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NOMINATION OF CARL J. ARTMAN

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

THE NOMINATION OF CARL J. ARTMAN TO BE ASSISTANT SECRETARY OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

FEBRUARY 1, 2007
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NOMINATION OF CARL J. ARTMAN

THURSDAY, FEBRUARY 1, 2007

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

The committee met, pursuant to notice, at 9:30 a.m. in room 485, Senate Russell Office Building, Hon. Byron L. Dorgan (chairman of the committee) presiding.

Present: Senators Dorgan, Thomas, Inouye, Tester, and Cantwell

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. We will call the hearing to order today.

Today we are receiving testimony on the President's nomination of Carl Artman to be Assistant Secretary for Indian Affairs at the Department of the Interior. In addition to Mr. Artman, statements will be made by Chairman Danforth of the Oneida Tribe of Wisconsin, in which Mr. Artman is a member, and by Jacqueline Johnson, executive director of the National Congress of American Indians.

Last September, our committee held a hearing on Mr. Artman's nomination. We moved quickly to approve the nomination and move it to the floor of the Senate. There was a hold put on it in the Senate, and the nomination did not get completed. The President has resubmitted the nomination. I decided to hold an early hearing. It is my intention to report the nomination out today with the consent of the Vice Chairman and the other committee members. Then it is my intent next week to work very hard to try to move this nomination. I talked to the Secretary of the Interior yesterday. If we need to get some help from the President, we need to do that.

It is shameful to me that starting tomorrow, the month of February, it will be 2 full years that the Assistant Secretary for Indian Affairs position has been open and unfilled. That is unbelievable, given the challenges we face. Whatever the reasons for it, it has to change. This has to stop. We have a nominee that I believe is qualified, well qualified, I have supported this nominee. I will do so again this morning.

If there are problems here in the Congress as we move this to the floor, my hope is that myself, the vice chairman, the Secretary of the Interior and the President can figure out where those problems exist, resolve them and move this nomination. It is long past the time that the assistant secretary position be filled. As I said, we have significant challenges. I use the word crisis to describe

what we are confronted with in Indian health care and housing and other related issues. I don't believe that is too strong a word. But to see this position unfulfilled for 2 full years is just plain wrong. I hope we can resolve that and fix it.

So I will in 1 moment call up the first two witnesses, but let me call on the vice chairman for comments.

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator THOMAS. Thank you, Mr. Chairman. Certainly I share your concern about the vacancy that has been here. It is past time to fill it, and I am delighted that we are moving forward. I certainly support that.

I too talked to the Secretary of the Interior and certainly have been working to get this going. I certainly want us to continue. I extend my greetings to Mr. Artman and appreciate him being here for the second time for his nomination. He has a varied background in Government and the private sector, which is needed to fulfill all the requirements for this position.

I also extend welcome to our witnesses this morning, Gerald Danforth and Jacqueline Johnson. We are glad to have you here.

So again, I agree with the chairman that this vacancy has been there too long. It is very important to have a voice right in the secretary's group for the Indian tribes and the Indian affairs. So I think we have a chance here, Mr. Chairman, to move forward, and I support you and I am very pleased to have Mr. Artman be our candidate.

The CHAIRMAN. Senator Thomas, thank you very much.

Let me call our first two witnesses, Gerald Danforth, chairman of the Oneida Tribe in Wisconsin; and also Jacqueline Johnson, executive director of the National Congress of American Indians here in Washington, DC. Chairman Danforth and Ms. Johnson, thank you very much.

Chairman Danforth, we will hear from you first. Welcome.

STATEMENT OF GERALD L. DANFORTH, CHAIRMAN, ONEIDA TRIBE OF INDIANS OF WISCONSIN, ACCOMPANIED BY WILLIAM GOLLNICK, CHIEF OF STAFF

Mr. DANFORTH. Thank you, Mr. Chairman. Good morning, Vice Chairman Thomas, good morning, honorable members of the Senate Committee on Indian Affairs.

I am Gerald Danforth, chairman for the Oneida Tribe of Indians of Wisconsin. And I bring along a message from just less than 16,000 Oneidas of Wisconsin, expressing their pride and offering our support and confidence in this particular candidate, Carl Joseph Artman.

As you just recalled, this past Congress, when this hearing was first held to consider Carl, I was not able to attend at that time. Our vice chair, Kathy Hughes, represented the Oneida Tribe at that particular hearing. But I feel very privileged and honored to be here to offer this testimony this morning.

Mr. Artman is a very bright and extremely hard-working individual. He has established a broad array of educational achievements and has sought out many, many different diverse career opportuni-

ties to apply those achievements to. We believe that his academic record and his professional experiences more than highly qualify him for these responsibilities.

We know that the job of the assistant secretary is demanding. In the best of circumstances, it is a very delicate balance of authority and responsibility, and we believe that Carl Artman has demonstrated in many different ways his ability to fulfill those sort of demanding circumstances to a very significant and good resolve.

I was at the listening session you made reference to, Mr. Chairman, this past Saturday. I spoke on behalf of Oneida then that we believe that the committee's priorities and the agenda that you framed out were right on point and very much in line with what ours were at home. In listening to it, I think there were probably, I want to say 150 or 160 tribal leaders present on that Saturday morning in Minnesota to attend that hearing. It was phenomenal.

So I appreciate your motivation and your desire to invigorate this activity throughout Indian country. I think it was really appreciated by all who attended. I would like to note, too, that during the course of that listening session, when you had made reference to this appointment of the assistant secretary's position coming forward in an expeditious sort of way, the resolve around the room was very much in line with what your thoughts were. And I say that because it is not just an Oneida thing, it is not just a Carl Artman thing, it is about Indian country in general, and it is about the United States of America and our Government, and the credibility of such.

