2097

Turning to the proposal at hand, I want to recognize the chairman's effort to address a very complex set of problems in a fair and constructive manner. Here are my comments.

The bill combines several issues in a way that is not helpful to clarity of thought. I would agree with many other witnesses in pointing out that these Titles deal with disparate issues, and suggest that Titles I and III be separated. First, let me address the insurance provisions of Title II.

## TITLE II

1. We do not know how many tribes are now insured, how many insurers hide behind tribal sovereign immunity (in which case, what exactly is the tribe paying for?), or how many tribes have trouble finding insurers. It doesn't make sense to legislate first and define the problem second.

2. The bill provides that the federal insurance will be available to all tribes having a TPA allocation. My understanding is that all tribes have a TPA allocation, and that tribes that compact or contract under 638 for all or part of the TPA allocation are covered to that extent by the Federal Tort Claims Act. It is not clear, then, what this legislation is intended to cover in relation to the existing protection of the Tort Claims Act, in relation to causes of action outside the Tort Claims Act, and in relation to tribes having a TPA but neither compacting nor contracting under 638.

3. The bill provides that the federal insurance will be available to tribes not buying their own coverage. Will this be a disincentive to tribes to buy their own coverage if the Secretary will buy it for them? Will tribes who now buy their own insurance cancel in favor of the Secretary's policy?

Given the lack of information on the real scope of the problem (and in light of the current public



attention to the far more serious problem of the ability of the public to sue their HMO's), it seems that there is insufficient basis for this legislation at this time.

#### TITLE I

I have had some experience in state-tribal relations, having been a founder of the Commission on State-Tribal Relations in 1976 - a coalition of organizations of tribal governments, state legislators, attorneys general and county governments formed to examine the intergovernmental relationships on Indian reservations and encourage their improvement. I might add that we enjoyed the participation of several state governors in our work, but none of the organizations of state governors saw fit to associate with us formally.

Let me state in the clearest terms possible a fundamental problem with the whole area of state-tribal relations. In all the work I have done in this area, I am constantly finding that well-meaning people on both sides of the fence think that tribal, state and municipal governments cannot meet and make agreements without federal consent. That is absolutely untrue. I understand that from time to time Congress wishes to encourage states and tribes to settle their differences without recourse to litigation. But for Congress to grant "consent" where none is required does not facilitate tribal-state cooperation, it discourages it.

Formal (as opposed to political) barriers to tribal-state (and in that I include tribal-county or tribal-municipal) agreements can only be found in federal, tribal or state law. Not only is there no general federal principle of law requiring federal consent to tribal-state agreements, the Indian Reorganization Act recognizes in specific terms the power of Indian tribes to negotiate with state and local government. We must assume that the Congress that passed the IRA meant that tribes could not only negotiate but could make agreements - Congress was surely not encouraging pointless intergovernmental negotiations.

Rather than assume the need for federal consent to negotiations, one must look at the specific subject matter and determine whether that subject matter is one that falls within federal control, and one must look at the proposed agreement to determine whether its provisions trigger some federal power. Tribes, for example, cannot encumber or alienate trust property without federal approval. An intergovernmental agreement that sought to do this, then, would require the appropriate federal consent. Tribes cannot transfer jurisdiction to state governments without a referendum of the people, a restriction imposed by federal law. Therefore, there are federal limitations on tribal powers to make agreements, but they are not of the sort that would in general require Congressional consent in advance of any negotiations or any agreement that might be made.

In summary, the consent of the United States is not needed for tribes and state to make tax agreements unless they infringe on a particular federal restriction. In fact, there are probably hundreds of tax collection agreements throughout the country, some decades old, whose legality is not in question.

What is missing in the equation is the political will on the part of states and tribes to make tax

collection agreements. In a situation such as this, the party whom the existing law favors finds the law crystal clear; the party feeling disadvantaged by existing law finds it "ambiguous" and seeks to have it "clarified" - that is, changed to be more favorable. Under the existing state of the law, tribes play defense and states play offense. These tax provisions will encourage states to bring additional pressure to extend their taxing powers deeper into reservation life.

The greatest encouragement possible for increased tribal-state cooperation in the tax or any other area is for the federal government - all three branches - to take seriously the federal trust responsibility to Indian tribes. When that happens, states see an incentive to negotiate. If, on the other hand, the states see - as they often do - a lack of federal enthusiasm for the tribal position, they are not encouraged to negotiate but instead encouraged to take a hard line. That is precisely why the anti-tribal forces control the agenda in the Congress now - because the Congress does not simply reject their position and get on with business. As long as the anti-tribal forces feel they can get some concession, why on earth would they not continue the pressure?

As I understand the law, Indian tribes are only obligated to pay taxes to the state on fee land and on certain off-reservation activities (under the Mescalero decision). S. 2097 seems to be aimed at situations in which the Supreme Court has suggested that tribes should collect taxes for the states on transactions where the state taxes the consumer and the tribe is the vendor. Even in these three situations, a very small amount of money is involved, but this bill may open the door to much larger claims by the states because of the ambiguous wording of the bill.

I would have thought that the Congress might have learned some lessons about facilitating tribal-state agreements from the fiasco of the gaming compacts. As a general rule, I would urge this committee to make a very careful analysis - as I understand these hearings to be - of the costs and benefits of federal involvement in the tribal-state relationship, particularly where, as here, there is no inherent federal role.

Finally, I would like to address Sect. 105, JOINT TRIBAL-FEDERAL-STATE COMMISSION ON INTERGOVERNMENTAL AFFAIRS. As the founder and principal staff support for the Commission on State-Tribal Relations for about ten years (and as a veteran of the American Indian Policy Review Commission), I have some experience in this area. It is true that there is a need for more detailed information concerning the tribal-state relationship. Little of that information is available from federal agencies, however. The tribes, states and municipalities have the information about existing agreements - formal and informal - and would be willing to share that information if it would be of help.

Rather than create a commission which would put everything on hold for a few years, this Committee could perform a valuable service by holding hearings in which each federal agency is asked to report on the actions it takes to support tribal taxing and regulatory powers, thereby facilitating tribal-state cooperation. It could also hold hearings on the public services - paid for out of both federal and state tax dollars - which are denied to otherwise eligible Indian people on the ground that they are Indians and - unlike their non-Indian neighbors - are required to exhaust specifically Indian services before being served by state and local government.

I am skeptical about whether a federal commission would help at this point. It might delay the slow progress in this area by providing the excuse that "Let's not do anything until the federal commission makes its report". In my view, the track record of such commissions is pretty dismal, being mired in organizational politics and the difficulty of obtaining funding to do the job needed.

The greatest disincentive to increased tribal-state cooperation these days is the perception by the states that they have the tribes on the run politically, and the shocking but not surprising overreaching by many states in the gaming compacting process. It is reminiscent of the 19th century treaty negotiations that Indian tribes are forced to engage in "negotiations" with the states with U.S. Attorneys and federal marshals figuratively standing outside the door ready to close them down if they don't agree to state demands. Creating such an inherently unfair and unworkable process is not my idea of the actions of a trustee, or of facilitating true tribal-state cooperation.

If Congress would give a clear indication to the states that it is truly committed to tribal self-determination and not willing to give in to state pressure, tribes and states can get back to the business of negotiating their way around various obstacles as they have been for the past 30 years, and with very little federal involvement. The best single thing Congress could do would be to reduce the power of states in the gaming negotiations and restrict the power of states to impose taxes on Indian reservations, which would enable tribes to have an economic development policy and begin to solve their economic problems without undue reliance on gaming revenue.

Thank you for the opportunity to testify.

Testimony of

Phyllis C. Borzi, J.D., M.A.

Center for Health Policy Research  
George Washington University Medical Center  
Washington, D.C.

on

Title II of S. 2097

"The Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998"

Mr. Chairman, Mr. Vice-Chairman and Members of the Committee:

Good morning. My name is Phyllis C. Borzi, and I am a senior research staff scientist at the Center for Health Policy Research of the George Washington University Medical Center. I am honored to be invited to testify before you today on Title II of the Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998.

Early this year, the Center completed a study entitled "Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations with Self-Determination Contracts/Compacts." I was the primary author of that study. Although the study had a somewhat narrower focus than the provisions of Title II of S. 2097, many of the issues that we examined and information that we gathered may be relevant to your consideration of the bill.

In the few minutes that I have this morning, I will briefly describe our study, summarize the relevant findings and recommendations, and comment on several issues raised by S. 2097. I have provided the Committee with a copy of the entire study, including the "Handbook for

Tribes on How To Reduce Private Liability Costs," which we prepared. I must stress, however, that the views I express here today are my own and do not reflect the views of the Federal agencies that funded our study or the representatives of those agencies who served on our Technical Advisory Committee.

### **Description of Purposes and Methodology of the Study**

In a series of steps beginning in 1987, Congress extended the protections of the Federal Tort Claims Act (FTCA) to tribes and tribal organizations carrying out programs under the Indian Self-Determination and Education Assistance Act (ISDEAA) (P.L. 93-638). As you know, the FTCA provides immunity for certain tribal entities and individuals against common law tort claims arising from acts or omissions that are both within the scope of self-determination contracts and within the scope of the individual's employment as a matter of state law. Although not "insurance" in the conventional sense, the FTCA operates in a way similar to insurance by protecting covered entities and individuals from direct and personal tort liability, thus reducing or eliminating the need for commercially purchased liability insurance.<sup>1</sup> One objective of Congress in extending FTCA coverage was to reduce the need for private liability insurance for self-determination activities. Yet today, a decade later, some tribes, tribal organizations, and insurers still appear to be unaware of either the existence or the breadth of FTCA coverage with

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<sup>1</sup> The term "coverage" under the FTCA is used as a shorthand for the principle that the FTCA provides immunity to P.L. 93-638 contractors and compactors and their employees from direct liability for certain injuries they may have committed. If a claim is "covered" under the FTCA (i.e., meets all the requirements specified in the Act), the United States steps into the shoes of the tribal defendant(s) and assumes liability for the claim. Consequently, private liability insurance is unnecessary for claims covered by the FTCA.

respect to P.L. 93-638 activities. The cost savings that were expected to result from extending FTCA coverage to tribes and tribal organizations do not appear to have been fully realized.

For a number of years after FTCA coverage was extended to self-determination contractors, tribal representatives expressed concern about the availability and cost of private liability insurance. Some tribes had difficulty in obtaining private liability insurance at all; others complained that the quoted rates seemed inordinately high. Since many tribal activities are funded under self-determination contracts or compacts and potential tort claims involving those activities are generally covered under the Federal Tort Claims Act (FTCA), the question was: why were tribes paying so much for commercial liability coverage that was merely supposed to supplement their immunity from tort liability under the FTCA?

The U.S. Department of Health and Human Services, in conjunction with the Departments of Interior and Justice, contracted with the Center for Health Policy Research (CHPR) of the George Washington University Medical Center to examine tribal experiences in purchasing private liability insurance to supplement coverage under the FTCA. The Center was asked to assess tribal access to commercial liability insurance and recommend strategies to help the tribes find more affordable insurance to supplement or "wrap around" their FTCA coverage. To empower tribes to be better purchasers of commercial liability insurance, however, it was crucial that they better understand the extent to which their liability for potential negligence was already covered under the FTCA. Until tribes had a more complete understanding of the extent of their tort immunity under the FTCA, it seemed unlikely that they could adequately assess their need for supplemental private liability insurance. So our study was focused on issues surrounding tribal experiences with private liability insurance and the FTCA.

The specific purposes of the study were:

- (1) to examine access to private liability insurance by tribes and tribal organizations operating programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, and the coordination of that insurance with the immunity from tort liability for self-determination contractors and compactors and their employees provided under the FTCA;
- (2) to identify barriers to the appropriate pricing of private liability insurance; and
- (3) to recommend strategies to assist contracting and compacting tribes and tribal organizations to assess their need for private liability insurance and obtain this insurance at reasonable prices.

To help guide the study, we established a technical advisory committee (TAC). The TAC was comprised of representatives of three Cabinet departments: (1) the Department of Justice (DOJ), Torts Branch, Civil Division; (2) the Department of Health and Human Services (DHHS), including representatives of the Office of the Assistant Secretary for Planning and Evaluation (ASPE), the Office of Assistant Secretary for Management and Budget (ASMB), the Office of the General Counsel (OGC) and the Indian Health Service (IHS); and (3) the Department of the Interior (DOI), including representatives of the Office of the Solicitor and the Bureau of Indian Affairs (BIA). During the course of this study, the TAC met regularly to assess the study's progress and make recommendations to the research project staff.

All federally recognized tribes and national and regional tribal organizations received an announcement from the IHS describing the study objectives, the different elements of the study, and the CHPR project staff. The announcement invited tribes and tribal organizations to contact representatives from the BIA, IHS, or research project staff if they wanted to participate in the study. We specifically sought information about both positive and negative experiences in securing private liability insurance. Twenty-two tribes and tribal organizations volunteered to be

included in the study.

Let me identify up front some of the limitations of our study. Because participation in the study was voluntary, we made no attempt to categorize or compare tribal experiences throughout Indian country. Our goal simply was to provide information that would help tribes secure appropriate and affordable private liability insurance. In addition, the study was limited in funding and scope; therefore, it was not possible to select a representative sample of all P.L. 93-638 contractors and compactors. It was clear from the study's inception that because of the self-selected nature of the participants, the study would not necessarily yield statistically valid data that could be generalized to all P.L. 93-638 contractors and compactors. But we expected, however, that the participating tribes would provide useful information about their problems and successes in obtaining appropriate and reasonably priced liability insurance policies, and that it was valuable to share this information more broadly with other tribes.

As it turned out, the twenty-two tribes and tribal organizations that volunteered to participate in the study constituted a geographically diverse group and provided contact with tribal governments, health clinics and other tribal entities.

Researchers held initial telephone conversations with each of the tribes and tribal organizations to determine their familiarity with and understanding of the FTCA and the FTCA claims process, and to learn about their experiences in obtaining private insurance coverage. A series of key questions were developed and refined to serve as a general guide for these conversations, although specific questions and follow-up requests for information were often tailored to the individual participant's responses.

During the telephone interview and site visit stages of the project, tribal participants were



asked to supply names of brokers and insurance companies providing private liability coverage to them either currently or in the past. These brokers and insurance companies were contacted and invited to participate in the study. Although some of them agreed to participate, the non-response rate was high, particularly among insurance companies, even after follow-up telephone calls. Nearly all of the brokers and insurance companies providing coverage to site visit participants, however, agreed to participate in the study; but obtaining useful information from the insurance companies was substantially more difficult than gathering information from the brokers.

