

## NOTES

# Tribal Telecom: Telecommunications Regulation in Indian Country

## I. INTRODUCTION

Native American communities across the country suffer from considerable economic depression. Native American reservations are home to the highest unemployment and poverty rates in the nation.<sup>1</sup> There is a tremendous need for creative economic development on tribal lands, but successful development in these regions must seek to balance the interests of making a profit and preserving Native American values. Native American communities may be able to achieve this dual goal by investing in technology industries. Native American lands can potentially provide a number of attractive incentives for hi-tech businesses.

Hi-tech entrepreneurs who locate their businesses on tribal lands may be able to take advantage of restrictions on the government's regulatory power over these industries. Tribes themselves may be able to run and regulate their own hi-tech businesses on tribal lands. Such hi-tech industries could include local or long-distance telephone service, wireless services, cable service, satellite service, internet access, distance learning technology and telemedicine services. Hi-tech businesses could potentially provide a lucrative and sustainable economic resource for tribes.

This note will explore the legal implications inherent in the development of telecommunications ventures both on Native American lands, and by Native American businesses. Part II of this note will consider the economic potential of hi-tech ventures on tribal lands. Part III will focus on the telecommunications opportunities that may be currently available to tribes. Part IV will consider federal regulatory authority over tribal telecommunications, and Part V will focus on state regulatory authority. Part VI of this note will discuss potential tribal regulatory authority over non-Indian

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1. Stephen Cornell and Joseph P. Kalt, *Pathways from Poverty: Economic Development and Institution-Building on American Indian Reservations*, Harvard Project on American Indian Economic Development (project report at 2) (Apr. 8, 2000) <<http://www.ntda.rockyboy.org/members/predoc11.html>>.

telecommunications businesses on tribal lands. Part VII will highlight the latest legal developments relating to Native American communications, and Part VIII of this note will suggest the steps necessary to promote Native American telecommunications in the future.

## II. ECONOMIC POTENTIAL

Depressed economies and a lack of jobs are serious problems to most Native American communities in the United States. On many Native American reservations, poverty rates exceed 50 percent.<sup>2</sup> By contrast, the overall poverty rate in the U.S. is only about 13 percent.<sup>3</sup> Most of the jobs that do exist on reservations are government-related, and private sector job creation on reservations has been limited to a relatively few reservations and villages.<sup>4</sup> The Native American communities that have been able to attract private industry have primarily only been those with either marketable natural resources, or those with large and accessible tourist attractions.

The multi-billion dollar hi-tech industry could potentially provide many economic opportunities for tribal nations. Native American communities could create jobs and stimulate local economic development by starting Native-owned and operated hi-tech companies or by attracting outside hi-tech companies onto tribally owned lands. Although there are currently only a few hi-tech companies that are owned and operated by Native Americans, the potential for considerable growth exists. Tribes have already started telephone companies, cable companies, and radio stations. Some tribes are also considering investing in television stations, wireless services, geographic positioning services, telemedicine, and distance-learning services. Given the lucrative potential of these hi-tech industries, many tribes could greatly improve their economic situation by developing these types of hi-tech economies. In smaller markets, nearby Native communities could join together to create a market large enough to sustain hi-tech tribal enterprises.

Correctly applied, hi-tech industries could bring significant advances to tribal economic, political, and social welfare. For example, the development of hi-tech tribal companies would facilitate the education and training of a skilled, marketable workforce in Native American communities. In turn, this education and training would attract other business and investment to Native American reservations. A hi-tech tribal economy would also help create the technology infrastructure that would allow businesses to participate in needed telecommuting, remote computer applications, and electronic data interchange. As a result, hi-tech tribal economies would likely encourage many types of

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2. U.S. Census Bureau, *Population, Land area, and Poverty Data for American Indian and Alaska Native Areas*, (Apr. 4, 2000) <<http://www.census.gov/geo/www/ezstate/aianapov.html>>.

3. U.S. Census Bureau, *People and Families in Poverty by Selected Characteristics*, (Apr. 4, 2000) <<http://www.census.gov/hhes/poverty/poverty97/pv97est1.html>>.