I believe you have an excellent candidate to consider. Carl has earned a juris doctorate, a masters of law, and a masters in business administration. I know that in his pursuit of those achievements, he has made a lot of sacrifices to accomplish those. As I mentioned previously, I think even more importantly are the positions of responsibility that he has sought out to apply those talents and skills. I think his experience is going to be tested on a regular basis in his new responsibilities that I believe he will assume. I think that we will all be satisfied by his choice and his selection to fulfill that duty.

As the committee may recall in its records, different times in the past, in 1976 and again in 1989, the committee had heard testimony from Oneida on different matters. Reference was made to how the Oneida had assisted from the very early stages of the United States the framework for establishing, for example, some of the terms and principles of our constitution. Some of the values and some of the core instruments outlined in the Iroquois Confederacy are examples of how our governments, how the Iroquois Government and how the U.S. Government have worked in very similar ways.

So I am proud to say that we can recall part of that history, and I am proud to say that we have an Oneida member here today to be considered for this position. And we believe that Carl Joseph Artman will do so in fulfilling those responsibilities with honor and distinction. Thank you.

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

The CHAIRMAN. Mr. Chairman, thank you very much. We appreciate your coming to Washington to provide testimony about a member of your tribe who has been nominated by the President.

Next we will hear from Jacqueline Johnson, the executive director of the National Congress of American Indians. I understand that you are here today on behalf of President Garcia.

STATEMENT OF JACQUELINE JOHNSON, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS

Ms. JOHNSON. Yes; President Garcia would have loved to have been here, but they are having ceremonies and he is unable to leave the Pueblo until Sunday. But as always, he extends his regards to this committee and to your leadership.

NCAI is really pleased and proud to be able to be here. It is our first time to testify in the 110th Congress. But once again, to be able to be here to tell you how much we appreciate the bipartisan efforts that are done by this particular committee, being a nonprofit and a non-partisan organization, it is extremely important for us to getting our work done that we do our work and move forward in our efforts in such a manner. I appreciate both your leadership, Senator Dorgan and Senator Thomas.

In Tulsa last year, a couple of years ago, actually, because we have been waiting for this nomination to happen, as you noted, Senator Dorgan, since February, 2 years ago, NCAI passed a resolution saying we wanted to an expeditious appointment of the Assistant Secretary of Indian Affairs, because it is a critical role. It is a critical position for Indian country. It is the position of a symbol, it is the position of where we hold some of our most revered Native Americans who have held this position in the past.

Clearly, it is the symbol that tribes look to that see, even though the Secretary of the Department of the Interior has the ultimate trust responsibility delegated by Congress to be our trustee, but we know that this position is the one that is the advocate within the Administration. We see this person as being the one who has to champion our causes with the White House, who has to represent us when we are dealing with OMB and budget cuts, who has to make hard decisions about how those budgets reflect the needs of Indian country, who has to address the issues that we have with our education, our health care, dealing with law enforcement, has to help just organize the 10,000 staff members of the Bureau of Indian Affairs [BIA], who many times provides direct services to tribes or also works very hard and diligently to provide the support to tribes for self-governance tribes, helping to move forward the energy and the effort of Indian country.

Although we appreciate Jim Cason's efforts in fulfilling that position in the last two years, he does not have the blessing of Congress. He does not hold that position as having his name nominated by the White House. He is not this particular President's nominee at the time.

And it is very important for us that this particular position gets moving forward and we appreciate your efforts to do so. We find that it is a shame that it has been 2 years, that the one position that we all revere from Indian country has not moved forward.

Particularly, Carl Artman has met the task of having, you heard Gerald Danforth's testimony, and he has gone on and on about the qualifications and the skills that Carl holds to be able to hold this position. NCAI looks forward to working with someone with such special skills, abilities and knowledge, to be able to work with and to be able to make those kinds of decisions.

We know that as a primary advocate within the organization, that he will have the responsibility of having to make critical decisions that are sometimes very controversial. Those decisions many times have been held at bay and decisions have not been made. We know that when someone is sitting in an acting position, we are all waiting for the time when the real person will come in and set the direction as far as reorganization.

So we look forward to your moving forward the nomination, to be able to move those issues forward, so that some of those decisions that have been held far too long can move forward.

But the most important thing that I think that this position carries is the symbolism and the responsibility of government to government relationships, the responsibility of consultation, the one that I know that you hold and revere, the reason why you went out and have said that you wanted to go forward and have these consultations around Indian country, to be able to hear from tribal leadership.

This is a position that holds that responsibility. One of the main features of his position is to consult with tribes and with Indian country, to be able to bring in the input, the recommendations to help us move forward, the vision. So I would like to support Chairman Danforth's recommendation. I would like to support the President's nomination, I would like to support you in your efforts to move forward this name, Carl Artman, for the Senate to confirm, and with all of Indian country, we stand forward in wanting to have an Indian at the helm of the BIA. We want to make sure that is a practice that we maintain for the future. It is very important for us to know that one of our own can lead our direction.

Thank you very much.

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

The CHAIRMAN. Ms. Johnson, thank you very much. Thanks to both of you.

Let me say that we look forward to working with the president of the National Congress and Tribal Chair Danforth. Thank you for being here.

Let me just ask one question. We have been joined by other colleagues, then we will hear from Mr. Artman.

As I indicated last year, the Congress, this committee, I should say, passed out the nomination unanimously, I believe, to the floor of the Senate. There was an anonymous hold placed on the nomination. Do either of you have any knowledge of why an anonymous hold would be placed on this nomination? Is there anything about the nomination that you think would justify somebody trying to hold it up?

Mr. DANFORTH. None whatsoever that I am aware of.