An important issue in negotiating private insurance coverage is the interaction between the FTCA and supplemental private insurance. Thus, at the recommendation of the TAC, individuals in the DOI field solicitors' offices and in the DHHS Office of the General Counsel were interviewed to obtain background information with respect to the FTCA claims filing and coverage experience of the tribes. Representatives of the Civil Torts Division of the DOJ were also interviewed during this preliminary information-gathering phase of the study. Another meeting with DOJ occurred at the end of the project to further clarify the FTCA administrative claims process and to discuss other substantive issues raised during the site visits and the tribal consultation meeting. Other opportunities for consultation and input from DOJ also took place during the drafting stages of the study and accompanying handbook as we consulted DOJ on several occasions to clarify issues as they arose.

In addition, several tribes and tribal organizations were willing to provide us with copies of their current insurance policies. Although we reviewed the terms of the policies themselves, they generally did not contain pricing information. During subsequent interviews, tribes and

tribal organizations shared limited pricing information with us.

The next phase of the study consisted of three multi-day site visits to tribes and tribal organizations. In preparation for the site visits, researchers developed selection criteria and further refined key questions that had originally been used in the initial telephone interviews. Researchers used four criteria to select the site visit participants: (1) the willingness of the tribe or tribal organization to take part in the site visits; (2) the extent of their knowledge and experience with the FTCA and private liability insurance;<sup>2</sup> (3) their proximity to one another;<sup>3</sup> and (4) the amount of P.L. 93-638 funding they received.<sup>4</sup>

The three areas selected for site visits were the southwestern United States (New Mexico and Arizona), northern Wisconsin, and the Pacific Northwest (Alaska and Washington State). A total of twelve tribes and tribal organizations participated in the site visits. The site visits also included meetings with six insurance brokers (three of whom represented one company that had developed a special insurance product for tribes and tribal entities), and one insurance company. While conducting the on-site interviews, we gathered names of other brokers and insurance companies active with tribes and tribal entities and followed up on these leads. We conducted

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<sup>2</sup> We selected participants for the site visits that represented a wide range of knowledge and experience with the FTCA and private liability insurance.

<sup>3</sup> A map was prepared showing the geographic locations of each of the potential study participants. To make the most efficient use of travel time and our travel budget, we focused on the areas in which potential participants were most concentrated. In evaluating which of these areas of concentration to visit, we attempted to include geographically diverse regions of the country.

<sup>4</sup> We attempted to visit tribes and tribal organizations with a sufficiently large share of P.L. 93-638 funding so that the existence of FTCA coverage might have a meaningful impact on their private insurance premiums.

in-depth telephone interviews with three additional brokers. We also contacted three nationwide insurers that currently sell liability coverage to tribes and tribal organizations. One was eventually interviewed after a substantial delay in responding to our requests; another referred us to one of its subsidiaries which failed to respond to our repeated inquiries; and a third refused to talk with us directly, but referred us to its internal department of governmental affairs and media at the home office for information (which we decided not to pursue because, in our judgment, it was unlikely that pursuing this process would lead to contact with someone knowledgeable about these issues within the company in a timely fashion).

In addition, researchers also received information about two insurance companies that had been established as "captive" insurance companies because of the lack of interest on the part of existing insurance companies in writing tribal coverage.<sup>5</sup> In one instance, the captive insurance company was set up by a brokerage firm; in the other, it was a joint venture between brokers, consultants, and a reinsurer. In each case, the captive insurer was established solely to underwrite tribal coverage.

Ultimately, we were successful in interviewing (either on-site or by telephone) representatives of one nationwide insurance company, two tribally chartered insurance companies, and one reinsurer, bringing the study's interview total to nine brokers and four insurance companies. To facilitate our discussion with tribes, brokers and insurers, we prepared a background paper on the history of tribal coverage under the FTCA. This paper was included

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<sup>5</sup> Generally "captive" insurance companies are closely-held (i.e., owned by a small group of people) subsidiaries of an existing entity. A captive insurance company is typically created to provide insurance for an enterprise or a group of enterprises that have difficulty securing commercial insurance in the marketplace from existing insurance companies.

in our final report.

A tribal consultation meeting was held on April 23, 1997, attended by all members of the TAC, representatives from four tribes, and a Washington, D.C. lawyer with numerous tribal clients. At this meeting, the research group presented preliminary findings and recommendations from our site visits and conducted a group discussion. The discussion generated a number of useful comments and suggestions which were incorporated into the report.

Finally, we developed a handbook for tribes and tribal organizations. The handbook describes in layperson's terms the liability coverage available under the FTCA, the potential need for private liability insurance to supplement FTCA coverage, and strategies to help tribes reduce private insurance costs. The handbook was included in our final report.

### **Our Findings**

The principal findings of the study are as follows:

1. The immunity from tort liability provided by the FTCA can be very beneficial for tribes and tribal organizations involved in P.L. 93-638 activities. Working with knowledgeable brokers, some tribes and tribal organizations report that they have been able to reduce their private liability insurance premiums substantially and, in some cases, completely drop certain types of coverage (e.g., medical malpractice) because of the FTCA.
2. Some tribes and tribal organizations involved in P.L. 93-638 contracting, however, may not have fully realized the benefits of the FTCA, because of the uncertainty, confusion, and lack of understanding among tribes, brokers, and insurance companies as to what activities are covered by the FTCA, when private sector coverage is unnecessary or duplicative, or how a FTCA claim proceeds through the system. This problem persists despite the publication of regulations under Title I of the Indian Self-Determination and Education Assistance Act Amendments ("1996 Regulations"), issued in June, 1996, which contain useful information about the FTCA for P.L. 93-638 contractors and compactors.

3. The difficulty that tribes and tribal organizations have in determining what private coverage they need to supplement their FTCA immunity may be compounded by what they describe as inconsistencies in how Federal personnel determine that particular claims are covered under the FTCA. Tribes, tribal organizations, and brokers report that there does not appear to be a uniformly applicable framework for coverage or a precedent-based decision-making system the results of which are available publicly. It is, therefore, hard for tribes, tribal organizations and insurers to judge the types of claims that might be covered under the FTCA and even harder to evaluate the extent to which private liability insurance is necessary or duplicative. This appears to be more of a problem with non-medical claims.
4. Notwithstanding the perception of self-determination contractors and brokers that there is no way to predict when the FTCA will apply to a particular tort claim because this decision requires a case-by-case analysis, a general framework for analysis of the FTCA's applicability to tort claims involving P.L. 93-638 contractors and their employees can be constructed that provides some assistance in assessing the likelihood that private liability insurance may be needed.
5. Tribes and tribal organizations report that the lines of communication between themselves and the Federal agencies involved in FTCA decision-making need to be improved. Tribes and tribal organizations report difficulties in determining a claim's status and resolution and receiving timely responses to tribal inquiries as to whether a claim will be covered or not by the FTCA.
6. Many insurance companies are unfamiliar with the FTCA and its applicability to self-determination contractors. Other insurers are uncertain about the reach of the FTCA and the process for filing an FTCA claim. As a result, some insurers may misconstrue, underestimate, or disregard the value of the FTCA in designing private liability insurance coverage for tribes and tribal organizations and in determining premiums to be charged for that insurance coverage. Because the level of sophistication about tribal tort immunity through the FTCA varies substantially, the number of insurers willing to write tribal coverage, while growing, is still relatively small. This is surprising in that insurers routinely sell coverage to state and local governmental entities that have basic grants of immunity under statutes that are similar to the FTCA and therefore would have the same need as tribes for only supplementary private insurance coverage.

## **Our Recommendations**

The principal recommendations of the study are as follows:

1. A clearinghouse could be created through which tribes and tribal organizations

could share information about their experiences with the purchase of private liability insurance. In addition, to facilitate networking among tribes, a web page could be created. The web page could include general information on the FTCA and list the designated regional contact people within the responsible agencies who can be contacted for more specific assistance.

2. The Secretaries of Health and Human Services and the Interior, in conjunction with the Department of Justice, could conduct informational meetings in various regions to acquaint tribes, tribal organizations, brokers, and insurance companies with the basic principles of immunity from tort liability provided for self-determination contractors under the FTCA. The purpose of these meetings would be: (a) to assist tribal self-determination contractors to better understand the immunity from tort liability provided under the FTCA in order to improve their ability to purchase non-duplicative private liability insurance; and (b) to assist brokers and insurance companies to develop appropriate insurance products.
3. Informational materials could be developed for distribution to P.L. 93-638 contractors. These materials should be written in clear and understandable layperson's language. They would generally describe the immunity provided to self-determination contractors under the FTCA and identify (to the extent possible) the types of activities that may not be protected so as to assist tribes in understanding the extent to which they may need supplemental private liability insurance. These materials could be used by the tribes to share with brokers and representatives of insurance companies who are unfamiliar with the FTCA. The *Handbook for Tribes on How to Reduce Private Liability Insurance Costs* (which is part of this report) and the 1996 Regulations could serve as starting points. To maximize the usefulness of these materials for tribes in their negotiations with insurance companies, any guidance should be issued by the Federal government, since privately issued materials on the FTCA may be perceived as less authoritative.
4. Principles for determining more clearly when private liability insurance duplicates tribal FTCA immunity could be developed and communicated to all P.L. 93-638 contractors and compactors. In addition, examples of insurance contract language that does not duplicate the FTCA could be identified and shared with and among tribes, tribal organizations, brokers, insurance companies, and the Federal government.
5. If they have not yet done so, tribes and other P.L. 93-638 contractors and compactors should designate a tribal tort claims liaison with the Federal agencies for purposes of the FTCA, as the 1996 Regulations instruct. Similarly, the agencies should provide the tribal contractors with a list of key regional contact persons who can act as resources for the tribal contractors on FTCA matters.

6. Misunderstandings and confusion about FTCA could be reduced by improving communications between self-determination contractors and Federal agencies.
7. More consistent interpretation and application of policies and procedures within and across Federal agencies would reduce confusion about FTCA issues. For instance, consideration could be given to developing consistent internal agency procedures for determining whether a claim will be covered under the FTCA. In addition, agencies could develop standardized responses to tribes that request information about the FTCA from the government. They also could develop a "to-whom-it-may-concern" letter verifying and explaining FTCA coverage of P.L. 93-638 activities, which could be used by the tribes when dealing with brokers, insurance companies, and other entities that require verification of FTCA coverage.
8. To the extent possible, a body of general information about claims filed under the FTCA could be developed. An on-line claims registry could be organized by type, location and disposition of claim. This registry would be for internal agency use to facilitate consistency in interpreting the FTCA.
9. Consideration could be given to the creation of a publicly available data base containing the same type of information as would be in the claims registry but, if necessary to maintain confidentiality, available without tribal or individual identifying information.
10. The Federal agencies could consider issuing additional clarification on FTCA coverage of certain activities which have been the source of particular confusion for tribal contractors, such as employment-related torts.

## **Our Conclusions**

After a number of years in which tribes and tribal organizations experienced difficulty in finding private liability carriers willing to insure them at all, let alone at reasonable prices, today's marketplace offers both opportunities and challenges. Some tribes have leverage to negotiate lower rates, and they have a choice of insurers. They often have more than one carrier vying for their business, as the wide variety of enterprises in which the tribes are engaged (not all of which are covered under the FTCA) are attractive sources of income to insurance companies.

The grant of immunity from tort claims provided under the FTCA for P.L. 93-638 activities is extremely valuable to tribes and tribal organizations, particularly tribal health clinics. But extending FTCA immunity to self-determination contractors and compactors should have resulted in their paying less for private insurance. However, a lack of awareness of the applicability of the FTCA and/or a full understanding of its scope appear to have prevented some tribes from doing so. One of the most important steps that tribes can take to lower their private liability costs is to become better informed about the fundamentals of the FTCA and the kind of commercial insurance they need to supplement the immunity from tort claims that the FTCA provides self-determination contractors and compactors and their employees. Once they become more educated consumers, tribes can use that information to negotiate more effectively with brokers and insurance companies. Among the tribes in our study were some whose understanding of the FTCA enabled them to purchase cheaper private liability insurance that does not duplicate the coverage already provided under the FTCA. Knowledgeable brokers have worked closely with some tribes and tribal organizations to develop insurance products that meet those tribes' needs and significantly reduce their private insurance costs.

The Federal government can help tribes and tribal organizations by providing more accessible information about the FTCA in a form that is simple and useful to laypersons. Tribes and tribal organizations can help each other by sharing information about their experiences in obtaining appropriate and reasonably priced insurance.

#### **Specific Comments on Title II of S. 2097**

When we undertook the tribal liability insurance study, we quickly learned how little



information was available about many critical issues. For instance,

1. How many tribes purchase commercial liability insurance?
2. Of the tribes that do, what types of insurance do they purchase?
3. What is the extent and limits of their coverage (i.e., is it "gap" or comprehensive coverage)?
4. How much does it cost each year?
5. What is the claims history under each policy? What types of claims have been brought against the tribe? How were the claims resolved (dismissed, settled, litigated)?
6. How many tribes self-insure? What mechanism do they use to do this?
7. How many tribes participate in a purchasing consortium or other group purchasing mechanism?
8. How many tribes decide not to purchase additional private liability insurance? What factors influence this decision? What happens when an individual is injured on the reservation? Does the tribe treat injuries of tribal members different from injuries of non-tribal individuals?
9. If the tribe purchases commercial liability insurance, does the insurer take into consideration FTCA immunity in pricing the policy? If so, how is this done? If not, why not?
10. Does the insurance company have the right to assert the tribe's sovereign immunity? If so, under what circumstances? Who makes the decision to raise sovereign immunity?
11. To what extent is the tribe consulted if the insurer decides to settle a tort claim?
12. How many claims against tribes or tribal organizations have been filed under the FTCA? How many have been determined by the Department of Justice to involve covered claims? How many have been rejected? What is the ultimate disposition of claims that are covered under the FTCA? How much in judgments or settlement fees has been paid on behalf of tribes? Is there a pattern in the cases?

Of course, there were no answers to any of these questions. Nor did our 16 months of

research yield any concrete statistics in these critical areas. Therefore, the study and report to Congress required under section 202 of the bill is critical. But collecting the information necessary for sound policymaking in this area is not necessarily as easy as it seems and drawing conclusions from the data collected may have limitations.