4. The 1980 Census found that 65.7 of those Native Americans who were employed on reservations were employed in tribal, federal, state, or local government. Cornell & Kalt, *supra* note 1, at 2; *citing*, U.S. Census Bureau, *Subject Report*, Table 26, p. 404.

businesses to create jobs on or near tribal lands. Hi-tech tribal industries could also expand outside markets for Native American products and services through inter-tribal, regional, national, and international marketing.<sup>5</sup>

### III. TELECOMMUNICATIONS OPPORTUNITIES FOR TRIBES

One of the hi-tech industries with the most economic potential for tribes is the telecommunications industry. It is difficult, however, to determine the full extent of tribal jurisdictional authority over telecommunications operation and regulation. Courts and legislatures have not settled the extent to which tribes can assert jurisdiction over telecommunications on tribal lands. Typically, parties disagree as to the extent of tribal authority over physical telecommunications infrastructure on tribal lands, and over frequency spectrum in the air over tribal lands.

Applying the traditional telecommunications regulatory structure to federal Native American law is a complicated exercise. There has never been a clear definition of the amount of control that state and federal regulatory agencies possess over telecommunications services in Indian country. Most often, federal and state regulatory agencies have assumed jurisdiction over telecommunications services within the boundaries of tribal lands by default, because the tribes on those lands have not exercised their authority to regulate these services.<sup>6</sup> Some states, however, have acknowledged that they lack jurisdiction over Native American-owned telecommunications companies that operate on Native American reservations.<sup>7</sup>

### IV. APPLICABLE FEDERAL POLICY

Currently there are no presidential or agency-wide policies that specifically address Native American telecommunications. The Federal Communications Commission has the primary responsibility for regulation of telecommunications, but the FCC does not have a Native American policy that explicitly recognizes and treats tribes as governmental entities. The FCC does have a minority policy that incidentally benefits entities owned by tribes, but this policy deals with Native Americans only based on their minority status and does not recognize any sovereign governmental power of tribal governments.

Should the FCC implement a more comprehensive Native American policy statement, the FCC can look to a number of federal agencies as examples. The EPA, as well as the Departments of the Interior, Agriculture, Energy, Commerce, and Justice each have created comprehensive formal policies to govern agency-tribal relationships.<sup>8</sup> The policy statements of each of these agencies uniformly recognize the unique status of

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5. U.S. Congress, Office of Technology Assessment, *Telecommunications Technology and Native Americans: Opportunities and Challenges*, OTA-ITC-621, at 104 (Washington, DC: U.S. Government Printing Office, August 1995) [hereinafter OTA].

6. JAMES CASEY ET AL., *NATIVE NETWORKING: TELECOMMUNICATIONS AND INFORMATION TECHNOLOGY IN INDIAN COUNTRY*, at 15 (Jean Smith, ed. 1999) [hereinafter Smith].

7. The states of California and Arizona have acknowledged such a lack of jurisdiction over tribal activities on tribal lands, see *id.* at 15; see also, *Zachary v. Wilk*, 173 Cal. App. 3d 754, 759-60 (1985).

8. OTA, *supra* note 5, at 85.

tribal governments and support the concept of tribal self-determination.

The EPA's Native American policy provides an example of a comprehensive approach to agency-tribal relations that could also be potentially applied to telecommunications policy. The EPA first issued a Native American policy in 1984.<sup>9</sup> This policy recognized in a general way which tribal governments were sovereign entities that possessed the primary responsibility for setting and enforcing environmental standards on Native American lands. The EPA policy recognized that it was the EPA's responsibility to support the efforts of tribes in developing their own local environmental regulatory programs.<sup>10</sup> In the absence of local tribal programs, the policy dictated that it was the responsibility of the federal government to enforce environmental standards on Native American lands.