Ms. JOHNSON. I do know that there was the hold placed on the nomination. I personally talked to some of the folks who may have been responsible for the hold with the Republican Steering Com-

mittee. And there was concern about the nomination, the Oneida Nation's, his position he held with gaming. It was a time when the Republican Steering Committee was placing a hold on all Indian bills for further review, particularly those that were moving forward under UC, felt that they didn't get the proper review.

We at NCAI wanted to express, went to that meeting, I personally went to that meeting to express my concern that even though the President could have a recess appointment, that that wasn't the message that we wanted to have. We felt very clearly that this position is significant enough to Indian country. It is critical enough to our relationships with the Federal Government that it needed to have the confirmation and support of the members of Congress. That was our message that we gave forward.

The CHAIRMAN. Well, obviously I am asking more about the intrigue of the U.S. Senate. So it is a question that we will perhaps better ask inside this institution, but I wanted just to get your sense from outside about what you have heard on this.

We have been joined by a former chairman of this committee for many years, Senator Inouye. We have a former chairman, Senator McCain, still on the committee, and a vice chairman, Senator Thomas. My hope would be that we can move the nomination today and I will hope to put together something from Senator Thomas, myself, Senator McCain, Senator Inouye, the current leadership of the committee and the former chairman of the committee to see if we can't move this very quickly.

After 2 years, at long, long last, this position should be filled. It should have been filled a long time ago. But we are going to work very hard to get that done.

Senator Thomas.

Senator THOMAS. I don't have any questions. Thank you both for being here, and I am enthusiastic about moving forward as anyone can be. So we will try and do it. Thank you.

The CHAIRMAN. Senator Tester.

Senator TESTER. No questions.

The CHAIRMAN. Senator Inouye.

Senator INOUYE. I am ready to vote.

The CHAIRMAN. Senator Inouye is ready to vote. [Laughter.]

First we have to hear from Mr. Artman. But we will then vote. Let me say, Senator Inouye, as you recall, last fall, last September, we had heard from Mr. Artman and he comes again today. Let me thank the two witnesses for being with us, again. Chairman Danforth, thank you for traveling to Washington to represent your tribe. We appreciate the testimony of both of you.

Now I would like to call forward Mr. Artman. Carl J. Artman is the President's nominee to be the Assistant Secretary of Indian Affairs in the Department of the Interior.

Mr. Artman, as I indicated, has previously appeared before this committee. At that point I believe your family was with you, Mr. Artman. I don't believe they are with you today, but you may correct me. Mr. Artman offered a statement to this committee, this committee evaluated his qualifications and credentials at that point and I believe unanimously approved this nomination. Then it was subject to a hold and never came to a vote in the United States Senate. To the extent that we can, we intend to correct that.

But as a formal matter, we wish to hear from you again and be able to ask you a few questions, Mr. Artman. Why don't you proceed? Welcome to the committee. If you do have family present, please feel free to introduce them.

STATEMENT OF CARL J. ARTMAN, NOMINEE TO BE ASSISTANT SECRETARY, INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. ARTMAN. Thank you, Mr. Chairman and Mr. Vice Chairman, for holding this hearing today, and thank you, Senator Inouye and Senator Tester, for being here as well.

Mr. Chairman, I do not have family here today, though my son did want to come. But I am finding as he is in kindergarten, he is starting to find any excuse he can to get out of school. But we left him there today. [Laughter.]

Mr. Chairman, Mr. Vice Chairman, and Senators, my name is Carl Artman. It is a privilege and an honor to appear before you this morning seeking your confirmation of my nomination by President Bush to be the Assistant Secretary for Indian Affairs.

I am a member of the Oneida Tribe of Indians of Wisconsin, one of the six Nations of the Haudenosaunee, or the Iroquois Confederacy. I have served my tribe in various positions, ranging from the tribal representative in Washington, DC to chief operating officer of a telecommunications partnership to chief counsel of the tribe's legal office. I am currently the Associate Solicitor for Indian Affairs in the Office of the Solicitor at the Department of the Interior.

I am honored to have been nominated by President Bush, and look forward to the opportunities that lie ahead. Secretary Kempthorne and I have had numerous conversations about Native American matters. I share Secretary Kempthorne's views on education, economic development, substance abuse and other matters relevant and important to tribal governments.

I look forward to sharing the Secretary's vision for the relationship between the Department of the Interior and Indian country and encouraging a conversation about that relationship. The Secretary has expressed his confidence in me to bring what he has described as an ambassadorial nature to the position of Assistant Secretary.

Indian country provides an overwhelming number of challenges, ranging from substance abuse, high unemployment rates, crumbling infrastructure. Then there are the issues that are unique to Indian country, such as the retention of sovereignty, maintaining and expanding self-governance and self-determination.

If you were to ask me why I want this job, my answer would be that I am drawn to respond to those seemingly insurmountable obstacles for Indians and Alaska Natives. However, I see the determination and the potential of Indians and Alaska Natives. Reservation populations are growing. Leaders are digging in to stem the spread of substance abuse and the lawlessness that follows in its wake. Teachers at tribal schools provide more with less and inch by inch, tribes are reclaiming their land and the inherent rights of that ownership.

As Indians and Alaska Native reclaim rights lost through history, societal plagues, the Department of the Interior must be their

partner in these battles. I will contribute to a more accessible and expeditious Bureau of Indian Affairs [BIA] and Bureau of Indian Education to assist tribal communities to develop their natural, political and socio-economic infrastructures.

A primary goal of mine will be the measurable engagement in the battle to eradicate methamphetamine abuse from reservations and tribal communities. I will focus on three areas, meant to work in concert to be the beginning of the end of that cancer. First, I want to bolster the power of the BIA's Office of Justice Services to offer assistance in the form of money, manpower, technology, and education to the tribes that need the most assistance.

Second, I want to ensure that the good work that has already begun at the Bureau of Indian Education continues. A reorganized regional structure and a focus on the foundational needs of the students will result in an excellent education for the students that are enrolled in the second largest school system in the Nation.