Based on our experiences, I offer the following suggestions and observations:

1. **Careful preparation is necessary to make the study as comprehensive and useful as possible.**

As a researcher, I am always tempted to ask for more information rather than less, because it is very difficult to anticipate what types of information might ultimately be useful in designing a program to provide supplemental tort liability coverage. However, the usefulness of any data is directly related to the reliability of the data. Our study used a variety of techniques to assure that the information we received was reliable: preliminary general initial interviews, follow-up telephone calls with additional questions, extensive on-site interviews, and review of actual insurance contracts. Talking to several people from each tribe, rather than just one, was also a check on the reliability of the information we received. However, using a combination of these techniques was costly, time-consuming and labor-intensive.

In conducting the study required under section 202, the Secretary may not have the resources or the time to employ all of these methods. Typically, one would expect that the primary vehicle for collecting information about tribal liability insurance would be a requirement to fill out a form or provide details about tribal coverage when a tribe receives a "tribal priority allocation." The form used to collect the information should be simple but standardized. If additional detail is required, the instructions to the form should be clear about what must be

supplied (e.g., a copy of the declarations page of the insurance policy or the policy itself).

Determining what coverages tribes have and the limits of that coverage may be difficult. The language of insurance is arcane and confusing to most people and the tribal representative to whom falls the task of filling out the Secretary's form may be no more experienced in this area than anyone else.

**2. Determining the adequacy of tribal private liability coverage is at best difficult; at worst, it may be impossible.**

Section 201 requires the Secretary to determine on a tribe by tribe basis whether the supplemental private liability insurance the tribe has is adequate. To the extent that a tribe has no supplemental coverage, the bill appears to require the Secretary to provide it. If the tribe has coverage, then the question of adequacy must be addressed. But to determine whether tribal supplemental coverage is adequate, one has to have a clear idea of the parameters of the coverage to be supplemented. However, because of the nature of the FTCA itself, determining what is and is not covered under the Act is not easy.

Each claim that is filed under the FTCA is examined on a case-by-case basis and many of the factors that bear most significantly on coverage decisions are matters of state law. As we conducted our site visits, each of the tribal representatives complained about the lack of certainty over what claims were actually covered under the FTCA and urged us to recommend that the government provide more clarity. But after our months of research, even the three lawyers on the project agreed that the type of certainty the tribes sought was not possible.

**3. The Secretary must work closely with representatives of the Department of Justice who administer FTCA coverage to develop guidelines for assessing the adequacy of private liability insurance.**

The goal of all parties is to assure that tribes have private liability insurance that is appropriate, but not excessive. As previously noted, this balance is often hard to strike.

The FTCA provides immunity only to a self-determination contractor and its employees carrying out a P.L. 93-638 contract. But the tribal employees must be carrying out their duties under the contract and performing activities that are within their job or position description. Although the scope of the P.L. 93-638 contract issues are matters of federal law, whether an employee is acting within the scope of employment in carrying out those activities is a matter of state law. Distinguishing between official duties and voluntarily undertaken activities may require fact-intensive analysis that differs in each case. Given the variability of state employment law and the complicated factual nature of the analysis necessary to reach a legal judgment, making generalizations as to whether certain fact patterns will result in FTCA protection may not be possible.

As a result of this uncertainty, some tribes have chosen to purchase more comprehensive private liability insurance that may duplicate some of the protection they may have under the FTCA. In that case, the Department of Justice has required insurers to bear the cost of litigating claims that are covered under the FTCA. The Department's lawyers will stay involved in the litigation and work with the insurance company's lawyers, but the insurer bears the litigation cost and pays any judgment due up to the limits of the policy. Again, the problem is that it may be impossible to determine before a claim is filed whether or not the claim will be covered.

During the course of our study, we examined a few private liability insurance policies purchased by tribes and were surprised to find that none contained language that we think would solve this problem of potential duplicative coverage. A simple statement, such as "This policy

covers only tort claims not covered under the FTCA,” would be helpful in making clear to the Justice Department that the coverage is not duplicative. More difficult, of course, is the question of how the insurance underwriter would price that policy.

4. **The provision contained in section 201(c) requiring insurance policies to contain provisions waiving the insurer's right to assert a tribe's sovereign immunity is essential and should be made effective with respect to any policy or contract of insurance entered into or renewed after the date of enactment.**

Generally the liability policies we examined were silent as to the right of the insurance company to raise the tribe's sovereign immunity as a defense. A few contained a provision that stated that the insurer would only raise the immunity defense if the tribe authorized the company to do so in writing. However, one insurance company representative with many clients in Indian country bragged to us that every time a claim was filed against the policy, the insurer routinely raised immunity to defeat the claim. The premiums charged by this company were no lower than other insurance companies writing tribal liability insurance that did not raise the immunity defense. We found it quite troubling that this insurer charged tribes so much for coverage, even though its exposure for claims was practically non-existent. When we asked one of this insurer's tribal clients whether, as a hypothetical matter, the tribe approved of an insurer using the tribe's sovereign immunity in this way, the tribal representative remarked, “Why would a tribe pay an insurance company if it planned to avoid all claims by raising immunity? The tribe could do that itself; it wouldn't need insurance.”

5. **If the Secretary is required to establish a program to provide Federal supplemental insurance, it must be actuarially sound.**

Section 201 contemplates that some type of Federal supplemental coverage will be made available to tribes which do not have adequate supplemental tort coverage. This raises a number

of questions, both philosophical (e.g., should Congress require all tribes to have insurance to compensate parties who are injured by the tribe's negligence or should the decision to supplement FTCA coverage be made by each tribe) and technical. Regardless of whether such supplemental insurance is mandatory or voluntary, any Federal insurance program must be actuarially sound. The greater degree of flexibility that the tribes have either in determining whether they want supplemental coverage or whether they will purchase supplemental coverage in the private marketplace or from the Federal government, problems of adverse selection will arise. Clearly professional risk managers must be consulted before such an undertaking gets too far along. There are many other technical details that must be examined as well. At a minimum, however, the bill should require the Secretary to set premiums at a level that assures the pool's actuarial soundness.

**6. Legislation could provide the Secretary with flexibility in fulfilling the mandate to obtain or provide liability insurance for tribes.**

The Secretary could decide to make supplemental liability coverage available to tribes in various ways, such as:

- ◆ By operating a Federal insurance program.
- ◆ By using the Federal Employees Health Benefits Program (FEHBP) model (i.e., setting minimum Federal criteria for coverage, then permitting any insurer that wants to offer such a package to participate in the program with the Secretary's oversight).
- ◆ By using a variant of the FEHBP model (e.g., setting minimum Federal criteria for coverage, then utilizing a competitive bidding process, selecting one or more private carriers to offer the supplemental insurance).
- ◆ By setting minimum Federal standards for the coverage and solvency, but offering a Federal charter to any purchasing consortium of tribes or tribal organizations or any self-insured risk pool established by one or more tribes or tribal organizations.

**7. Existing insurance arrangements that provide adequate supplemental tort coverage for tribes in a cost-efficient manner should not be disrupted.**

Some insurers and brokers have spent considerable time developing private liability insurance programs that are tailored to meet the needs of individual tribes and take into consideration their coverage under the FTCA when applicable. To the extent that these programs do the job in a cost-efficient manner, Federal legislation should not disrupt them. On the other hand, as previously noted, we did discover at least one example of an insurer that was not providing its tribal clients with a fairly priced product (i.e., the insurer that was using sovereign immunity to defeat all claims).

**8. The Committee should consider asking the General Accounting Office to evaluate the adequacy of tribal regulation with respect to solvency and consumer protections for tribally-chartered insurance companies.**

Although beyond the scope of our study, more careful evaluation of the operation of tribally-chartered insurance companies may be desirable. A number of people we interviewed expressed concern about the degree to which tribally-chartered insurance companies appear to escape the type of initial scrutiny and ongoing monitoring with respect to solvency and consumer protections that insurance companies that are regulated by the states undergo. Although there are not many currently in operation, if Congress were to require all tribes to secure adequate supplemental liability coverage, it might become a more attractive option to establish a tribally-chartered insurance company to provide that coverage. The GAO could provide an objective evaluation of the strengths and weaknesses of tribal regulation of insurance.

**Conclusion**

In conclusion, S. 2097 is a good first step toward assuring tribes access to more adequate and more affordable private liability insurance to supplement the protection from tort liability that self-determination contractors have under the FTCA. This is a complex issue, but one which is important not just to the tribes themselves but to others who visit or engage in commercial activities on tribal lands.

I understand that the bill is a work in progress and to the extent that I can be a resource for members of the Committee or your staff, please feel free to contact me.

Thank you again for inviting me to testify and I will be pleased to take your questions.



**ASSESSMENT OF ACCESS TO PRIVATE LIABILITY INSURANCE  
FOR TRIBES AND TRIBAL ORGANIZATIONS  
WITH SELF-DETERMINATION CONTRACTS/COMPACTS**

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The views expressed in this report are those of its authors, and do not necessarily reflect the views of the members of the Technical Advisory Group, or of the Federal government.

### Executive Summary

#### **Introduction**

This study examines issues surrounding tribal experiences with private liability insurance and the Federal Tort Claims Act (FTCA). The primary purposes of the study are: (1) to examine access to private liability insurance by tribes and tribal organizations operating programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, and the coordination of that insurance with the immunity from tort liability for self-determination contractors and compactors and their employees provided under the FTCA; (2) to identify barriers to the appropriate pricing of private liability insurance; and (3) to recommend strategies that will assist tribes, tribal organizations, and other contractors and self-governance compactors to reduce the need for private liability insurance, as well as its cost.

#### **Findings**

The principal findings of the study are as follows:

1. The immunity from tort liability provided by the FTCA can be very beneficial for tribes and tribal organizations involved in P.L. 93-638 activities. Working with knowledgeable brokers, some tribes and tribal organizations report that they have been able to reduce their private liability insurance premiums substantially and, in some cases, completely drop certain types of coverage (e.g., medical malpractice) because of the FTCA.
2. Some tribes and tribal organizations involved in P.L. 93-638 contracting, however, may not have fully realized the benefits of the FTCA, because of the uncertainty, confusion, and lack of understanding among tribes, brokers, and insurance companies as to what activities are covered by the FTCA, when private sector coverage is unnecessary or duplicative, or how a FTCA claim proceeds through the system. This problem persists despite the publication of regulations under Title I of the Indian Self-Determination and Education Assistance Act Amendments ("1996 Regulations"), issued in June, 1996, which contain useful information about the FTCA for P.L. 93-638 contractors and compactors.

3. The difficulty that tribes and tribal organizations have in determining what private coverage they need to supplement their FTCA immunity may be compounded by what they describe as inconsistencies in how Federal personnel determine that particular claims are covered under the FTCA. Tribes, tribal organizations, and brokers report that there does not appear to be a uniformly applicable framework for coverage or a precedent-based decision-making system the results of which are available publicly. It is, therefore, hard for tribes, tribal organizations and insurers to judge the types of claims that might be covered under the FTCA and even harder to evaluate the extent to which private liability insurance is necessary or duplicative. This appears to be more of a problem with non-medical claims.
4. Notwithstanding the perception of self-determination contractors and brokers that there is no way to predict when the FTCA will apply to a particular tort claim because this decision requires a case-by-case analysis, a general framework for analysis of the FTCA's applicability to tort claims involving P.L. 93-638 contractors and their employees can be constructed that provides some assistance in assessing the likelihood that private liability insurance may be needed.
5. Tribes and tribal organizations report that the lines of communication between themselves and the Federal agencies involved in FTCA decision-making need to be improved. Tribes and tribal organizations report difficulties in determining a claim's status and resolution and receiving timely responses to tribal inquiries as to whether a claim will be covered or not by the FTCA.
6. Many insurance companies are unfamiliar with the FTCA and its applicability to self-determination contractors. Other insurers are uncertain about the reach of the FTCA and the process for filing an FTCA claim. As a result, some insurers may misconstrue, underestimate, or disregard the value of the FTCA in designing private liability insurance coverage for tribes and tribal organizations and in determining premiums to be charged for that insurance coverage. Because the level of sophistication about tribal tort immunity through the FTCA varies substantially, the number of insurers willing to write tribal coverage, while growing, is still relatively small. This is surprising because insurers routinely sell coverage to state and local governmental entities that have basic grants of immunity under statutes that are similar to the FTCA and therefore would have the same need as tribes for only supplementary private insurance coverage.

### **Recommendations**

The principal recommendations of the study are as follows:

1. A clearinghouse could be created through which tribes and tribal organizations could share information about their experiences with the

purchase of private liability insurance. In addition, to facilitate networking among tribes, a web page could be created. The web page could include general information on the FTCA and list the designated regional contact people within the responsible agencies who can be contacted for more specific assistance.

2. The Secretaries of Health and Human Services and the Interior, in conjunction with the Department of Justice, could conduct informational meetings in various regions to acquaint tribes, tribal organizations, brokers, and insurance companies with the basic principles of immunity from tort liability provided for self-determination contractors under the FTCA. The purpose of these meetings would be: (a) to assist tribal self-determination contractors to better understand the immunity from tort liability provided under the FTCA in order to improve their ability to purchase non-duplicative private liability insurance; and (b) to assist brokers and insurance companies to develop appropriate insurance products.
3. Informational materials could be developed for distribution to P.L. 93-638 contractors. These materials should be written in clear and understandable layperson's language. They would generally describe the immunity provided to self-determination contractors under the FTCA and identify (to the extent possible) the types of activities that may not be protected so as to assist tribes in understanding the extent to which they may need supplemental private liability insurance. These materials could be used by the tribes to share with brokers and representatives of insurance companies who are unfamiliar with the FTCA. The *Handbook for Tribes on How to Reduce Private Liability Insurance Costs* (which is part of this report) and the 1996 Regulations could serve as starting points. To maximize the usefulness of these materials for tribes in their negotiations with insurance companies, any guidance should be issued by the Federal government, since privately issued materials on the FTCA may be perceived as less authoritative.
4. Principles for determining more clearly when private liability insurance duplicates tribal FTCA immunity could be developed and communicated to all P.L. 93-638 contractors and compactors. In addition, examples of insurance contract language that does not duplicate the FTCA could be identified and shared with and among tribes, tribal organizations, brokers, insurance companies, and the Federal government.
5. If they have not yet done so, tribes and other P.L. 93-638 contractors and compactors should designate a tribal tort claims liaison with the Federal agencies for purposes of the FTCA, as the 1996 Regulations instruct. Similarly, the agencies should provide the tribal contractors with a list of key

regional contact persons who can act as resources for the tribal contractors on FTCA matters.