The EPA strengthened and refined its initial Native American policy in 1991 and 1994.<sup>11</sup> Currently, the EPA policy is structured to strengthen tribal self-regulation efforts. Under the EPA's current policy, tribal governments are encouraged to develop and administer their own environmental programs and, as needed, to work as partners with state and federal environmental regulatory agencies to implement these programs. The FCC could emulate the EPA's emphasis on tribal self-regulation and directly apply it to telecommunications.<sup>12</sup>

The EPA's approach to tribal communications includes a number of key elements.<sup>13</sup> The EPA policy explicitly recognizes tribal sovereignty and commits the agency to further the ability of tribal governments to exercise self-determination. The agency also advocates legislative and regulatory changes that support the Native American policy. The agency provides funding and technical assistance for tribal governments, and participates in ongoing communications with tribal governments. To oversee the implementation of its Native American policy, the agency has established a central agency office on Native American affairs. These components of EPA's tribal policy are relevant to, and could be applied by, the FCC with respect to its telecommunications responsibility.<sup>14</sup>

### A. Presidential Policies

If no federal agency that has responsibility for telecommunications has created a formal Native American policy-statement, then Presidential policy is applicable to

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9. U.S. Environmental Protection Agency, Memorandum from Alvin L. Alm, Deputy Administrator, *Indian Policy Implementation Guidance*, Nov. 8, 1984; noted in, OTA, *supra* note 5, at 85.

10. *See id.*

11. U.S. Environmental Protection Agency, Memorandum from William K. Reilly, Administrator, *EPA/State/Tribal Relations*, July 10, 1991; and U.S. Environmental Protection Agency, Memorandum from Carol M. Browner, Administrator, to all employees on *EPA Indian Policy*, Mar. 14, 1994; noted in, OTA, *supra* note 5, at 85.

12. OTA, *supra* note 5, at 85.

13. *Id.*, at 85-87.

14. *Id.*, at 87.

Native American telecommunications.<sup>15</sup> Presidential policy applies to all federally recognized tribes and Alaska Native villages, and some agency policies extend to Native Hawaiian groups and state-recognized tribes as well. While there are no current presidential policies that specifically address Native American telecommunications, presidential Native American policy does provide a framework that could be applied to telecommunications. Over the past 30 years, Presidential Native American policy has consistently supported the concept of allowing sovereign tribal governments to govern their own affairs. Tribal telecommunications advocates contend that this support should be extended to foster greater tribal involvement in telecommunications regulation.

One of the first presidents to articulate a clear policy supporting tribal sovereignty was Richard Nixon. President Nixon's Native American policy reaffirmed the unique status of Native American tribes as part of the tribal-federal relationship. Nixon stated,

We must assure the Native American that he can assume control of his life without being separated involuntarily from the tribal group. And we must make it clear that Native Americans can become independent of federal control without being cut off from federal concern and support.<sup>16</sup> President Nixon made it a goal for the federal government to respect Indian tribal sovereignty as a general policy practice. Nixon proposed legislation that allowed tribes to contract with federal agencies to administer programs and which provided federal funding directly to tribes for the administration of Native American educational programs. These initiatives resulted in the landmark Indian Self-Determination and Education Assistance Act of 1975.<sup>17</sup>

Like Nixon, President Reagan also voiced support for tribal sovereignty. President Reagan stated:

Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination. In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members.<sup>18</sup>

President Bush, also stressing tribal sovereignty, articulated a Native American policy similar to Reagan's. President Bush declared:

This government-to-government relationship is the result of sovereign and independent tribal governments being incorporated into the fabric of our Nation, of Indian tribes becoming what our courts have come to refer to as quasi-sovereign domestic dependent nations. Over the years this relationship has flourished, grown, and evolved into a vibrant partnership in which 500 tribal governments stand shoulder to shoulder with other government units that form our Republic.<sup>19</sup>

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15. OTA, *supra* note 5, at 84.

16. President Richard Nixon, Statement to the Congress of the United States, The White House, July 9, 1970; *noted in*, OTA, *supra* note 5, at 83.

17. *See id.*, at 84.

18. President Ronald Reagan, Statement by the President on Indian Policy, The White House, Jan. 24, 1983; *noted in*, OTA, *supra* note 5, at 84.

19. President George Bush, Indian Policy Statement, The White House, June 14, 1991; *noted in*, OTA, *supra* note 5, at 84.