And third, I will focus on economic development in Indian country. The Department's Office of Economic and Energy Development will become both a resource and a thought leader in economic development in Indian country.

I will continue the discussion about methamphetamine abuse that was started by the Secretary with the leaders of all facets of the broader tribal community. I will listen for where the Department and the Federal Government may help tribes and their members gain traction in this fight.

The Department of the Interior can and will be a positive force in Indian country. And if confirmed, I will lay the foundation for an era that will provide new commitments through action to programmatic goals and mandated duties. If confirmed, I will foster an interaction borne of partnership and mutual goals, not just fiduciary requirements.

And if confirmed, I will use the Office of Assistant Secretary for Indian Affairs to promote communications between tribes that have realized financial success and those that strive for a fraction of that success to move beyond mere subsistence benefits for their membership. The success of one tribe, either in business, government administration or cultural preservation, is the best incubator for the success of other tribes.

I will use the office to promote more vibrant and goal-oriented communications between tribes and their neighbors. I hope to foster the growth of tribal governments. Tribal sovereignty is inherent, and this sovereignty is best exhibited in a vibrant tribal government that understands the judicious exercise of its jurisdiction for the benefits of its members and the seventh generation.

Tribal governments embody the power of sovereignty. It cares for the present and plans for the future, and is what the outside examines to judge the health of that tribe. To lead their people and improve the communities, tribal governments must be able to fight the obstacles that foster hopelessness. If confirmed, I will bring forth the potential of the breadth and depth of the Department of the Interior and specifically the Office of the Assistant Secretary for Indian Affairs, so that Indians and Alaska Natives can use these resources, their resources, to conquer the problems bearing down on their governments and their people, to gain that foothold

that will propel them upward and to preserve a culture and build a legacy and to provide a future for their seventh generation that is as great as their past.

Thank you for your time, Mr. Chairman, Mr. Vice Chairman, and Senators.

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

The CHAIRMAN. Mr. Artman, thank you for your statement today, and the discussion that we have had previously.

Let me just ask a couple of questions then call on my colleagues. We have had a number of assistant secretaries of Indian affairs. Some have been fairly aggressive and have made some modest difference in certain areas. Some have left the office without having made any apparent changes, or having made any difference in what has happened on Indian reservations.

I did hold a listening session in Minneapolis on Saturday. There was a large number of people there. One tribal chair stood up and told about his two daughters, reminded me again of the third world conditions that exist in some areas, the gripping, wrenching poverty, and the challenges that we face. He said he has two daughters, one has eight children, one has three children. Both live in used trailers that have been brought to his reservation from the State of Michigan. I believe he said both of them heat their trailers with wood stoves, neither trailer has running water and they have outdoor toilets.

If you describe that, people would say, well, that is obviously in some other part of the world. But it is here. And you see it in too many places.

So when you start with the issue of education, health care, housing, and then all the other issues, you mentioned methamphetamine, you could have mentioned alcohol abuse and gangs, and so many challenges that these tribal chairs and tribal councils face in many ways with limited resources. I just think that this position needs to be filled by someone who is very aggressive and interested in working on unique and aggressive approaches to these things.

I am going to put together in the middle of this year, some time in the summer, a summit on economic development here in Washington, DC, to see if we can think of new ways, outside the box, to begin dealing with these issues. There is no social program quite as important as a good job that pays well for people who are able to work. And yet the rampant unemployment in circumstances where there are no jobs is something we have to confront as well, because that relates to almost all the other things I have said.

The diabetes scourge on the Indian reservations, we have to deal with that. Indian Health Service is engaged in health care rationing for American Indians. We have so many issues. I spoke on the floor the other day and told of a woman having a heart attack who was wheeled into a hospital on a gurney with a piece of paper taped to her leg that said to the hospital, there is no money for contract health services. So understand if you admit this woman, you are on your own, hospital.

It is unbelievable. So that is why I felt so strongly about the 2 years that this position has been vacant. I feel so strongly about getting your nomination done. But that is just the first baby step.

The second step is for you to use this position to really make a difference.

So I guess what I will do is submit a few questions to you, but I have done that previously. I would just say this. I am comfortable with your nomination. You are well qualified to assume this position. I hope you will assume this position, if we can move this through the Senate, with great energy and dedication and conviction to meet some goals that we can establish together that will really make a difference for the First Americans.

Senator Thomas.

Senator THOMAS. Thank you, Mr. Chairman.

Mr. Artman, we are glad you are here. I look forward to supporting the chairman's continued effort on the Senate to get this job done.

Let me ask you a couple of questions. You submitted materials to the committee that recused yourself from issues on your tribe in Wisconsin. As an associate solicitor, can you tell me what issues you recused yourself from?

Mr. ARTMAN. At the moment, the only issue within the solicitor's office that has required my recusal so far has been any issue that has dealt with the Iroquois Confederacy's land claim in the State of New York. The Oneida Tribe of Indians of Wisconsin is part of that land claim and that dates back to about 1804. It has been ongoing since. I have not participated in any of those discussions or decisions.

Senator THOMAS. So you have recused yourself from gaming applications in Wisconsin or New York that would present a conflict?

Mr. ARTMAN. Where it involves Oneida. And in New York, it clearly involves Oneida.

Senator THOMAS. Good. I have been particularly and continue to be particularly interested in the economic development. I think that if the tribes are going to have sovereign nations, they have to have a sovereign economy as well, or close to it.

Do you have any policy recommendations or thoughts that would help create non-gaming jobs on the reservations?

Mr. ARTMAN. I intend to work very closely with the Department of the Interior's Office of Indian Economic and Energy Development. In its name, it certainly provides hint as to one of the outlets for economic development, and that is in energy development, where it is possible, on the reservations. But not all reservations have that opportunity.