6. Misunderstandings and confusion about FTCA could be reduced by improving communications between self-determination contractors and Federal agencies.
7. More consistent interpretation and application of policies and procedures within and across Federal agencies would reduce confusion about FTCA issues. For instance, consideration could be given to developing consistent internal agency procedures for determining whether a claim will be covered under the FTCA. In addition, agencies could develop standardized responses to tribes that request information about the FTCA from the government. They also could develop a "to-whom-it-may-concern" letter verifying and explaining FTCA coverage of P.L. 93-638 activities, which could be used by the tribes when dealing with brokers, insurance companies, and other entities that require verification of FTCA coverage.
8. To the extent possible, a body of general information about claims filed under the FTCA could be developed. An on-line claims registry could be organized by type, location and disposition of claim. This registry would be for internal agency use to facilitate consistency in interpreting the FTCA.
9. Consideration could be given to the creation of a publicly available data base containing the same type of information as would be in the claims registry but, if necessary to maintain confidentiality, available without tribal or individual identifying information.
10. The Federal agencies could consider issuing additional clarification on FTCA coverage of certain activities which have been the source of particular confusion for tribal contractors, such as employment-related torts.

## Conclusions

After a number of years in which tribes and tribal organizations experienced difficulty in finding private liability carriers willing to insure them at all, let alone at a reasonable prices, today's marketplace offers both opportunities and challenges. Some tribes have leverage to negotiate lower rates, and they have choices of insurers. They often have more than one carrier vying for their business, as the wide variety of enterprises in which the tribes are engaged are attractive sources of

income to insurance companies.

The grant of immunity from tort claims provided under the FTCA for P.L. 93-638 activities should have resulted in tribes and tribal organizations paying less for private insurance. However, a lack of awareness of the applicability of the FTCA and/or a full understanding of its scope appear to have prevented some tribes from doing so. One of the most important steps that tribes can take to lower their private liability costs is to become better informed about the fundamentals of the FTCA and the kind of commercial insurance they need to supplement the immunity from tort claims that the FTCA provides self-determination contractors and compactors and their employees. Once they become more educated consumers, tribes can use that information to negotiate more effectively with brokers and insurance companies. Among the tribes in our study were some whose understanding of the FTCA enabled them to purchase cheaper private liability insurance that does not duplicate the coverage already provided under the FTCA. Knowledgeable brokers have worked closely with some tribes and tribal organizations to develop insurance products that meet those tribes' needs and significantly reduce their private insurance costs.

The Federal government can help tribes and tribal organizations by providing more accessible information about the FTCA in a form that is simple and useful to laypersons. Tribes and tribal organizations can help each other by sharing information about their experiences in obtaining appropriate and reasonably priced insurance.

Interior and Justice, contracted with the Center for Health Policy Research (CHPR) of the George Washington University Medical Center to examine tribal experiences in purchasing private liability insurance to supplement coverage under the FTCA. The primary purposes of the study were: (1) to examine access to private liability insurance by tribes and tribal organizations operating programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, and the coordination of that insurance with tribal liability coverage provided under the FTCA; (2) to identify barriers to the appropriate pricing of private liability insurance; and (3) to recommend strategies that will assist contracting and compacting tribes and tribal organizations to assess their need for private liability insurance and obtain such insurance at reasonable prices.

## II. Methodology for this Study

Researchers established a technical advisory committee (TAC) to help guide the study. The TAC was comprised of representatives of three Cabinet departments: (1) the Department of Justice (DOJ), Torts Branch, Civil Division; (2) the Department of Health and Human Services (DHHS), including representatives of the Office of the Assistant Secretary for Planning and Evaluation (ASPE), the Office of Assistant Secretary for Management and Budget (ASMB), the Office of the General Counsel (OGC) and the Indian Health Service (IHS); and (3) the Department of the Interior (DOI), including representatives of the Office of the Solicitor and the Bureau of Indian Affairs (BIA)<sup>3</sup>. During the course of this study, the TAC met regularly to assess the study's progress and make recommendations to the research project staff.

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<sup>3</sup> See Attachment 2 for a list of TAC members.



## Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations with Self-Determination Contracts/Compacts

### I. Research Question

In a series of steps beginning in 1987, Congress extended the protections of the FTCA to tribes and tribal organizations carrying out programs under the Indian Self-Determination and Education Assistance Act (P.L. 93-638).<sup>1</sup> The FTCA provides immunity for certain tribal entities and individuals against common law tort claims arising from acts or omissions that are both within the scope of self-determination contracts and within the scope of the individual's employment as a matter of state law. Although not "insurance" in the conventional sense, the FTCA operates in a way similar to insurance by protecting covered entities and individuals from direct and personal tort liability, thus reducing or eliminating the need for commercially purchased liability insurance.<sup>2</sup> An objective of Congress in extending FTCA coverage was to reduce the need for private liability insurance for self-determination activities. Yet today, a decade later, some tribes, tribal organizations, and insurers still appear to be unaware of either the existence or the breadth of FTCA coverage with respect to P.L. 93-638 activities. The cost savings that were expected to result from extending FTCA coverage to tribes and tribal organizations do not appear to have been fully realized.

The Department of Health and Human Services, in conjunction with the Departments of

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<sup>1</sup> See Attachment I for a more detailed description of the legislative history of the extension of Federal Tort Claims Act coverage to tribes and tribal organizations. This coverage also extends to tribal grant schools as provided under the Hawkins-Stafford grant program (P.L. 101-512, 104 Stat. 1915, 1990 (Nov., 1990)).

<sup>2</sup> "Coverage" under the FTCA is used throughout this report and its accompanying Handbook as a shorthand for the principle that the FTCA provides immunity to P.L. 93-638 contractors and compactors and their employees from direct liability for certain injuries they may have committed. If a claim is "covered" under the FTCA (i.e., meets all the requirements specified in the Act), the United States steps into the shoes of the tribal defendant(s) and assumes liability for the claim. Consequently, private liability insurance is unnecessary for claims covered by the FTCA.

All federally recognized tribes and national and regional tribal organizations received an announcement from the IHS describing the study objectives, the different elements of the study, and the CHPR project staff. The announcement invited tribes and tribal organizations to contact representatives from the BIA, IHS, or research project staff to indicate an interest in participating in the study. Twenty-two tribes and tribal organizations volunteered to be included in the study. The purpose of the study was not to categorize or compare tribal experiences throughout Indian country, but simply to provide information that would help tribes secure appropriate and affordable private liability insurance. Since this study was limited in funding and scope, it was not possible to select a representative sample of all P.L. 93-638 contractors and compactors. It was clear from the study's inception that because of the self-selected nature of the participants, the study would not necessarily yield statistically valid data that could be generalized to all P.L. 93-638 contractors and compactors. It was expected, however, that the participating tribes would provide useful information about their problems and successes in obtaining appropriate and reasonably priced liability insurance policies, that in turn could be shared with other tribes. As it turned out, the twenty-two tribes and tribal organizations that volunteered to participate in the study constituted a geographically diverse group and provided contact with tribal governments, health clinics and other tribal entities.

Researchers held initial telephone conversations with each of the tribes and tribal organizations to determine their familiarity with and understanding of the FTCA and the FTCA claims process, and to learn about their experiences in obtaining private insurance coverage. A series of key questions were developed and refined<sup>4</sup> to serve as a general guide for these

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<sup>4</sup> See Attachment 3 for a list of these questions.

conversations, although specific questions and follow-up requests for information were often tailored to the individual participant's responses.

During the telephone interview and site visit stages of the project, tribal participants were asked to supply names of brokers and insurance companies providing private liability coverage to them either currently or in the past. These brokers and insurance companies were generally contacted and invited to participate in the study. Although some of them agreed to participate, the non-response rate was high, particularly among insurance companies, even after follow-up telephone calls. Nearly all of the brokers and insurance companies providing coverage to site visit participants, however, agreed to participate in the study; however, obtaining useful information from the insurance companies was substantially more difficult than gathering information from the brokers.

An important issue in negotiating private insurance coverage is the interaction between the FTCA and supplemental private insurance. Thus, at the recommendation of the TAC, individuals in the DOI field solicitors' offices and in the DHHS Office of the General Counsel were interviewed to obtain background information with respect to the FTCA claims filing and coverage experience of the tribes. Representatives of the Civil Torts Division of the DOJ were also interviewed during this preliminary information-gathering phase of the study. Another meeting with DOJ occurred at the end of the project to further clarify the FTCA administrative claims process and to discuss other substantive issues raised during the site visits and the tribal consultation meeting.<sup>5</sup> Other opportunities for consultation and input from DOJ also took place during the drafting stages of the this study and accompanying Handbook to clarify issues as they arose.

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<sup>5</sup> See Attachment 4 for a discussion of these Department of Justice interviews.

In addition, several tribes and tribal organizations were willing to provide us with copies of their current insurance policies. Although we reviewed the terms of the policies themselves,<sup>6</sup> they generally did not contain pricing information. During subsequent interviews, some tribes and tribal organizations shared limited pricing information with us.

The next phase of the study consisted of three multi-day site visits to tribes and tribal organizations. In preparation for the site visits, researchers developed selection criteria and further refined key questions that had originally been used in the initial telephone interviews. Researchers used four criteria to select the site visit participants: (1) the willingness of the tribe or tribal organization to take part in the site visits; (2) the extent of their knowledge and experience with the FTCA and private liability insurance;<sup>7</sup> (3) their proximity to one another;<sup>8</sup> and (4) the amount of P.L. 93-638 funding they received.<sup>9</sup>

The three areas selected for site visits were the southwestern United States (New Mexico and Arizona), northern Wisconsin, and the Pacific Northwest (Alaska and Washington State). A total of twelve tribes and tribal organizations participated in the site visits. The site visits also included meetings with six insurance brokers (three of whom represented a company that had developed a special insurance product for tribes and tribal entities), and one insurance company.

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<sup>6</sup> See Attachment 5 for a discussion of our review of the private insurance policies.

<sup>7</sup> We selected participants for the site visits that represented a wide range of knowledge and experience with the FTCA and private liability insurance.

<sup>8</sup> A map was prepared showing the geographic locations of each of the potential study participants. To make the most efficient use of travel time and our travel budget, we focused on the areas in which potential participants were most concentrated. In evaluating which of these areas of concentration to visit, we attempted to include geographically diverse regions of the country.

<sup>9</sup> We attempted to visit tribes and tribal organizations with a sufficiently large share of P.L. 93-638 funding so that the existence of FTCA coverage might have a meaningful impact on their private insurance premiums.

While conducting the on-site interviews, we gathered names of other brokers and insurance companies active with tribes and tribal entities and followed up on these leads. We conducted in-depth telephone interviews with three additional brokers. We also contacted three nationwide insurers that currently sell liability coverage to tribes and tribal organizations. One was eventually interviewed after a substantial delay in responding to our requests; another referred us to one of its subsidiaries which failed to respond to our repeated inquiries; and a third refused to talk with us directly, but referred us to its internal department of governmental affairs and media at the home office for information (which we decided not to pursue because, in our judgment, it was unlikely that pursuing this process would lead to contact with someone knowledgeable about these issues within the company in a timely fashion).

In addition, we also received information about two insurance companies that had been established as "captive" insurance companies because of the lack of interest on the part of existing insurance companies in writing tribal coverage.<sup>10</sup> In one instance, the captive insurance company was set up by a brokerage firm; in the other, it was a joint venture between brokers, consultants, and a reinsurer. In each case, the captive insurer was established solely to underwrite tribal coverage.

Ultimately, we were successful in interviewing (either on-site or by telephone) representatives of one nationwide insurance company, two tribally chartered insurance companies, and one reinsurer, bringing the study's interview total to nine brokers and four insurance companies. To facilitate our discussion with tribes, brokers and insurers, we prepared a background paper on the

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<sup>10</sup> Generally "captive" insurance companies are closely-held (i.e., owned by a small group of people) subsidiaries of an existing entity specially created to provide insurance for an enterprise or a group of enterprises that have difficulty securing commercial insurance in the marketplace from independent insurance companies. See page 45 for a more detailed discussion of the types of insurers providing liability coverage to tribes and tribal organizations.

history of tribal coverage under the FTCA. This paper appears as Attachment I.

A tribal consultation meeting was held on April 23, 1997, attended by all members of the TAC, representatives from four tribes, and a Washington, D.C. lawyer with numerous tribal clients. At this meeting, the research group presented preliminary findings and recommendations from our site visits and conducted a group discussion. The discussion generated a number of useful comments and suggestions that have been incorporated into this report where appropriate.

Finally, the research group developed a handbook for tribes and tribal organizations. The handbook describes in layperson's terms the liability coverage available under the FTCA, the potential need for private liability insurance to supplement FTCA coverage, and strategies to help tribes reduce private insurance costs. The handbook is appended to this report.

### III. Key Findings from Site Visits to Tribes, Tribal Organizations, Brokers and Insurance Companies

The principal findings of the study are as follows:

1. The immunity from tort liability provided by the FTCA can be very beneficial for tribes and tribal organizations involved in P.L. 93-638 activities. Working with knowledgeable brokers, some tribes and tribal organizations report that they have been able to reduce their private liability insurance premiums substantially and, in some cases, completely drop certain types of coverage (e.g., medical malpractice) because of the FTCA.
2. Some tribes and tribal organizations involved in P.L. 93-638 contracting, however, may not have fully realized the benefits of the FTCA, because of the uncertainty, confusion, and lack of understanding among tribes, brokers, and insurance companies as to what activities are covered by the FTCA, when private sector coverage is unnecessary or duplicative, or how a FTCA claim proceeds through the system. This problem persists despite the publication of regulations under Title I of the Indian Self-Determination and Education Assistance Act Amendments ("1996 Regulations"), issued in June, 1996, which contain useful information about the FTCA for P.L. 93-638 contractors and compactors.

3. The difficulty that tribes and tribal organizations have in determining what private coverage they need to supplement their FTCA immunity may be compounded by what they describe as inconsistencies in how Federal personnel determine that particular claims are covered under the FTCA. Tribes, tribal organizations, and brokers report that there does not appear to be a uniformly applicable framework for coverage or a precedent-based decision-making system the results of which are available publicly. It is, therefore, hard for tribes, tribal organizations and insurers to judge the types of claims that might be covered under the FTCA and even harder to evaluate the extent to which private liability insurance is necessary or duplicative. This appears to be more of a problem with non-medical claims.
4. Notwithstanding the perception of self-determination contractors and brokers that there is no way to predict when the FTCA will apply to a particular tort claim because this decision requires a case-by-case analysis, a general framework for analysis of the FTCA's applicability to tort claims involving P.L. 93-638 contractors and their employees can be constructed that provides some assistance in assessing the likelihood that private liability insurance may be needed.
5. Tribes and tribal organizations report that the lines of communication between themselves and the Federal agencies involved in FTCA decision-making need to be improved. Tribes and tribal organizations report difficulties in determining a claim's status and resolution and receiving timely responses to tribal inquiries as to whether a claim will be covered or not by the FTCA.
6. Many insurance companies are unfamiliar with the FTCA and its applicability to self-determination contractors. Other insurers are uncertain about the reach of the FTCA and the process for filing an FTCA claim. As a result, some insurers may misconstrue, underestimate, or disregard the value of the FTCA in designing private liability insurance coverage for tribes and tribal organizations and in determining premiums to be charged for that insurance coverage. Because the level of sophistication about tribal tort immunity through the FTCA varies substantially, the number of insurers willing to write tribal coverage, while growing, is still relatively small. This is surprising because insurers routinely sell coverage to state and local governmental entities that have basic grants of immunity under statutes that are similar to the FTCA and therefore would have the same need as tribes for only supplementary private insurance coverage.