President Clinton's Native American policy, like that of his predecessors, also supported tribal self-determination. In a 1984 meeting with tribal leaders, President Clinton stated, "Today I reaffirm our commitment to self-determination for tribal governments. Today I pledge to fulfill the trust obligations of the federal government. Today I vote to honor and respect tribal sovereignty based upon our unique historical relationship."<sup>20</sup> President Clinton also issued a memorandum to the heads of all of the executive departments and agencies directing them to take a number of specific steps to implement his policy.<sup>21</sup> First, Clinton required each federal department and agency to operate in a manner that recognizes a government-to-government relationship between the federal government and the tribes. Second, the memorandum mandated that all executive departments and agencies consult with tribal governments before taking any action affecting Native American tribes. Third, Clinton instructed all executive departments and agencies to evaluate their departmental programs to assess the impact that the programs have on tribes. Finally, he ordered all executive departments and agencies to remove any procedural obstacles that impeded those governmental bodies from working directly and effectively with tribes on matters that affect trust property or tribal government rights.<sup>22</sup>

## B. Regulatory Landscape

Until recently, the prospect of asserting Native American sovereignty in the telecommunications industry has not been seriously considered by tribes. The division of federal, state, and local jurisdiction over telecommunications has generally been well established, and there is usually not much dispute over what governmental body regulates which services.<sup>23</sup> There is no clear concept of how existing regulatory structures should apply to telecommunications services provided by Native American tribes.

Generally, regulatory jurisdiction over telecommunications services is divided between the federal and state governments. The Communications Act of 1934, as amended by the Telecommunications Act of 1996, expressly grants federal jurisdiction over interstate and international wire or radio communications.<sup>24</sup> The Communications Act also specifically grants the states authority over intrastate communications.<sup>25</sup>

## C. Federal Regulatory Authority

Most courts, but not all of them, have held that federal statutes written to apply to

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20. President Bill Clinton, Indian Policy Statement, The White House, Apr. 29, 1994; *noted in*, OTA, *supra* note 5, at 84.

21. President Bill Clinton, *Government-to-Government Relations with Native American Tribal Governments*, Memorandum of Apr. 29, 1994, 59 Fed. Reg. at 22951-22952 (1994); *noted in*, OTA, *supra* note 5, at 84.

22. *See id.*, at 84.

23. Smith, *supra* note 6, at 12.

24. *Id.*

25. *Id.*

all Americans also apply to Native Americans on Native American lands.<sup>26</sup> If a court were to disagree with this general rule, however, Congress could act to specifically include Native Americans within the scope of federal telecommunications legislation. Regardless of the scope of the FCC's regulatory jurisdiction over Native American lands, the FCC's regulatory actions may never impinge upon the overriding concept of tribal sovereignty. The U.S. Supreme Court has made clear that tribal sovereignty may not be diminished by federal agency regulations.<sup>27</sup>

Tribal regulatory jurisdiction over telecommunications on, and over, tribal lands is supported by three well-established principles of Native American law: (1) federal trust responsibility; (2) tribal sovereignty; and (3) tribal self-determination. The historical context, and evolution, of these three core principles of federal Native American law provide a strong conceptual basis supporting tribal jurisdiction over telecommunications.

### 1. Federal Trust Responsibility

Native American tribes hold a unique status based on the historical relationship between the tribes and the federal government.<sup>28</sup> One of the major aspects of this relationship is that the United States government has assumed a federal trust responsibility in its relationship to Native American tribes. As a part of this responsibility, the U.S. government has a fiduciary duty to conduct its authority with respect to the tribes in a manner that protects the best interests of the tribes. For example, the federal government has a responsibility to serve as trustee of tribal lands and natural and financial resources, and to provide services necessary to the health and welfare of Native American tribes.<sup>29</sup>

The government's trust responsibility, however, does not equal a license to control Native American affairs. The U.S. Supreme Court held in *U.S. v. Creek Nation* that governmental power to manage and control Indian property and affairs is not absolute, but is instead subject to limitation inherent in a guardianship.<sup>30</sup> As a result of the federal trust relationship, the federal government currently interacts on a government-to-government basis with the tribes in areas such as health, education, and land and resource management.<sup>31</sup> This interaction has led to the formation of partnerships between tribal governments and relevant federal agencies, ultimately resulting in increased tribal self-regulation in these areas. The inclusion of telecommunications within the federal trust responsibility is a logical next step in defining the federal trust responsibility for the next century. Ensuring adequate telecommunications infrastructure

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26. Smith, *supra* note 6, at 18.

27. See *Pyramid Lake Paiute v. Morton*, 354 F. Supp. 252, 256-57 (D.D.C.1973); *noted in*, Smith, *supra* note 6, at 18.