In speaking with the director of that office, Bob Middleton, he and I have discussed several initiatives that we can engage in right away to begin the process of thinking about economic development and then hopefully eventually putting it in place. That includes bringing the tribes together, as I mentioned in my opening statement, bringing the tribe that have realized financial success in whatever venture they may have entered into. For example, the Southern Utes, with their energy economic development, they have realized tremendous success. And have them be a guide for other tribes that are out there.

Bring the academic world into this. I know he has already started speaking with deans from business schools. I would like to see students on reservations looking at the situations and giving their

ideas, some fresh ideas. And bringing together leaders from Indian tribal governments, finance, business, business education to begin to look at where other opportunities exist.

Then if you look at any calendar year, there are many, many economic development conferences. This year the White House is hosting one for Indian economic development. And as Chairman Dorgan mentioned, Congress, this committee, will be hosting a summit on economic development as well.

But there are also many private ones out there, or ones that are held by tribes. What I would like to do is see if we can't coordinate that calendar, on whatever basis, annual basis, 18 month basis, so that there is actually a learning curve in that, so tribal leaders are going to those, and as they go to one and they go to the next one, actually they are moving up in the learning process. And by the end of the process, hopefully ideas and money are coming together to have real economic development within Indian country.

Senator THOMAS. Good. Well, energy development, of course, is very important in our area of the country and the opportunities are there. I think we just need to make sure the tribal members understand that they can benefit from this type of economic development.

As you know, many Senators are concerned about off-reservation gaming. How strict should the Department be in evaluating off-reservation gaming into trust for gaming purposes?

Mr. ARTMAN. Right now, the Secretary of the Interior is very concerned about off-reservation gaming. I think he has made that clear.

Right now, a letter is being developed that will be sent to the tribes that have applications into the Department of the Interior for off-reservation gaming, telling them of the Secretary's concerns and noting for them that the Secretary and other people within the Department, myself if confirmed, and myself as associate solicitor currently, will be looking at these issues and trying to figure out a way to better manage it, to lay out guidelines, to lay out parameters, both for the applicants and the reviewers, and also, importantly, for the communities surrounding them, so that everybody can have input into the process.

I imagine, at the end of the review process that the letter will refer to, that you are going to see significant changes in the section 20 regulations and the 151 regulations, section 20 dealing with the off-reservation gaming, Section 151 dealing with the land into trust. Hopefully these changes will be able to give everybody a clear idea of what will be acceptable for off-reservation gaming. The Secretary's primary concern is with the two-part determination, the section in the Indian Gaming Regulatory Act that deals with the potentially far-flung lands. And many of the applications that are currently before the Department of the Interior are just that, the far-flung lands.

So he wants to be very careful to ensure that what is being considered there does not somehow impact the very basis for Indian gaming to begin with.

Senator THOMAS. Thank you very much.

Mr. ARTMAN. I should note also, Vice Chairman Thomas, that I completely support that, and I will be active in the development of those regulations and parameters.

Senator THOMAS. We appreciate your efforts. I certainly am very enthusiastic about the potential for economic development, particularly in the west where the energy potential is there, and we simply need to encourage the tribal members to understand that they will benefit from that sort of economic development.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Tester.

Senator TESTER. First of all, thanks, Carl, for stopping in the other day so we could have a visit in the office. I am just going to do one question here, and that is, it dove-tails off what the chairman talked about in his remarks, and that is the aggressiveness of this position and how you have to be aggressive to really get things done. Jacqueline Johnson talked about outreach to tribes. My question is, how will you reach out to tribes so that you can represent their needs in sum, in whole?

Mr. ARTMAN. Thank you, Senator. And thank you for hosting me the other day. It was a pleasure meeting you and speaking with you.

In reaching out to the tribe, certainly we can rely on the consultation process, which is already in place. The consultation process, since the beginning, it is evolving as to what exactly that means. If confirmed, during my tenure as assistant secretary for Indian Affairs, I would like to reach out to tribes and have not just a consultation, but to have a conversation, an ongoing conversation about what issues are out there affecting them.

As I have mentioned already to President Garcia and other tribal leaders, I would like to sit down with them on a relatively regular basis, not to talk about anything specific, but let's hear what they feel is going on in Indian country, what are their concerns and how does that mesh with the Department of the Interior, and likewise, they need to hear open conversation from the Department of the Interior on where we are going and what we are going to be doing and how we are going to be helping them. Or what we may be doing that may impact them in other ways, be it these off-reservation gaming parameters or perhaps in the area of economic development, oil, Indian valuations.

This way people are not surprised. This way people can contribute to the process early on.

Senator TESTER. When you think of outreach, do you anticipate the tribes coming to you, or are you going to go to them?

Mr. ARTMAN. Both, Senator Tester. Certainly as Assistant Secretary of Indian Affairs, if confirmed, I need to get out to Indian country and visit them. I need to visit the tribes and see what challenges they are facing or see what they have done on their reservations that is worth repeating elsewhere.

Senator TESTER. Thank you.

The CHAIRMAN. Senator Cantwell.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman. I am not going to ask any questions this morning, in order to save myself and the committee time. I am going to submit some individual questions. With 27 tribes in the northwest, we have some pretty unique issues and interests, everything from the Makah Tribe out on our peninsula, to a variety of other issues. So I think what I will do is just submit those questions to you.

Mr. ARTMAN. Thank you, Senator.

The CHAIRMAN. Senator Cantwell, thank you very much.

Let me just make one final comment. Senator McCain and I last year were made aware that 18 years after the law was enacted putting into place the off-reservation gaming issue, and the process by which applications are made and so on, 18 years later, there are no regulations in place. We asked Mr. Skibine from the Department to tell us why this is the case, he said they are being developed.