#### IV. Discussion of Findings

A number of recurrent themes and concerns were echoed in our initial telephone conversations with those who responded to the study announcement and in our site visits to selected tribes. Several common issues also emerged in our contact with insurance companies and brokers.

In general, nearly everyone we interviewed expressed a high degree of frustration. To the extent that people were aware that the FTCA applied to self-determination activities at all, many found it a source of great puzzlement. Some tribes were aware of FTCA immunity and had heard that it might be beneficial in reducing private liability insurance premiums, but beyond that there was little they could say with certainty. Other tribes, often with the assistance of an insurance broker, had developed a basic understanding of the FTCA. Only a small number of tribes or tribal organizations were very knowledgeable about tribal coverage under the FTCA.

Most of the tribes we interviewed had very favorable claims histories (in other words, had very few claims filed), and therefore little experience at all with claims filed under either the FTCA or through private insurance. Brokers and insurers confirmed that this lack of claims experience was characteristic of tribes and tribal organizations in general. On the other hand, many tribal representatives wondered why they had heard so little about the FTCA and how they could learn more about it, particularly if it could help them reduce private liability insurance costs.

The principal concerns and complaints voiced by tribes, tribal organizations, and brokers during the course of our interviews are described within the context of each of the findings.

1. *The immunity from tort liability provided by the FTCA can be very beneficial for tribes and tribal organizations involved in P.L. 93-638 activities. Working with knowledgeable brokers, some tribes and tribal organizations report that they have been able to reduce their private liability insurance premiums substantially and, in*



*some cases, completely drop certain types of coverage (e.g., medical malpractice) because of the FTCA.*

The general consensus among tribes, tribal organizations, and brokers was that extending FTCA coverage to P.L. 93-638 activities had been a positive development. For many of the tribes and tribal organizations we interviewed, FTCA coverage of P.L. 93-638 activities has led to lower general liability and/or medical malpractice insurance premiums.

The benefits of the FTCA are particularly striking for tribal health clinics, primarily because most of them have concluded it is no longer necessary to carry medical malpractice coverage for their health provider employees. Tribes and tribal organizations also report that the availability of FTCA immunity for medical malpractice claims is extremely useful as a recruitment tool for physicians and other health professionals. Because the FTCA applies to tribal clinic employees carrying out self-determination activities when acting within the scope of their employment, they no longer have to purchase their own medical malpractice insurance. In contrast, other health institutions often require doctors, nurses, and other health care providers to provide their own malpractice insurance.

Representatives of tribal clinics indicate that FTCA protection is valuable because it allows tribal clinics to reclaim scarce financial resources that would otherwise be used for insurance premiums and put those resources to better use for medical services and other expenses. In two cases, tribal health facilities indicated that they were able to hire more health care providers as a result of the availability of additional funds that resulted from their lower insurance costs. In addition, representatives of one tribal organization reported that before FTCA coverage was extended to P.L. 93-638 contractors and compactors, they were paying \$400,000 annually for

medical malpractice insurance. Now this organization pays an annual premium of only \$5,000 for a medical malpractice policy specifically designed to cover any potential gaps in the FTCA coverage.

We interviewed one broker who specialized in dental malpractice coverage that was coordinated with the FTCA. Many of the Public Health Service dentists in this broker's region purchase private malpractice insurance themselves because, although they practice in tribal clinics funded under P.L. 93-638, they also treat non-tribal patients under Medicaid provider agreements, which fall outside the scope of self-determination contracts.<sup>11</sup> Under these Medicaid agreements, the dentists must agree to indemnify the state for possible medical malpractice claims. Typically dentists purchase personal malpractice insurance to cover any potential liability they might incur if a successful malpractice claim based on their Medicaid activities were brought. However, because of the availability of immunity under the FTCA for self-determination activities, the broker can offer personal malpractice insurance coverage for the Medicaid portion of their practice to dentists employed by the tribal clinic at a much lower premium.

Even though many of the tribal clinics have been able to drop or reduce their malpractice insurance coverage because of the FTCA, some tribal clinics expressed concern about potential gray areas or gaps where the FTCA might not cover all activities and indicated that they either have purchased or are considering purchasing a more limited "wrap-around" insurance policy to cover any potential malpractice liability that might not be covered under the FTCA.

Brokers described similar economic benefits resulting from the FTCA for tribes and tribal organizations with respect to non-medical liability insurance. For instance, the FTCA has helped

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<sup>11</sup> It is unclear whether such insurance is necessary, especially if the activities are arguably within the scope of the tribe's or tribal organization's P.L. 93-638 contract or compact. 25 C.F.R. §§900.197. However, in the interest of completeness, we simply report one potential solution to concerns about this problem.

to make professional liability coverage (particularly for tribal police officers and tribal jails) more affordable and easier for the tribes to obtain.

2. *Some tribes and tribal organizations involved in P.L. 93-638 contracting, however, may not have fully realized the benefits of the FTCA, because of the uncertainty, confusion, and lack of understanding among tribes, brokers, and insurance companies as to what activities are covered by the FTCA, when private sector coverage is unnecessary or duplicative, or how a FTCA claim proceeds through the system. This problem persists despite the publication of regulations under Title I of the Indian Self-Determination and Education Assistance Act Amendments ("1996 Regulations"), issued in June, 1996, which contain useful information about the FTCA for P.L. 93-638 contractors and compactors.*

A number of tribes and tribal organizations appeared to be only vaguely aware of what the FTCA covers and the extent to which private liability insurance might actually be unnecessary. Few tribes that we interviewed had a clear understanding of the scope of the FTCA and the claims filing process. Even fewer had received any kind of training or information on the FTCA. Several tribes remarked that they had received memos or circulars on the FTCA from either the BIA or the IHS, but most of the tribes said that the information was not very helpful or understandable because to them it seemed primarily written for lawyers, not lay people.

One tribe described FTCA coverage as "an angle used by insurers to sell a product" to the tribes. Another tribe did not know that the FTCA covered P.L. 93-638 activities and a tribal representative remarked that the study announcement was "the first we've heard of this." A couple of tribes did note that several years ago a BIA representative had visited them to explain the FTCA, but the tribes described the presentation as too technical and said that they had been disappointed that they could not get definitive answers on some of the coverage issues in which they were most interested.

Even when brokers, insurers, or others dealing with tribes and tribal organizations say that they are familiar with the application of the FTCA to tribal activities, their actual understanding may be limited or incomplete. For instance, many brokers share with tribes and tribal organizations written information which they have prepared or which they have received from other brokers or consultants. Unfortunately, based on material we have reviewed, some of the background material on the FTCA currently being used does not appear to be entirely accurate. In other cases, tribal representatives showed us explanations or interpretations of the FTCA that were clearly inconsistent with the 1996 Regulations. We were generally unable to determine whether the inconsistent material predated the issuance of the regulations and simply had not been updated to conform to the new guidance or whether it was intended to reflect the material in the regulations but was simply inaccurate.

However, we were not surprised that self-determination contractors and their insurance brokers are having trouble finding accurate and understandable information about the FTCA's applicability to self-determination activities. In carrying out the research for this study, our own experience in trying to clarify legal issues affecting tribes and tribal organizations arising under the FTCA has convinced us that there is too much room for interpretation (and misinterpretation) because of the paucity of authoritative material describing the extent and limitations of the FTCA in relation to P.L. 93-638 contractors and compactors.

Many of the individuals we interviewed also were unfamiliar with the 1996 Regulations. Some had heard about them and some had received them from the BIA or IHS, but only occasionally did we encounter individuals who had actually read them. In fact, we provided copies of the regulations to many of the tribes and brokers we interviewed. Some brokers attributed this lack of

awareness of the 1996 Regulations by tribes and tribal organizations to the frequent turnover in tribal personnel handling insurance or risk-management issues.

Not surprisingly, many of the tribes and tribal organizations we interviewed had a fundamental lack of understanding of the relationship between the FTCA and private liability insurance or the potential effect that the FTCA could have on their private insurance premiums.

Of those who were familiar with the 1996 Regulations, tribal representatives said that the regulations were somewhat useful, but that they did not provide specific enough guidance on whether private insurance was necessary or what that insurance should cover. In particular, there was interest in having more examples of situations that are not covered by the FTCA. Some respondents asserted that the examples provided in the regulations were not the most typical or realistic situations that occur.

Anticipating this criticism, at the suggestion of our TAC, we had been in telephone contact prior to our site visits with representatives of five field solicitors' offices around the country and with representatives from the Office of the General Counsel (OGC) at DHHS to gather information about the types of claims that are being filed under the FTCA, focusing particularly on the claims most likely to be denied. The results of those interviews are appended to this paper as Attachment 6. We expected that focusing on claims likely to be denied would be a fruitful way to develop additional examples for the tribes of what was covered under the FTCA and what was not. Surprisingly, we discovered that this inquiry was not productive because the cases handled by the field officers were quite fact-specific and were not easily generalized. In addition, in many instances, the agencies had not yet reached a decision as to whether or not the particular claim was covered under the FTCA.

Several tribes and tribal organizations said that understanding how the FTCA applied to their

activities was a challenge. Although they believe that they should learn more about their FTCA coverage, they report that reliable information describing the FTCA is scarce and that they do not know where to go to find answers. As one tribal representative put it, the provisions of the FTCA are "nebulous" -- he knew that the law existed, but was not exactly sure what it covered or how it could affect the tribe.

An area of particular uncertainty for tribes was private liability insurance for GSA vehicles. One tribe stated that it was carrying some private insurance on its vehicles that probably was not required (they described it as "courtesy insurance" on leased GSA vehicles), but it was simpler to buy comprehensive coverage for all vehicles than to determine exactly what private insurance was necessary. One tribe reported that previously they did not carry collision insurance on GSA vehicles. When their GSA vehicle was damaged, the tribe sent the bill to GSA. Eventually the tribe realized that GSA simply billed the tribe back for the damage on the tribe's vehicle lease statement. The tribe thought that the FTCA covered all damage to GSA vehicles, and did not realize that vehicle coverage under the FTCA is limited to the damage negligently caused to another person's vehicle and does not cover damage to the tribe's own vehicle.

FTCA coverage for tribal law enforcement officers is another complex and particularly unclear area to tribes. Especially confusing are claims arising out of incidents that occur off the reservation and involve issues of multiple geographic jurisdictions. In some areas of the country, tribal lands are interspersed with non-tribal lands, often in a checkerboard pattern. Tribal police officers performing activities within a P.L. 93-638 contract's scope of work (e.g., pursuing an alleged assailant), may find themselves intermittently on and off tribal lands. Would the FTCA cover a claim (for example, the use of excessive force) in connection with the apprehension of a suspect by

a tribal police officer off the reservation? Although tribes and tribal organizations would like a definitive answer to this question, it may not be possible to provide it in the abstract, since coverage will depend on the specific facts and circumstances of the particular incident as well as how the tribal police officer's scope of work was described in the P.L. 93-638 contract and in the police officer's position or job description. Although the Federal government will determine whether the activities fall within the scope of the self-determination contract, scope of employment issues are matters of state law.

Another area of uncertainty involves FTCA coverage for tribal law enforcement officers in cross-deputization situations. These situations occur when tribal police officers are deputized by one or more states to operate as law enforcement officers for the state on non-reservation lands. If an incident occurs off the reservation while the tribal police officer is conducting activities on behalf of the state, those activities may not be covered under the FTCA.

Some tribes have concluded that the best way to deal with the two situations described above is to assure that the description of the scope of work to be performed by the tribe under the P.L. 93-638 contract is written broadly and specifically includes law enforcement activities which take place off the reservation. As indicated above, the same approach should be taken with writing position or job descriptions for law enforcement officers.

In our interviews, the only area of coverage under the FTCA that seemed to be comparatively clear to tribes, tribal organizations, brokers and insurance companies was medical malpractice. Perhaps this is because medical malpractice involves a much narrower range of activities in a more constrained setting than activities that might give rise to general liability claims. In addition, there are relatively clear legal guidelines and a well-developed body of law defining the appropriate

standard of care to be used to measure whether a particular act constitutes medical malpractice. In contrast, the law of negligence for general liability claims is far less developed with fewer legal precedents, and involves situations and issues that are more complex, in part because claims for general liability encompass a wider and more divergent set of activities.

Many times during our site visits, tribes and tribal organizations described specific situations and asked whether or not such claims would be covered by the FTCA. Although we were not in a position to answer their questions definitively (other than to suggest a broad framework for analysis), it may be helpful to illustrate the range of inquiries that have arisen concerning coverage under the FTCA. In some cases, answers to these questions may be found in the 1996 Regulations. Other questions represent what members of the TAC described as "open issues" (commonly raised questions for which no agreed-upon answers exist).

In the majority of cases, however, clear answers cannot be provided because the questions involve issues that must be decided under state law. This is particularly true when it comes to analyzing whether the individual whose activities gave rise to the injury was acting within the scope of his or her employment when the injury occurred. The FTCA provides immunity only to employees of a self-determination contractor carrying out a P.L. 93-638 contract when the employees are carrying out their duties under the contract and performing activities that are within their job or position description. Thus even though the relationship between the individual and the contractor may clearly reflect employee/employer status, not all activities that the individual may undertake during the period of service for the employer may be part of his or her official duties or the duties that the individual may be required to perform under the self-determination contract. Distinguishing between official duties and voluntarily undertaken activities may require intensive analysis of the



facts and circumstances of each case based on applicable state law principles. Given the variability of state employment law and the complicated factual nature of the analysis necessary to reach a legal conclusion, it may not be possible both to satisfy the tribal representatives' desire for clearer advance understanding of the parameters of the FTCA and their need to have accurate and reliable information about situations in which the tort immunity provided by FTCA will relieve them of the need to purchase private liability insurance. In other words, because of the variability of state law, making generalizations about whether certain fact patterns will result in FTCA protection or not may be more misleading than helpful.