28. See generally, *Morton v. Mancari*, 417 U.S. 535 (1974); *noted in*, OTA, *supra* note 5, at 81.

29. Frank Pommersheim, *Tribal-State Relations: Hope for the Future*, 36 S.D. L.REV. 235, 239 (1991); *noted in*, OTA, *supra* note 5, at 81.

30. See *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935); *noted in*, Smith, *supra* note 6, at 12.

31. See Dean B. Suagee, *Self-determination for Indigenous Peoples at the Dawn of the Solar Age*, 25 MICH. L.REV. 701-712 (1992); *noted in*, OTA, *supra* note 5, at 81.

will be essential to the well-being and survival of tribes in the future. The spirit of the federal trust responsibility calls the federal government to interact with tribes on a government-to-government basis with respect to telecommunications. This government-to-government relationship would logically result in a grant of greater regulatory authority to individual tribal governments over telecommunications activities on tribal lands.

## 2. Tribal Sovereignty

Tribal sovereignty is a second central principle of Native American law. Historically, Native American tribes possess all the powers of a sovereign state.<sup>32</sup> Conquest rendered the tribes subject to the legislative authority of the United States and terminated the tribes' external sovereign powers, but did not affect their internal sovereign power. These internal powers of the tribes, however, are subject to qualification by subsequent treaties and congressional legislation.<sup>33</sup>

The concept of tribal sovereignty has its roots in the legal precedents formed by the tribes' first relationships with the European colonists on the American continent.<sup>34</sup> On behalf of their colonies, European nations entered into over 175 treaties with the individual governments of Native American tribes before 1776. Since the formation of the United States, the federal government has negotiated and ratified 370 treaties with Native American tribes. Even the commerce clause of the U.S. Constitution recognizes a special sovereign status of Native American tribes, placing the tribes on a par with foreign nations with respect to the list of sovereign entities with which the federal Congress has power to regulate commerce.<sup>35</sup>

The basic sovereign governmental power of tribes is an inherent power and is not a power that has been delegated by Congress to the tribes. The sovereign governmental power of the tribes can only be abrogated if Congress expresses a clear intent to do so. The Supreme Court has declared that tribes possess "inherent powers of limited sovereignty which ha[ve] never been extinguished,"<sup>36</sup> and described the tribes as "domestic dependent sovereigns."<sup>37</sup> Generally, tribes possess all powers over self-governance on their tribal lands other than those given up through treaty, those taken away by an act of Congress, or those taken away through implied divestiture.<sup>38</sup> Within reservation boundaries, tribes have the authority to govern tribal internal affairs and to

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32. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 241-42 (Washington, DC: U.S. Government Printing Office, 1941, reprinted by William S. Hein Co., 1982); *noted in*, Smith, *supra* note 6, at 18.

33. *See id.*

34. *See* OTA, *supra* note 5, at 81-82.

35. U.S. CONST. art. I, sec. 8; *noted in*, OTA, *supra* note 5, at 82.

36. *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *noted in*, OTA, *supra* note 5, at 82.

37. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1931); *noted in*, OTA, *supra* note 5, at 82.

38. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201-11 (1978); *noted in*, OTA, *supra* note 5, at 82.



exercise civil regulatory jurisdiction on tribal lands.<sup>39</sup> This authority grants tribes jurisdiction over a wide range of activities on Native American lands.<sup>40</sup> Tribal telecommunications advocates believe that telecommunications should be included as one of these activities. Tribal telecommunications advocates reason that tribal sovereignty endows tribes with the authority to regulate telecommunications activities that take place on their tribal lands.<sup>41</sup>

### 3. Tribal Self-Determination

Tribal self-determination is a key element of tribal sovereignty, and has been recognized and supported as a core principle of federal Native American policy in numerous federal statutes, regulations and presidential statements.<sup>42</sup> For example, Congress passed the Indian Reorganization Act in 1934 specifically to strengthen tribal government self-determination. The Indian Self-Determination and Education Assistance Act of 1975 gave tribes the right to reclaim control over programs administered by the Bureau of Indian Affairs (BIA) and Indian Health Services (I.H.S.) by entering into self-governance compacts.<sup>43</sup>