Would you check on that and find out for us, is there at long, long last a plan to get some regulations in place to deal with this issue of off-reservation gaming applications?

Mr. ARTMAN. If I may, Mr. Chairman, today actually is the close of the comment period for the section 20 regulations. The comments will be reviewed, we have received many comments. In speaking with Mr. Skibine yesterday, he hopes that these regulations will be published this spring.

The CHAIRMAN. Mr. Artman, thank you very much. I want to thank the witnesses today.

Mr. Artman, I appreciate your being here and your being willing to serve our country.

I now move the committee to a business meeting to consider Mr. Artman's nomination.

[Whereupon, at 10:05, the committee proceeded to other business.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF CARL J. ARTMAN, NOMINEE FOR THE POSITION OF ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman, Mr. Vice Chairman, Senators, my name is Carl Artman. It is a privilege and an honor to appear before you this morning seeking your confirmation of my nomination by President Bush to be the Assistant Secretary for Indian Affairs.

I am a member of the Oneida Tribe of Indians of Wisconsin, one of six Indian nations of the Haudenosaunee, or Iroquois Confederacy. I have served my tribe in positions ranging from the tribal representative in Washington, DC to Chief Operating Officer in a telecommunications partnership, to, most recently, Chief Counsel of the tribe. I currently serve as the Associate Solicitor for Indian Affairs in the Office of the Solicitor within the Department of the Interior.

I am honored to have been nominated by President Bush and look forward to the opportunities that lie ahead.

Secretary Kempthorne and I have had numerous conversations about Native American matters. I share Secretary Kempthorne's views on education, economic development, substance abuse, and other matters important to tribal governments. I look forward to sharing the Secretary's vision for the relationship between the Department of the Interior and Indian country, and in encouraging a conversation about that relationship. The Secretary has expressed his confidence in me to bring what he has described as an ambassadorial nature to the position of assistant secretary.

Indian country provides an overwhelming number of challenges: Substance abuse, high unemployment rates on many reservations, lack of adequate health care, dilapidated education facilities, crumbling infrastructures from roads to irrigation ditches, and crime outpacing law enforcement personnel and funds. And then there are the issues unique to Indian country such as the retention of sovereignty and maintaining and expanding self-governance and self-determination.

If you were to ask me why I want this job, my answer would be that I am drawn to respond to those seemingly insurmountable obstacles for Indians and Alaskan Natives. I see the determination and the potential of Indians and Alaskan Natives. Reservation populations are growing. Leaders are digging in to stem the spread of substance abuse and the lawlessness that follows in its wake. Teachers at tribal schools provide more with less. Inch by inch tribes are reclaiming their land and the inherent rights of such ownership.

As Indians and Alaskan Natives reclaim rights lost through history or societal plagues, the Department of the Interior must be their partner in these battles. I will contribute to a more accessible and expeditious Bureau of Indian Affairs and Bureau of Indian Education to assist tribal and Alaskan Native communities to develop their natural, political, and socio-economic infrastructure.

A primary goal of mine will be measurable engagement in the battle to eradicate methamphetamine abuse from reservations and tribal communities. I will focus on three areas meant to work in concert to be the beginning of the end of this cancer.

First, I want to bolster the power of the BIA's Office of Justice Services to offer assistance in the form of money, manpower, technology, and education to the tribes that need the most assistance. Second, I want to ensure the good work that has already begun in the Bureau of Indian Education continues. A reorganized regional structure and a focus on foundational needs will result in an excellent education for the students enrolled in the second largest school system in the Nation. And third, I will focus on economic development in Indian country. The Department's Office of Indian Economic and Energy Development will become both a resource and a thought leader in economic development in Indian country. We will bring together influential leaders from Indian governments, finance, business, and business education to focus on the development of sustainable tribal economies.

I will continue the discussion, started by the Secretary, with leaders of all facets of the broader tribal community; and I will listen for where the Department and Federal Government may help tribes and their members gain traction.

The Department of the Interior can and will be a positive force in Indian country. If confirmed, I will lay the foundation for an era that will provide new commitments, through action, to programmatic goals and mandated duties.

If confirmed, I will foster an interaction born of a partnership and mutual goals, not just fiduciary requirements.

If confirmed, I will use the Office of the Assistant Secretary for Indian Affairs to promote communications between tribes that have realized financial success and those that strive for a fraction of that success to move beyond provision of subsistence benefits for their membership. The success of one tribe, either in business, government administration, or cultural preservation, is the best incubator for success of other tribes.

I will use the office to promote more vibrant and goal-oriented communications between tribes and their neighbors.

I hope to foster the growth of tribal governments. Tribal sovereignty is inherent, and this sovereignty is best exhibited in a vibrant tribal government that understands judicious exercise of its jurisdiction for the benefits of its members and the seventh generation. Tribal governments embody the power of sovereignty. It cares for the present and plans for the future. It is what the outside examines to judge the health of the tribe.

To lead their people and improve their communities, tribal governments must be able to fight the obstacles that foster hopelessness. If confirmed, I will bring forth the potential of the breadth and depth of the Department of the Interior, and specifically the Office of the Assistant Secretary for Indian Affairs, so that Indians and Alaskan Natives can use these resources—their resources—to conquer the problems bearing down on their governments and people, to gain that foothold that will propel them upward, to preserve a culture and build a legacy, and to provide a future for their seventh generation that is as great as their past.

Mr. Chairman, Mr. Vice Chairman, and Senators, thank you.

FEB 0 2 2007

The Honorable Byron L. Dorgan, Chairman
Committee on Indian Affairs
Room 836 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed you will find my responses to the written questions submitted following my confirmation hearing before the Committee in Indian Affairs on Thursday, February 1, 2007.

If I can be of further assistance, please let me know.