The following questions provide a glimpse of the range of specific issues which were raised during our site visits:

- Is a tort action against an employee of a tribal clinic, based on a breach of confidentiality regarding a medical record, covered by the FTCA?
- Does the FTCA apply to tort actions involving employees of tribal programs that are funded by a combination of P.L. 93-638 funding and funding from other sources?
- Is a health professional employed by a tribal clinic involved in traditional healing practices, which are encouraged and supported by IHS, considered acting within the scope of employment if a medical malpractice charge is brought when a negative outcome occurs (e.g., if an individual participating in a sweat has a heart attack)?
- Do tribes have to buy private insurance coverage for all vehicles?
- Does the FTCA apply to claims arising out of negligence in the transport of patients by private water or aviation craft from out in the field to the hospital in the main city at the request of a tribal entity's health facility?
- Are off-site activities sponsored by tribal health centers covered by the FTCA? For instance, does the FTCA cover claims of negligence committed on outings coordinated by the sobriety program in which groups of children are taken out in canoes/boats by health professionals? Does the FTCA cover alleged acts of malpractice committed by tribally-employed health professionals at health fairs in gymnasiums of tribal schools, or in other settings away from tribal hospitals or

clinics?

Nearly every tribe and tribal organization we interviewed described how difficult it was to determine when private liability insurance was duplicative or unnecessary. One individual stated that his tribal organization carries extensive private liability insurance that provides more extensive coverage than the protection the tribe receives under the FTCA. He observed that the financial burden of this practice falls just as much on the federal government as on his organization, since the federal government pays for the tribe's insurance out of program dollars or indirect cost dollars. This same individual explained that the reason the tribe carried such extensive private liability insurance coverage was because of the vagueness of the FTCA, the seeming inconsistency in coverage interpretations from field solicitors' office to field solicitors' office, and the lack of advance assurance that the FTCA will cover a particular claim. One tribal representative observed that private carriers are inclined to settle claims to avoid the cost of defense, while the government is more likely to simply deny FTCA coverage to avoid the cost of settlement or payment of the claim, thus leaving the tribe at financial risk.<sup>12</sup>

Vehicles represent the tribes' biggest potential exposure. Despite relatively clear rules about FTCA coverage of vehicle-related liability, most tribes and tribal organizations appear to be purchasing far more extensive vehicle liability coverage than they need.

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<sup>12</sup> Comments like these illustrate another fundamental source of confusion for tribes and tribal organizations: they seem to equate "coverage" under the FTCA with payment of a claim. "Coverage" under the FTCA simply means that a claim involving one or more specified torts has been brought against an employee of the United States (or a tribe or tribal organization operating under a P.L. 93-638 contract) acting within the scope of his or her employment and that, pursuant to the FTCA, the United States will step into the shoes of the named defendant by being substituted as the proper defendant in the case. However, the fact that a claim is "covered" by the FTCA (i.e., appropriately brought under the Act) does not necessarily mean that the plaintiff will be successful in the lawsuit.

One broker told us that he recommends private liability insurance for P.L. 93-638 program vehicles because he finds that too many accidents fall outside the scope of activities covered by the FTCA. Usually this occurs because the driver is not acting within the scope of his or her employment when the injury occurs or because the driver's activity involves conduct not explicitly covered under the P.L. 93-638 contract.<sup>13</sup> By providing private vehicle insurance to the tribe, this broker is confident that any automobile his clients drive is covered, regardless of the circumstances. The ability of the broker to advise a tribe about appropriate insurance coverage is complicated further when a tribe owns or leases some vehicles that the broker is not even aware of until there is an accident. This problem is not unique to tribes, however, but can occur with all entities that own large numbers of vehicles.

One tribal organization reported a frustrating experience in trying to purchase insurance that accurately reflected the applicability of the FTCA to tribal vehicles. When the tribal organization submitted its budget for self-determination activities to the IHS local area office, the contract specialist questioned why it was carrying so much private liability insurance coverage. At the time, this tribal organization was paying approximately \$6,000 per year for liability coverage. Half of these expenses was for a \$1 million liability policy covering two large transport vans purchased under its P.L. 93-638 contract. IHS told the tribal organization that it no longer needed to carry private liability insurance because liability coverage was provided under the FTCA.

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<sup>13</sup> For instance, a tribal policeman who picks his son up at school in a tribal police vehicle and causes an accident may not be covered under the FTCA because, under state law, he may not be acting within the scope of his employment. Or an off-duty tribal policeman who answers a police call in his personal vehicle and causes an accident may not be covered by the FTCA because he may not be acting within the scope of the activities designated in the P.L. 93-638 contract or because the P.L. 93-638 contract may not provide for an individual on call to respond in a personal vehicle.

The tribal organization requested a letter from the IHS office explaining tribal FTCA coverage and took the letter and a Federal memorandum detailing FTCA coverage to its broker. The broker informed the insurance company that his client wanted to drop the comprehensive liability coverage and maintain only collision coverage on the vans. It took more than a year for the tribal organization to get a response from the insurance company. During that time, the tribal organization continued to make payments on the original policy. The insurance company evidently was uncomfortable providing just collision insurance coverage to the tribal organization and eventually dropped all coverage for the tribe. The tribal organization later received a refund on its premium payments and now carries only collision coverage with a new insurance company.

To further complicate matters, a public utilities commission (PUC) within the state involved in the above example requires all private carrier units (e.g., large vans) to carry liability insurance. When the tribal organization's coverage with the original insurance company was finally dropped, the PUC was notified. Recently, the PUC sent a letter to the tribal organization informing it that its vehicles could not be driven on public highways since the tribal organization no longer carried liability insurance. The tribal organization called the PUC, advised them that liability coverage was unnecessary because of the applicability of the FTCA, and sent the PUC a copy of its P.L. 93-638 contract with the page describing FTCA coverage. The PUC said that they had to confer with their legal department to determine whether FTCA coverage was sufficient. Only after the IHS local area office called the PUC directly was the tribal organization told that it could temporarily drive its vans until a final decision was reached. To date, this tribal organization still has not received a final decision from the PUC.

This illustrates why some tribes and tribal organizations buy private liability insurance even

though their activities are covered under the FTCA. Under certain circumstances, tribes and individuals have had difficulty in engaging in normal commercial transactions because they cannot show proof of insurance. Generally it is easier and less costly for an entity or individual to purchase insurance if prior continuous insurance coverage can be demonstrated. The insurance company can simply examine the applicant's prior record and make a determination as to whether to provide insurance and at what rate. In some cases, insurance companies may be unwilling to offer insurance to an applicant who has been operating in a professional or commercial capacity without prior insurance. At best, however, if proof of prior insurance is unavailable, the process to obtain coverage is likely to be more lengthy and complicated, since a complete investigation and risk-assessment will have to be made of the applicant. Failure to be able to show proof of insurance is a serious obstacle in situations in which time is of the essence for the self-determination contractor.

Several tribes and brokers described their concerns about this problem. For instance, one of the brokers described the dilemma his client experienced when the tribe was unable to lease a building to house the expansion of its P.L. 93-638 activities because it could not show proof of insurance. A comparable problem occurred when another client tried to rent a car to be used for P.L. 93-638 activities. Similarly, another broker's clients have been unable to purchase private malpractice insurance for their newly hired physicians working at the tribal health clinic, because the physicians cannot demonstrate that they have had previous malpractice coverage under the FTCA in their prior jobs at other tribal clinics. This is also a problem when a physician leaves the tribal clinic and takes a job at a facility not involved in self-determination activities, because the physician is not be able to furnish proof of prior malpractice coverage for the time he or she was employed by the tribal clinic. A potential solution to these problems is for the Federal agencies to develop form

letters that tribes could use to verify and explain FTCA coverage of P.L. 93-638 activities. The IHS has begun doing this in California and tribes report that it is very helpful.

One broker noted that some tribes will buy liability coverage for police officers, emergency medical technicians, and ambulances for "peace of mind" even though they know that tort liability protection of some type is provided under the FTCA. The broker explained that a tribe's likelihood of purchasing duplicate insurance coverage went down as its familiarity with the FTCA went up. The tribes that were more knowledgeable about the FTCA tended to rely more on their FTCA coverage, while the less knowledgeable ones tended to be more comfortable purchasing private liability insurance.

Purchase of duplicative or unnecessary liability insurance coverage can also result from a lack of understanding or misinformation about the extent and scope of FTCA coverage on the part of an insurer. For instance, a representative of one of the insurance companies told us that he believes that the immunity provided by the FTCA coverage is not "effective" and, therefore, the insurance company refuses to offer tribes a reduced rate for their liability coverage. When pressed, this individual only provided one example to back up his belief. He explained that a problem exists with GSA vehicles because the GSA merely bills the tribes for damaged vehicles, rather than paying for the damage itself. As he related this example, it was apparent that his views on the effectiveness of FTCA coverage may have been based either on unreliable information or a mistaken understanding of what role the FTCA is designed to play. However, this insurance company generally insures police vehicles for the same premium as the other vehicles. According to the company's representative, the net result for tribes is positive, since they are getting insurance coverage on emergency vehicles at a very competitive price, even though claims for damages caused

by these vehicles may be covered under the FTCA. Self-determination contractors who encounter this type of sales pitch from an insurance company or broker ought to analyze the economics of the situation for themselves before they make a decision to purchase private insurance coverage that duplicates FTCA protection.

In order to confirm FTCA coverage of tribal clinics, one broker routinely writes to the IHS regional office to request a letter verifying FTCA coverage for the facility in question. The broker told us that each of his tribal clients had been involved in a tort claim at one point or another that the client believed would be covered by the FTCA. Yet in each instance, that assessment was wrong. Consequently, now the tribes are purchasing insurance to cover themselves because they feel they cannot rely on the FTCA to protect them from liability. However, working with an insurer, this broker is able to offer tribal clinics an inexpensive medical malpractice policy that "wraps-around" or fills in the gaps in the FTCA coverage. The policy costs \$5,000 per year and has a \$1 million deductible and a \$5 million limit.<sup>14</sup>

This broker spent significant time and effort finding a carrier for the "wrap-around" medical malpractice product. Initially, he found it quite difficult to convince the insurance company that the FTCA coverage would pick up the vast majority of potential medical malpractice liability and that the insurance company's liability would be limited. (The broker believed that the insurance company would be "the payer of last resort" since most claims would fall within the FTCA purview.)

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<sup>14</sup> This is an example of one approach to avoiding purchase of private liability insurance that duplicates the FTCA. This broker concluded that most claims under the FTCA would involve amounts less than \$1 million, so the insurance policy only covered larger claims. It was then clear that for claims of less than \$1 million, no private insurance duplicated the FTCA. However, if a claim arose that involved less than \$1 million and was not covered by the FTCA (for instance, if the employee who caused the injury was not performing activities within the scope of his job or position description at the time of the injury), those claims would not be insured.

The broker's task of convincing the insurance company to offer the "wrap-around" product was made significantly harder because of the paucity of available information on the FTCA for him to use to buttress his analysis. As a result of this broker's ultimate success, however, in convincing an insurance company to write a "wrap-around policy," now when physicians leave the tribal clinic they can be provided with proof of insurance. The broker expressed confidence that insurance companies, in general, can be educated to understand that there is some value to FTCA coverage for tribes, and that ultimately more insurers would be willing to provide similar "wrap-around" medical malpractice coverage.

3. *The difficulty that tribes and tribal organizations have in determining what private coverage they need to supplement their FTCA immunity may be compounded by what they describe as inconsistencies in how Federal personnel determine that particular claims are covered under the FTCA. Tribes, tribal organizations, and brokers report that there does not appear to be a uniformly applicable framework for coverage or a precedent-based decision-making system the results of which are available publicly. It is, therefore, hard for tribes, tribal organizations and insurers to judge the types of claims that might be covered under the FTCA and even harder to evaluate the extent to which private liability insurance is necessary or duplicative. This appears to be more of a problem with non-medical claims.*

Several tribes commented that the information they had received from the BIA and the IHS was not consistent and queried, "Shouldn't the rules be the same?" This apparent inconsistency in describing and interpreting the law was reported by brokers as well. Thus, some of the "gaps" in FTCA coverage may reflect inconsistencies in the interpretation of coverage from field office to field office in different parts of the country. One broker specifically noted this problem, remarking that there frequently appear to be inconsistencies in advice provided by the BIA field solicitor's offices from region to region. In his experience, the information from the IHS regional offices was less variable than the information from the BIA.



One tribal representative observed that coverage of smaller claims tended to be denied on a routine basis. He was also told informally by a BIA field officer that the rule of thumb was that FTCA claims below a de minimus amount -- \$2,500 -- would not be processed. However, he has not been able to obtain written documentation of this policy regarding de minimus claims. He also indicated that another BIA field office with which he dealt had never heard of any such rule.

In a follow-up discussion with members of the TAC, we were told that no such rule exists. This misunderstanding may have arisen because there is a difference in the source of funds used to pay successful claimants under the FTCA. The Departments' have the authority to settle claims for amounts below \$25,000, however, such amounts are payable out of the agency's program money, rather than DOJ funds. It is possible that if the agency's program funds available to pay these claims were exhausted, the agency might have to stop processing claims. Regardless of the actual reason that de minimus claims were not being processed at that point, unfortunately the mistaken impression was left that, according to the BIA field office in question, small claims were not covered by the FTCA. To compound the confusion, because of the apparently conflicting information he received on the topic from two different BIA offices, the tribal representative also came away from this experience believing that the offices were not operating under the same set of rules.

Several tribes reported instances in which the U.S. Attorney's office "refused" to process claims under the FTCA because the tribe had private liability insurance. Rather than pursue its FTCA coverage, the tribe was told to rely on its private liability insurance. One broker also indicated that a representative in the U.S. Attorney's Office told his tribal clients that if they had private liability insurance, they should use it. This broker explained that given the DOJ's reluctance to accept FTCA claims, his clients often buy insurance to cover their legal costs -- not the cost of

defending against the claimant's substantive claim, but the cost of litigation to force the government to provide coverage for them under the FTCA.

The question of how the purchase of private liability insurance affects a claim under the FTCA is critical, yet many self-determination contractors and compactors are either unaware that it is an issue at all or unable to grasp its significance because of the confusion that surrounds it.

Because of the widespread lack of understanding of the effect of duplicative insurance coverage on the applicability of the FTCA, several follow-up discussions on this topic were held with DOJ and the other responsible Federal agencies, including discussions that occurred at the tribal consultation meeting in April, 1997, after the site visits were concluded.