Up to this point, neither the BIA nor the I.H.S. has assumed a major regulatory role over telecommunications. However, as the BIA and the I.H.S. get more involved in distance learning, telemedicine, GPS systems, and other telecommunications-related activities, tribes could seek to assert the regulatory authority granted to them under the Indian Self-Determination and Education Assistance Act to reclaim greater self-determination in these areas of telecommunications.<sup>44</sup> Potentially, the U.S. government could also extend the principle of tribal self-determination granted with respect to BIA and I.H.S. activities to activities regulated by the FCC, which has major telecommunications regulatory responsibility.<sup>45</sup>

## V. STATE REGULATORY AUTHORITY

States have less authority to regulate tribal telecommunications than does the federal government. Unlike federal law, state law does not apply generally to tribal lands or tribal activities.<sup>46</sup> States assert, however, that they have an important interest in regulating tribal telecommunications and should possess the right to regulate such activities.<sup>47</sup> States contend that the tribes have essentially acquiesced to state regulation by failing to assert their own regulatory authority over telecommunications. While the

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39. See OTA, *supra* note 5, at 82.

40. Although the federal government also frequently has concurrent jurisdiction. See *id.*

41. See *id.*

42. See *id.*

43. 25 U.S.C. Subsec. 13a, 450-450n, 455-458e (1975); 42 U.S.C. Sec. 2400b (1988); *noted in*, OTA, *supra* note 5, at 82.

44. See *id.*, 82-83.

45. See *id.*

46. Courts and federal and state regulatory agencies have upheld tribal civil authority in numerous contexts, including taxation, zoning, environmental protection and the regulation of electrical utilities; *noted in*, Smith, *supra* note 6, at 18.

47. See *id.*

extent of state regulatory authority over tribal telecommunications is ultimately unclear, many telecommunications commentators have concluded that tribes probably have the authority to fully self-regulate with respect to reservation activities, but that tribes are likely subject to state regulation for activities occurring off of tribal lands.<sup>48</sup>

## VI. TRIBAL REGULATION OVER NON-INDIAN TELECOMMUNICATIONS

As a general rule, tribes may exercise civil regulatory authority over all lands under their jurisdiction and over the activities and business that takes place on those lands.<sup>49</sup> In *Montana v. United States*, the United States Supreme Court found that tribes possess "inherent power to exercise civil authority over the conduct of non-Native Americans on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>50</sup> Because the availability of telecommunications services are vital to the health and welfare of a tribe and its members, tribal telecommunications advocates maintain that tribes should retain civil authority over non-Indian telecommunications activities on tribally-owned lands.

Tribes might consider asserting their authority as a regulatory body with respect to services offered on lands under their control in a number of ways. Tribes could ensure affordable rates for tribal members by establishing rate regulations for telecommunications services on tribal lands. They could set and enforce minimum service standards for telecommunications services occurring within Indian Country. Tribes could tax telecommunications services. Tribes could regulate and restrict the land use of Non-Indian telecommunications businesses on tribal lands, and tribes could establish consumer protection requirements for telecommunications services on tribal lands.

Tribes that actively regulate telecommunications activities on their lands would also be able to better monitor and influence federal telecommunications policy that may affect tribal members. This type of tribal input and consultation could help ensure that the FCC adequately accounts for tribal needs and concerns when implementing federal telecommunications programs. If tribal governments participate in the design and implementation processes of federal telecommunications policy, tribes can serve as an important catalyst in bringing high-quality, affordable telecommunications service to tribal lands.

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48. *See id.*

49. A 1934 opinion of the Solicitor of the Department of the Interior found that "over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and *to do business.*" 55 Interior Dec. 14, 50 (1934)(emphasis added); *see also*, *Montana v. United States*, 450 U.S. 544 (1981); *noted in*, Smith, *supra* note 6, at 17.

50. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

## VII. RECENT FCC ACTIVITIES

In accordance with a 1994 mandate by President Clinton, the FCC has recently started to develop an internal and external policy to govern its activities relating to Native Americans on a government-to-government basis. Tribal telecommunications advocates urge that if this policy applies all FCC regulations generally to Native American lands, the policy should also recognize the special regulatory rights that tribes derive from their sovereign governmental status. Potentially, the FCC could design a policy that deals with tribes on a government-to-government basis, and which recognizes concurrent federal and tribal authority over telecommunications on tribal lands. Under this type of policy, tribes could be held subject to FCC technical requirements, but given authority to self-regulate other aspects of telecommunications operations.<sup>51</sup> A tribe, for example, could notify the FCC that it is planning to build a radio station on its tribal lands and that the tribe has complied with all FCC mandated pre-construction technical considerations. The tribe could then proceed with construction without FCC authorization.<sup>52</sup> This type of concurrent jurisdiction could offer a workable compromise that would fulfill both federal regulatory and tribal economic goals.<sup>53</sup>

## VIII. NEXT POLICY STEPS

It is important that Congress and the president designate a lead agency to head up the effort to resolve pressing jurisdictional questions with regard to Native American telecommunications.<sup>54</sup> The lead agency should clarify the applicability of the federal trust responsibility to tribal telecommunications. Advocates of extending federal trust responsibility to Native telecommunications should emphasize that access to, and control of, telecommunications is essential to ensuring the well-being and survival of tribes in the future.

The designated lead agency should also clarify the appropriate role of the sovereign tribal governments in regulating and operating tribal telecommunications.<sup>55</sup> Tribal telecommunications advocates should emphasize that the Supreme Court has found tribes to be on par with the states and foreign nations in their right to self-regulate.<sup>56</sup> The lead agency should encourage and assist tribes in developing the capacity to self-regulate telecommunications activities on tribal lands, and help tribes to ensure the quality of tribal telecommunications services.<sup>57</sup>

Congress should acknowledge the unique sovereign status of tribal governments by amending federal communications law, in particular, the Communications Act of 1934,

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51. See Smith, *supra* note 6, at 19.

52. See *id.*

53. See *id.*

54. OTA, *supra* note 5, at 110.

55. *Id.*

56. See *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1931); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201-11 (1978); *noted in*, OTA, *supra* note 5, at 82.

57. OTA, *supra* note 5, at 111.

and requiring tribal involvement in the creation of all federal telecommunications policy that will affect the tribes.<sup>58</sup> Congress should require the FCC, and other appropriate federal agencies, to develop detailed policy and legislative proposals addressing Native American involvement in the telecommunications industry.<sup>59</sup> General federal telecommunications legislation should include provisions that address tribal telecommunications.<sup>60</sup> Current telecommunications legislation should be amended to address tribal involvement and a separate Tribal Telecommunications Act should be created.<sup>61</sup>

The FCC should also take a number of specific actions to support tribal telecommunications activities. The FCC should develop a formal Native American policy, set up an office of Native American affairs, and allow tribal governments to participate in regulatory proceedings in the same manner as the states.<sup>62</sup> The FCC should recognize tribes as sovereign governmental entities, and distinguish between its current classification of individual Native Americans as minorities under existing FCC minority policy and tribes as governments under new FCC Native American telecommunications policy.<sup>63</sup> The FCC should also make sure to consider the implications of all proposed FCC actions on tribes, and give tribes the opportunity to participate fully in FCC rule-making.<sup>64</sup> As a general policy goal, the FCC should promote tribal self-determination with respect to telecommunications operations on tribal lands, and the FCC should make every effort to encourage increased cooperation among state and tribal governments and the FCC.<sup>65</sup>

## IX. CONCLUSION

Current federal telecommunications policy neglects both Native American law and federal policy. The agencies that currently have general responsibility for Native American programs do not have telecommunications policies and do not actively participate in the wider telecommunications policy debate. The FCC has not adequately recognized Native American interests when setting federal telecommunications policy.

The challenge of establishing a federal tribal telecommunications policy lies in applying the principles of tribal sovereignty, tribal self-determination, and the Federal Trust responsibility to telecommunications regulation. Federal policy-makers need to focus on these concepts. A tribal telecommunications industry could potentially help revive depressed Native economies while maintaining and advancing, Native traditions and values. These advancements can only be realized if the tribal regulatory authority

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

that has been incorporated into other areas of tribal self-governance is extended to telecommunications. Telecommunications is an essential part of the infrastructure of Native American communities and will continue to be so. Recognition of tribal regulatory authority over telecommunications will be necessary to ensure tribal sovereignty over the next century.

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