Sincerely,

Carl J. Artman
Assistant Secretary for
Indian Affairs – Designate

Enclosures

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Role of Assistant Secretary

Question 1: What role does the Assistant Secretary play in fulfilling the federal trust responsibility to American Indians?

Answer: The Assistant Secretary is charged with fulfilling the trust responsibility to all trust beneficiaries, including tribes and individual Indians. In addition, the Assistant Secretary leads the Department in working with tribal governments to enhance the government-to-government relationship.

Assistant Secretary should be Indian or Have Indian Expertise

Question 2: Do you think it is important that the Assistant Secretary be of American Indian descent or have experience in American Indian law and policy?

Answer: The Assistant Secretary for Indian Affairs has broad responsibilities, ranging from advisor to the Secretary of the Interior to tribal trustee, as well as a liaison between the Federal government and Indian Country. The Assistant Secretary must understand the challenges and opportunities that face tribal governments, American Indians and Alaska natives. This person must know the cultural context of the issues and empathize with tribal leaders when developing solutions. Being familiar increases the likelihood that empathy and insight comes not only from observation, but from experience.

Understanding Indian law and policy requires knowledge of modern statutes, judicial precedent, evolution of tribal sovereignty from pre-European contact to the modern era, and the stress that has weighed upon the people and cultures that are American Indian. This allows the Assistant Secretary to comprehend the context of contemporary policy development, using history as a guide, and the ramifications such policy will have throughout Indian country.

Responsibilities When Worked for Oneida Tribe

Question 3: Prior to your current position as Associate Solicitor, you served as your tribe's Chief Counsel. What were your primary responsibilities as Chief Counsel, and what issues did you spend most of your time on?

Answer: As Chief Counsel for the Oneida Tribe of Indians of Wisconsin, I oversaw legal affairs that fell within the purview of the Oneida Business Committee, the governing body of the Tribe. I managed the in-house legal staff that provided advice on a wide range of issues to the Oneida Business Committee and its subordinate entities. Legal matters for which advice was provided included, but was not limited to: business operations, employee relations, corporate affairs, contract issues, Indian Child Welfare Act, housing, landlord-tenant matters, land use, real estate, environmental law, estate and wills, probate matters, finance, banking law, Indian Gaming Regulatory Act (IGRA), non-IGRA gaming issues related to the Wisconsin compact or other state gaming matters, insurance, and legislative drafting. The in-house attorneys represented the tribe in tribal, state, and federal court.

I spent the majority of my time managing the issues and staff of the law office and interacting with the primary client, the Oneida Business Committee. I participated in the negotiations and drafting of intergovernmental agreements with surrounding counties, towns, and villages, negotiations and drafting of amendments to the gaming compact with the State of Wisconsin, and other matters as required.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Airadigm

Question 4: You worked at the Airadigm company which filed for bankruptcy reorganization in 1999. Please explain what led to the reorganization and the extent of your involvement in that matter?

Answer: Airadigm Communications, a wireless telecommunications venture in which Oneida invested and played an active role on its board of directors, filed for Chapter 11 reorganization in 1999. At the time of the reorganization filing I served as the vice-president coordinating legal affairs, corporate development, and government relations of the company. I also served also on the board of directors. The Oneida Tribe was the largest equity investor in the company. Airadigm purchased auction licenses to provide digital wireless (1800 MHz) service to most of Wisconsin and a small portion of the Upper Peninsula of Michigan.

Sufficient start-up funding existed for the initial infrastructure build-out phase. The business plan required mezzanine financing to fund initial commercial operations and secondary infrastructure deployment. At the time Airadigm went to the capital markets for mezzanine financing the telecommunications market began to collapse. Numerous similarly situated companies shuttered their operations, sold below market value, or reorganized under Chapter 11. The capital markets were unwilling to finance, or were only willing to do so at an unacceptable rate.

Once commercial operations commenced, Airadigm was forced to use dwindling operating capital and sales revenues to make its debt payments to the Federal Communications Commission (licenses) and the equipment provider. In addition, it had a payroll, over one hundred land lease payments, marketing expenses, and various other business costs. The monthly costs that outpaced revenues and capital reserves, regulatory burdens, and inability to secure financing forced the company to reorganize under Chapter 11.

During this period I spent most of my time working with state and federal regulators to ease some of the financial and regulatory burdens on the company. This included proposals to restructure the debt on the licenses and a temporary reprieve from the E-911 mandates. I served on the board which voted to enter into Chapter 11 reorganization and adopt the reorganization plan.

Regulatory Priorities

Question 5: If you are confirmed, what do you anticipate will be the regulatory priorities during your term?

Answer: Regulations implementing section 20 of the Indian Gaming Regulatory Act, revisions of the regulations relating to the land-into-trust process, and completion of the trust-related regulations.

Question 6: Would these regulatory priorities include new regulations for 25 CFR Part 151, Land into Trust Acquisitions?

Answer: Yes, see the answer to question 5.

Question 7: In your experience as Associate Solicitor for Indian Affairs, are there matters that arise under the existing Part 151 regulations where you would find guidance from Congress beneficial?

Answer: Land-into-trust is governed by the Indian Reorganization Act (IRA) as well as specific provisions in other congressional enactments such as restoration statutes. Congress has plenary authority over Indian Affairs and if Congress believes that the land-into-trust process would benefit from legislative changes, then it can amend the IRA. Any such changes would then be implemented through corresponding changes to the Part 151 regulations, as necessary. I will make finalizing the section 151 regulations a priority.

Question 8: Would these regulatory priorities include regulations implementing Section 20 of the Indian Gaming Regulatory Act, which govern applications for a tribe to have off-reservation gaming?

Answer: Yes. The comment period for proposed section 20 regulations closed on February 1, 2007.