Contrary to the belief of many tribes, tribal organizations, and brokers, the decision of whether or not the FTCA applies to a particular claim is independent from any inquiry about whether or not the self-determination contractor has purchased private liability insurance. If the claim is not viable under the FTCA, then the tribe or tribal organization will want to rely on its private insurance if any. Once the decision is made that the FTCA applies to the claim, however, if the tribe has duplicative private insurance, DOJ will likely expect the insurance company to bear the cost of defending the claim and paying any judgment that might be awarded (up to the limits of the policy), although the U.S. Attorney will be in charge of the case, direct the legal strategy and work with the insurance company's lawyers. If the damages awarded to a successful plaintiff exceed the limits of the insurance policy, the DOJ Judgment Fund will pay the balance of the judgment. The mere fact that the U.S. Attorney insists that the insurance company from which duplicate insurance coverage has been purchased bear the cost of defending the case does not mean that FTCA coverage has been denied.

Yet tribes, the tribes, tribal organizations and brokers in our study are under the impression that the purchase of any private insurance will result in a determination that FTCA coverage is voided. Some tribes and brokers told us that the first question they are asked by BIA and IHS field offices is whether the self-determination contractor or compactor has private liability insurance. According to the tribes, the field offices do not generally try to determine the scope of that coverage or whether there is overlap between the private liability insurance and the FTCA. The degree to which this is a problem varies from field office to field office.

To the extent that tribes are under the impression that the purchase of any private liability insurance nullifies FTCA coverage (even coverage which specifically excludes claims covered under the FTCA), tribal decisions about whether or not to purchase insurance at all could be profoundly affected. In addition, this apparent confusion about the DOJ position could also affect tribal strategies to maximize the usefulness of private liability insurance.

It would be helpful if the government's policy regarding duplicative insurance could be clarified, thus reassuring self-determination contractors that they would not be disqualified from FTCA immunity merely because they purchase private liability insurance. The effect of such a purchase could be explained simply by noting that if the self-determination contractors have purchased insurance that duplicates their FTCA immunity, the financial burden associated with defending the tort claim may be shifted from the government to the insurance company because private coverage exists. Implementation of this policy is reasonable because it prevents an insurance company from profiting from the sale of a liability policy covering claims that it will never have to assume. Clarifying the government's position on duplicative insurance coverage thus could also be viewed as a warning to brokers and insurance companies to be more precise in the way they

describe coverage under the insurance policy.

Once they understand the need to avoid purchase of duplicative insurance coverage, the primary difficulty that self-determination contractors and compactors will have is distinguishing between supplemental private liability insurance and duplicative insurance, because no guidance has been given as to what the standards are for determining when and to what extent that private insurance is duplicative of the FTCA.

Given this problem, it is surprising that none of the insurance contracts we examined took the most straightforward approach, specifying simply that the insurance covers "only those claims not covered under the FTCA." This language makes it clear that the private liability insurance policy does not duplicate FTCA coverage. On the other hand, it does not provide tribes with a clear listing of what claims will or will not be covered under the policy.

Perhaps that is why some brokers respond to this concern by providing more bright-line approaches to articulating the boundaries of private insurance coverage. One example is the strategy of providing wrap-around insurance coverage with high deductibles as has been previously described. By creating a bright-line between claims above and below a threshold amount (for instance, \$1 million), it is clear that the brokers' clients do not have duplicative insurance coverage for claims below the threshold amount. If the deductible is set high enough, most claims will fall within the FTCA. To the extent that claims below the threshold amount are not covered by the FTCA, the tribe may be potentially at risk because it would be uninsured for those claims; however, it may ultimately fall back on its own sovereign immunity to avoid liability.

Another common concern echoed by tribes, tribal organizations and brokers is that although the provisions of the FTCA may have been intended to offer broad protection to tribes against

potential tort liability, since each claim is evaluated on a case-by-case basis, the degree of certainty or security for P.L. 93-638 contractors that they will be protected by the FTCA is extremely low. Time and time again during our interviews and site visits, we heard calls for greater certainty about what claims would be covered under the FTCA.

Based on our discussions with the TAC, particularly with the representatives of the DOJ who make FTCA coverage decisions, it appears that the degree of certainty that tribes, tribal organizations and brokers are seeking is unlikely to be provided in the near future. There are several reasons for this. First, the factual context for each claim varies substantially. In addition, there are two important variables that must be considered before FTCA immunity applies: (a) whether the activity that caused the injury was within the scope of the P.L. 93-638 contract; and (b) whether the individual who caused the harm was acting within the scope of his or her employment (i.e., performing duties within the individual's job or position description) when the incident giving rise to the claim occurred. The first variable involves interpretation of the scope of a P.L. 93-638 contract. The second is a matter of state, not Federal law. Neither of these analyses lends itself easily to generalization.

Moreover, there is simply not enough experience under the FTCA involving P.L. 93-638 contractors and compactors to develop a series of common situations or specific guidelines for tribes. And finally, the law affecting P.L. 93-638 contractors and compactors continues to evolve through the courts and it is very difficult to predict with certainty how the courts will view these issues.

4. *Notwithstanding the perception of self-determination contractors and brokers that there is no way to predict when the FTCA will apply to a particular tort claim because this decision often rests on a case-by-case analysis, a general framework for*

*analysis of the FTCA's applicability to tort claims involving P.L. 93-638 contractors and their employees can be constructed that provides some assistance in assessing the likelihood that private liability insurance may be needed.*

Even though FTCA tribal coverage determinations are made on a case-by-case basis, we believe that the framework for analyzing the cases is straightforward:

1. Did the activity involved in the claim cause injury to another person or damage to another person's property? In other words, does the claim involve a tort?
2. Does the activity that caused the injury fall within the scope of work covered under the P.L. 93-638 contract?
3. Was the person involved in the activity that caused the injury an employee of the P.L. 93-638 contractor? This must be determined under principles of state law.
4. Was the employee acting within the scope of his or her employment (determined under state law) in carrying out the activity?
5. Is the injury that allegedly resulted from the employee's action the type of injury covered under the FTCA?

If the answer to any of these questions is "no," then the claim for liability will not be covered under the FTCA. On the other hand, if the answer to each question is "yes," it is *likely* that the claim will be covered under the FTCA, although a final coverage decision will rest on a careful analysis of the particular facts and circumstances surrounding the claim. Using this analytic framework, tribes and brokers can make a reasonable assessment of the likelihood of FTCA coverage, although there are no absolute guarantees, even when all of the above questions can be answered in the affirmative.

5. *Tribes and tribal organizations report that the lines of communication between themselves and the Federal agencies involved in FTCA decision-making need to be improved. Tribes and tribal organizations report difficulties in determining a*

*claim's status and resolution and receiving timely responses to tribal inquiries as to whether a claim will be covered or not by the FTCA.*

The tribes and tribal organizations in our study suggested that the lines of communication between the tribes and the FTCA coverage decision-makers need to be improved. Many tribal representatives described problems in obtaining information on the progress of the claims once they have been filed with the appropriate agency.

Lack of information and control over the settlement of claims brought under the FTCA is a particular concern for health care providers, since information about malpractice claims that have been successfully brought or settled is placed in a national data registry and can be retrieved by health care institutions. Tribes report that they rarely are notified about a claim's status or resolution. One tribal organization described its FTCA claims experience as being akin to "entering a black hole" once the claim reaches the main Federal agency.

One tribal clinic cited the example of a physician who was named in a malpractice suit based on his work as an employee of a tribal clinic. After the U.S. Attorney took over the suit, the physician was unable to get any information on the status of the action until he hired his own lawyer. Because the claim was filed directly with the agency, the only notice the tribe had of the lawsuit was when the tribal organization received a copy of the Standard Form 95 and was asked to submit medical records. This same tribal organization has had three cases that it believes have been settled, but thus far, it has been unable to get formal notification in writing on the disposition or closure of the cases months after they believe the cases have been already resolved.

Physicians and other health professionals need to be aware that medical malpractice coverage under the FTCA has some disadvantages. For instance, under normal circumstances, if a medical

malpractice claim is filed against a health care professional, he or she would work with the malpractice insurer through the various stages of the case. Under the FTCA, although the DOJ may litigate the case, settle the case or pay any judgment that is ordered on behalf of the defendant provider, the health professional cedes control of the claim as soon as it is filed.

In one instance (which was not unique), a malpractice claim was filed against a physician for acts performed while an employee of a tribal clinic. However, by the time the claim was filed, the physician had moved thousands of miles away to a new job and was unaware he had been sued, since the defense of the case had been assumed by the DOJ. Years later when he applied for another job, a routine background check of the National Practitioner Data Bank revealed that the doctor had been sued and his case had been settled -- all without his knowledge. Currently the doctor is facing a more serious problem because of his failure to disclose the earlier incident of malpractice, even though he claims to have been unaware of it at the time he filled out his employment questionnaire. To address this problem, tribes and tribal organizations may want to be sure to notify any former employee against whom claims are filed.

Based on follow-up discussions with the TAC, it appears that, as a general matter, the U.S. Attorney's office handling each case notifies the agency involved of significant developments in the case. The problem appears to be that there is not a systematic procedure in place to keep the tribes informed about the case. Although frustrating for the tribes, this lack of communication is understandable in the context of the lawsuit because the tribe or tribal employee is no longer a party of record in the case at all once the United States is substituted as the defendant. Nevertheless, this tribal concern about ongoing information has been flagged as an issue for the agencies.



6. *Many insurance companies are unfamiliar with the FTCA and its applicability to self-determination contractors. Other insurers are uncertain about the reach of the FTCA and the process for filing an FTCA claim. As a result, some insurers may misconstrue, underestimate, or disregard the value of the FTCA in designing private liability insurance coverage for tribes and tribal organizations and in determining premiums to be charged for that insurance coverage. Because the level of sophistication about tribal tort immunity through the FTCA varies substantially, the number of insurers willing to write tribal coverage, while growing, is still relatively small. This is surprising because insurers routinely sell coverage to state and local governmental entities that have basic grants of immunity under statutes that are similar to the FTCA and therefore would have the same need as tribes for only supplementary private insurance coverage.*

Although there are exceptions, most brokers in our study report that insurance underwriters typically do not take the FTCA into consideration when pricing insurance, either because (1) the underwriters are unaware that the FTCA applies to tribes and tribal organizations, or, (2) even if underwriters are aware of FTCA applicability, they are under the impression that DOJ will do everything it can to deny that a claim is covered by the FTCA. In the latter case, underwriters are not convinced that their policy will be treated as providing gap or supplemental coverage, regardless of how the policy is designed.<sup>15</sup> Given this lack of certainty as to what claims will be covered under the FTCA, underwriters typically assume that the private liability insurance will always be required to pay any tort claims that are brought. Consequently, these insurers price coverage accordingly.

The role of the broker in assisting tribes and tribal organizations to find appropriately designed and priced insurance is critical. The tribes in our study that were most successful in

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<sup>15</sup> Unfortunately, the experience of the tribes and brokers that, with respect to some IHS and BIA field staff, the mere fact that a tribe has any insurance appears to be sufficient to send the tribes back to their private insurance carriers. This erroneous belief has been previously discussed at pages 27-28. Unfortunately, this misunderstanding reinforces a belief on the part of underwriters that the government will not provide coverage under the FTCA for tribal claims. As previously noted, unless the DOJ policy on duplicative insurance is more clearly articulated, communicated, and applied, the job of finding appropriately structured and priced private insurance for tribes will be harder.

reducing their insurance costs had been working with brokers familiar with tribal concerns and FTCA coverage of P.L. 93-638 activities.

Each of the brokers we interviewed counted tribes and tribal organizations as either a majority of their client base, or their exclusive client base. These brokers had invested considerable time and effort in educating themselves and the insurers with whom they did business about the needs of tribes and FTCA coverage of tribal activities. In part, their interest in the tribes was financial. Several brokers indicated that general liability coverage usually represents 10-15 percent of the total tribal premium and this percentage has remained unchanged, despite the extension of FTCA coverage to P.L. 93-638 activities.

It requires a skilled broker to know what additional private liability insurance is necessary for tribes and tribal organizations that are covered under the FTCA. Brokers who advise tribes and tribal organizations effectively on the purchase of private liability insurance coverage appear to do the following: (1) they have a clear understanding of the scope of the tort immunity provided to self-determination contractors under the FTCA; (2) they understand and are able to articulate the varied insurance needs of tribes and tribal organizations (typically this occurs if the broker's clients are mainly or exclusively tribes and tribal organizations); and, (3) they work closely with tribal clients on risk-reduction activities (such as performing on-site loss prevention examinations).

As previously discussed, ideally tribes and tribal organizations should purchase any necessary private liability insurance that does not duplicate coverage provided by the FTCA. When a broker is familiar with the limitations of the FTCA, he or she can better advise tribes on the private insurance that is needed to complement the FTCA. An experienced broker can thus facilitate the purchase of private liability insurance coverage that is "just right" -- not so broad that it duplicates

the FTCA protection and not so bare-bones that it leaves the tribes exposed to unnecessary risks by failing to fill the gaps in coverage adequately.

Many of the brokers we interviewed had developed techniques to assist their clients to maximize the effectiveness of FTCA immunity for tribes and to minimize the need for unnecessary private insurance. For example, one broker routinely wrote to the IHS regional office on behalf of his clients to request a letter verifying FTCA coverage for the client's P.L. 93-638 funded facility. The broker could then use the IHS letter as a basis to design, in cooperation with an insurance company, appropriate coverage to wrap around the FTCA coverage and meet the client's needs.

Even though FTCA protection for medical malpractice claims is fairly straightforward, it still may be difficult for some tribes to find an insurance company willing to write such a wrap-around medical malpractice product. It may require significant time and effort on the part of a broker to convince the insurance company that this structure makes sense. But based on the experiences of the tribal clinics we interviewed, this effort can yield substantial financial benefits. In addition, if the tribal clinic can purchase a reasonably priced wrap-around product, not only will the clinic feel more confident about the adequacy of its insurance coverage, but structuring coverage this way will have the added benefit of permitting the clinic to provide departing physicians with the proof of insurance they will need at their next job. On balance, the brokers in our study suggest that, although it takes considerable time and effort, insurance companies can be educated to understand that FTCA immunity for self-determination contractors can be appropriately factored into the pricing of private liability coverage.

Successful brokers research the needs of their client base. Some of the brokers in our study had worked closely with tribal lawyers and spent time on reservations observing the daily activities

and talking with various key staff. This research enables brokers to devise insurance programs specifically tailored to the multiple needs of tribes.

Some insurers have calculated premium rates for liability insurance by identifying and segregating tribal activities funded through P.L. 93-638 contracts. Special underwriting criteria are applied to the P.L. 93-638 activity which takes into consideration FTCA coverage, and the tribe's other activities are underwritten separately. This generally has the effect of reducing the otherwise applicable premium. Whatever the technique for pricing, given the importance of avoiding duplicative insurance coverage, it is critical that the insurance policy clearly explain the extent to which its general liability coverage is coordinated with or exclusive of the FTCA.<sup>16</sup>

Some brokers told us that the FTCA coverage was merely reflected in the pricing of the policy and that no special exclusion or endorsement relating to FTCA coverage was incorporated on the face of the policy itself. Given the DOJ's position about duplicative coverage, this does not seem to be a wise strategy. Without language in the policy showing that the insurance coverage is not duplicative, it is virtually certain that DOJ will take the position that the insurer must bear the cost of defending any claim brought against the tribe or its employees that would otherwise be covered under the FTCA and the cost of paying any judgment up to the policy limit.<sup>17</sup>

Another technique used by brokers to assist tribes in securing more affordable insurance is developing a loss or claims history for the tribe to provide a reliable baseline to use in setting premiums. According to the brokers we interviewed, tribal claims experience tends to be more

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<sup>16</sup> See Attachment 5 for a discussion of the insurance policies that were examined in connection with this study. In addition, see the discussion on pages 42-44 concerning approaches to avoiding duplicative insurance coverage.

<sup>17</sup> According to one broker, DOJ has already implemented this policy in at least one case in Alaska.

favorable than that of other clients, primarily because tribal members are generally less litigious as a group and because many often view the tribe as family and, thus, hesitate to file claims or suit.

Education and communication between a broker and his or her clients is critical to a successful broker-client relationship. Often, if considerable turnover in personnel at the tribal level occurs and if the tribal organization is decentralized, there can be a lack of continuity in providing and receiving information. Successful brokers communicate frequently with each department head (clinic, police department, legal, etc.), as well as the tribal administrator. On a regular basis, the broker will visit each tribal client to inspect vehicles and buildings, as well as to identify potential risks and develop risk-prevention strategies. Several brokers emphasized the need for this practice and described their activities (and those of certain insurers) in considerable detail.

For example, loss control assistance to clients can consist of a comprehensive range of activities, including running practice fire drills in various tribal buildings. Obviously the cost associated with the broker's involvement in these activities is built into the insurance premium. However, based on the reports we received, in the long run, the additional premium cost that tribes pay to finance these activities is relatively small compared to the longer term financial benefit tribes may experience in the future, because these loss-prevention measures have been shown to lead to fewer claims and lower future premiums. It is important to note, however, that some tribes may pay significant amounts for this loss control assistance, particularly those in remote locations where the travel costs for bringing the individuals on the risk-management team to the reservation. In those cases, the financial benefit may not be as great, at least in the beginning.

Despite their best efforts, however, brokers are not always able to place all the liability insurance for a tribe or tribal organization with a single carrier. Instead they may use multiple

insurance carriers. One broker indicated that this was due to the wide variety of tribal enterprises to be insured; another suggested that insurance companies were still reluctant to provide comprehensive tribal liability coverage, despite favorable claims experience.

One insurance company representative alleged that the process necessary to secure FTCA coverage is so time-consuming and bureaucratic that those who can afford to do so will use private liability insurance, and those who cannot, will use the FTCA. However, when pressed, this person could not provide any specific examples of cases in which his clients had problems with the claims processing procedure under the FTCA.

This situation, however, does illustrate the need for public education about the ease with which a claim can be filed under the FTCA. If tribes want more affordable insurance to supplement their FTCA coverage, they must become more educated consumers. This means that they must acquire more knowledge in general terms about how the FTCA operates so they can tell the difference between insurers' legitimate questions about the FTCA and marketing pitches designed to encourage tribes to buy more insurance than they really need. Although it is certainly not necessary to turn every tribal representative into an FTCA expert or tort lawyer, tribes must have enough general understanding about the applicability of the FTCA to their self-determination activities to recognize obvious misstatements made about the FTCA. If, for instance, tribes are unaware that the process for filing a claim under the FTCA consists of filing a single form with the responsible agency, then they are more vulnerable to arguments made by individuals, such as the broker who erroneously insisted the process was a bureaucratic nightmare, whose goal is simply to encourage the purchase of more comprehensive private liability insurance than the tribe really needs.

All of the brokers in our study said it initially was difficult to convince insurance companies

to provide liability coverage to tribes. Similarly, many tribes commented that as recently as five to seven years ago it was difficult for them to get insurance coverage. Few, if any insurance companies were willing to insure tribes and the premiums were sometimes prohibitively high. But the market appears to be changing since the advent of high-profile tribal businesses such as casinos. Now many of these same tribes report that they can get at a minimum two to three quotes when they put their insurance business out to bid, although few insurers made mention of or appeared to have any knowledge about the FTCA.

As a result of these market changes, insurance premiums have generally decreased, even when FTCA coverage is not specifically addressed in the contract. One tribe said that now insurance companies are "reasonable" and listen when tribes want to negotiate. A tribal representative attributed this new attitude to a desire on the part of the insurance companies to keep the tribes' business, because tribal claims experience is significantly better than most municipalities.

Several years ago, if an insurance company was willing to provide tribal liability insurance, it would generally use the same underwriting criteria to price the tribal policy as it did for small municipalities. Even though tribal claims experience was much more favorable, it was difficult to convince insurance companies to reflect this in determining premiums. After FTCA immunity was extended to tribes and tribal organizations, it became more apparent to insurers that tribal coverage could not be underwritten using the same risk factors as municipal coverage and, according to the brokers we interviewed, tribes became more desirable as customers to insurance companies.

Reports of heightened insurance companies' interest in keeping the tribes' business especially ring true since the advent of gaming and the increase in other tribal economic development activities. Tribes and brokers reported that some insurance companies will not write insurance for a tribe itself

unless the tribe has a casino. In some cases, the insurer will only write general liability coverage for tribal activities if it is linked with coverage for the casino.

Not surprisingly, several of our study respondents complained that the cost of insurance is high and that the premiums tend to increase annually as brokers recommend additional types of liability coverage. Because of their uncertainty about the scope of immunity under the FTCA, the tribes report difficulty in evaluating whether additional private liability coverage is needed. This is a particular concern for tribes with both gaming facilities and P.L. 93-638 contracts. Many tribes felt pressure to carry substantial amounts of private liability insurance for their non-gaming activities, if for no other reason than to protect their perceived "deeper pockets."

Both tribes and brokers indicated that before tribes had gaming enterprises, very few lawsuits (even legitimate ones) were ever brought against the tribes, largely due, they believe, to a perception that tribes simply were not wealthy enough to be a reliable source of compensation. With the advent of gaming activities, however, people now believe that tribes are capable of paying substantial judgments. Tribes fear that an increasing number of lawsuits will be filed by plaintiffs believing that the tribes will be willing to buy them off through generous settlements (even if the case is weak) in order to avoid the expense of litigation. A few of the tribes we interviewed said there is some evidence that the number of complaints filed is increasing; however, these tribes also indicated that they are dealing with the problem by refusing to settle cases and, if possible, forcing the plaintiffs to bring their actions in tribal court.

An example of this change in attitude on the part of insurers can be illustrated by the experience of a group of brokers from one firm that we interviewed. This group of brokers formed a company assimilating 10 years of experience working with tribal governments and developed a



special liability insurance product geared to tribes and tribal organizations. This company represents approximately 100 tribes nationwide and provides administrative support and claims processing services for their product.

These brokers decided to develop a product themselves because they found it difficult to locate insurers to write general liability policies for tribes. The brokers explained that in the 1980's when there was an overall crisis in the liability insurance market due to potentially unrestrained exposure resulting from environmental hazards and product liability lawsuits, many insurance companies lost interest in writing municipal coverage. Because tribes had been included in the same rating pool as the municipalities, tribes also found it difficult to purchase coverage, despite their status as sovereign nations and their more favorable claims histories.

The process used by this group of brokers to develop the special tribal product illustrates the importance of tailoring a product to meet the needs of potential clients. The brokers initially spent a year researching the needs of their client base, including working closely with a tribal lawyer and traveling to reservations. They discovered that tribes needed various types of products and that insurance needs varied widely by tribe. Based on this research, they designed an insurance program specifically targeted towards tribes and tribal organizations that recognizes and responds to multiple tribal needs. The group marketed this product through a network of brokers. Emphasizing education and communication, the company holds an annual training conference for brokers and tribes in which discussion of the FTCA and how it interacts with private liability insurance plays an important role.

Tribes that are interested in purchasing this company's product are asked to provide their latest annual financial report. All the activities funded through P.L. 93-638 contracts are identified and segregated out for underwriting purposes. In calculating tribal premium rates for general liability

insurance, the company applies special underwriting criteria to the P.L. 93-638 activities, which, according to the brokers, reduces the overall premium. At this point, the company has a 10-year loss history to rely on and the brokers believe that this provides a reliable baseline to use in setting premiums. Currently, this company is in the process of expanding its offerings to tribes by putting together an insurance package for health services coverage (i.e., malpractice insurance).

Another insurance broker, who had worked in Indian country for 20 years, described the evolution of his tribal experiences. His company has one office, but uses field agents, several of whom are local tribal members. He first heard about the FTCA while attending a National Congress of American Indians meeting. Information on the FTCA was also obtained from the BIA and tribal attorneys. This broker indicated that his tribal clients' claims experience has always been much lower than the industry average.

Despite this, he had great difficulty initially in obtaining general liability coverage for his tribal clients. At one point, he had to split the coverage for property insurance for one tribe among three carriers, because no one carrier would agree to insure the whole risk, even though his client had an excellent prior claims history. Moreover, these carriers would provide coverage for three to four years and then refuse to continue the coverage. The broker explained that this action was not due to the tribes' loss history, but fear of the unknown. Although the carriers had made money because of the tribe's low incidence of claims, the carriers' decision to drop the coverage was based on the carriers' belief that this favorable experience would not continue indefinitely.

The premium for the liability coverage that this broker currently purchases for his clients is calculated by taking P.L. 93-638 activities into consideration. Technically, the way this is done is by backing the cost of P.L. 93-638 activities out of total tribal expenditures. One set of underwriting

criteria is used to value the insurance company's exposure for non-P.L. 93-638 activities and another set of criteria is used to evaluate the insurer's P.L. 93-638 activity exposure. In this broker's experience, the benefits described as covered in the insurance policy are the same, regardless of whether or not the tribe has P.L. 93-638 contracts and regardless of what proportion of the tribe's total budget is comprised of P.L. 93-638 funds. According to several brokers and insurers who use this same method, the only way that FTCA coverage is reflected is in the reduction in premiums based on different underwriting criteria for P.L. 93-638 activities, rather than incorporating a specific carve-out in the policy itself for P.L. 93-638 activities. As previously discussed, given the DOJ's position on duplicative coverage, failure to explicitly carve out FTCA coverage will likely result in the insurance company having to bear the costs of defending a claim under the FTCA and paying any subsequent judgment up to policy limits.

As a practical matter, these two underwriting methods (segregating P.L. 93-638 activities from non-638 activities and applying separate underwriting criteria to each category vs. "backing the 638 activities out of the total expenditures") have the same effect, even though the brokers we interviewed described them as different approaches. In each case, separate risk analysis will be applied to tribal activities under the FTCA.

In addition to brokers and tribal representatives, we also interviewed insurers about their experiences with tribal liability insurance and the FTCA. Although there is no readily available list of companies that write tribal liability insurance, it appears that only a small number of insurance companies do so. Based on our conversations with tribes and brokers, we identified a few companies that were involved in writing tribal liability insurance. However, we found it quite difficult to convince insurance companies to participate in this study.

The insurers that were identified as writers of tribal insurance fell into three categories: (1) well-known national insurers;<sup>18</sup> (2) small, newly created insurance companies offering general liability insurance for tribes (usually including tribal gaming enterprises) that were typically organized as "captive" insurance companies;<sup>19</sup> and (3) tribally chartered insurance companies.<sup>20</sup>

We interviewed representatives of a nationwide insurer that has written tribal coverage for over 35 years. This insurer's public sector services division recently formed a government group to develop a strategy to target tribal clients. The government reinsurance group created a new

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<sup>18</sup> Generally, these insurance companies insured a limited number of tribes. Extending coverage to tribes or tribal organizations did not appear to be an important feature of a nationwide or regional marketing strategy undertaken by the insurer, but rather was the result of efforts by an individual broker working with the insurer over a period of years to secure coverage for particular clients. The brokers we interviewed noted that during the past few years, some change in the marketplace had occurred and a greater number of insurers were receptive to writing tribal coverage than they had been in the past.

<sup>19</sup> Typically these insurance companies assumed only a small part of the risk themselves, but worked in conjunction with large reinsurers who actually bore most of the risk. We conducted a telephone interview with one such reinsurer whose name was given to us by several tribes and brokers. It turned out that the particular office of the company we interviewed worked exclusively with one brokerage firm to market a particular product that was underwritten by a captive insurance company, created in a joint venture between the brokerage firm and a consulting firm. We later discovered that another office of the reinsurer in a different part of the country was offering, in conjunction with another brokerage firm, a competing tribal product.

If an entity is engaged in risk-intensive activities, it may be financially advantageous for that entity (or another entity acting on behalf of the enterprise) to establish a "captive" insurance company. In essence, a "captive" insurance company is a closely-held insurance company (i.e., owned by a very limited group of people) whose insurance business is purchased from and controlled by the owners of the captive. In other words, the entity typically forms a subsidiary (the captive) to assume the financial risk for the enterprise, either through direct insurance or reinsurance. In the cases that were described to us, certain groups of individuals with insurance experience (primarily insurance brokers) associated with a particular brokerage firm or corporation set up subsidiaries of that brokerage firm or corporation that were captive insurance companies. The sole purpose of these captive insurance companies was to write primary insurance or reinsurance for tribes and tribal governments and to market a specifically tailored product to these entities.

<sup>20</sup> According to the information we received, only two of these insurance companies are currently in operation. We conducted an on-site visit with a senior management representative of one of them. With respect to the other, we conducted a telephone interview with a representative of the brokerage side of the business who gave us information about the history and operation of their tribally chartered captive insurer. Tribally chartered insurers are not subject to state regulation as are their commercial insurance company counterparts. Instead they are regulated by the tribe which charters them. Some have raised concerns that this may not provide sufficient protection for tribes that purchase insurance, because the tribally-chartered insurance companies may not be subject to adequate solvency or other consumer protection standards. We are unable to evaluate the validity of these concerns as they involve issues beyond the scope of our study.