Consultation With Tribes

Question 9: In your testimony, you state that you "will use the Office to promote more vibrant and goal-oriented communications between tribes and their neighbors." In the testimony provided by the National Congress of American Indians, Jacqueline Johnson described the importance of consultation, defined as hearing tribal concerns prior to final departmental action and final departmental actions that reflect tribal concerns. How will you promote more vibrant and goal-oriented communications?

Answer: Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments, was published in the Federal Register in the year 2000. If confirmed, I will ensure that all Indian Affairs employees are aware of and follow this policy. I will work with my colleagues within the Department, other Federal agencies, and tribal leaders to ensure that consulting with tribes is foremost in any formulation of policy changes that impact American Indians and Alaska Natives. I will work with Secretary Kempthorne regarding his vision for our relationship with Indian Country and pledge to engage Tribal leaders.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Question 10: Are there particular matters that you have identified that call for this new communications approach?

Answer: I believe that proactive and bilateral communications can always be improved. I hope to invigorate the consultation process regarding all matters between the Department and the tribes.

Question 11: Are there particular instances that you have identified where you think tribal-community communications are insufficient?

Answer: Tribes and local communities have opportunities to work together as governments to solve local governmental issues. Many tribes have been successful in negotiating intergovernmental agreements with local governments. In those cases where government-to-government discussions are not successful, I will do what I can to foster the process to closure.

Question 12: Will your approach to improving tribal-community communications include formalizing, in policies or regulations, the means of these communications?

Answer: If confirmed I will review our current policies regarding tribal-community communications to determine if this is necessary.

Question 13: Would you consider implementing a uniform consultation process for all Departmental actions, except for where otherwise specified by Congress?

Answer: The requirement for a consultation process applies to all federal agencies. I am familiar with the consultation process of the Bureau of Indian Affairs and the Bureau of Indian Education. If confirmed, I will oversee the implementation of those policies and will work with other Assistant Secretaries to fulfill the requirement for consultation.

Question 14: Should your office publish regulations to implement Section 20 of the Indian Gaming Regulatory Act, would you encourage that the regulations clearly define tribal-community communications, such as, official notice and comment periods and community meetings?

Answer: Yes, I would encourage that the regulations clearly address the role of communities in the process.

Question 15: How will your approach to communications affect consultation processes between the Department of the Interior and tribes?

Answer: I will follow the Indian Affairs consultation policy. If confirmed, I will review recent consultations with Tribes to see if I can find best practices or develop better solutions.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Tribal Sovereignty

Question 16: In your testimony, you observe that "tribal sovereignty is inherent" and that "sovereignty is best exhibited in a vibrant tribal government that understands judicious exercise of its jurisdiction for the benefits of its members". As you know, some tribal governments fail to exercise their sovereignty judiciously.

In your experience as Associate Solicitor for Indian Affairs or in your other professional experiences, have you witnessed tribal governments that exceed their sovereign authority?

Answer: No.

Question 17: In your opinion, is there any federal authority to intervene in intra-tribal disputes, such as disenrollment decisions, given the U.S. Supreme Court opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)? If so, please describe the scope of the authority.

Answer: The federal authority to intervene in intra-tribal disputes is very limited and generally can be exercised only when the dispute threatens the Secretary's ability to discharge his trust responsibilities to the tribe, for example, as when the Secretary has to distribute judgment funds or other trust assets. Federal law has recognized the paramount interests of tribes in tribal membership matters. In the Santa Clara Pueblo v. Martinez case, involving a claim that a membership decision of the Pueblo violated Ms. Martinez's civil rights, the Supreme Court noted that Congress had considered and rejected a proposal that would have given the Department a role in hearing allegations of civil rights violations by tribal governments when it passed the Indian Civil Rights Act of 1968. The news media has carried stories about disenrollments from tribes with active gaming casinos. Gaming proceeds are not trust funds so these disenrollments would not implicate the Secretary's trust responsibilities.

Question 18: If disenrolling tribal members without the process afforded by tribal law is not a judicious exercise of a tribal government's jurisdiction, are there any appropriate actions that the Assistant Secretary of Indian Affairs, or other staff under the Assistant Secretary's authority, can take to protect the rights of the individual Indian? Please describe actions that you, if confirmed, might consider.

Answer: Strong, independent courts are a guarantee against abuse by any government. I support strengthening tribal courts. Some tribal governing documents include the Secretary as having a role in tribal enrollment appeals in limited circumstances.

Question 19: If you see limitations to the federal government's role in intervening in intra-tribal disputes, would you request guidance from Congress to reduce these legal limitations to better protect individual Indians whose membership is stripped away without due process or unlawfully by a tribal government? If so, what specific guidance would you seek?

Answer: In enacting the Indian Civil Rights Act of 1968, Congress struck a delicate balance between the civil rights of individuals and the sovereign rights of tribes to govern themselves. In the years immediately following the Supreme Court's decision in Santa Clara Pueblo v. Martinez, I understand that there were a number of legislative proposals to give Federal courts some jurisdiction to hear complaints of violations of civil rights and provide relief beyond the habeas corpus relief provided in the original act. I believe Congress should move cautiously in this area but I would be glad to cooperate with Congress if it decides to explore the problem and consider what kinds of relief might be appropriate without unduly intruding on tribal sovereignty.

Nature of the Assistant Secretary of Indian Affairs Position

Question 20: In your testimony, you describe that, if confirmed, you will approach the position in an "ambassadorial" manner. This suggests building and strengthening relationships within the Department of Interior, with other federal departments and agencies, and with tribes and communities.

If confirmed, how would you build and strengthen relationships with your counterpart in the Department of Housing and Urban Development, particularly the Office of Native American Programs?

Answer: I understand the BIA is currently working with Department of Housing and Urban Development's (HUD) Office of Native American Programs to streamline the processing of Title Status Reports (TSR) and limiting the number of TSRs required for the mortgaging of HUD homes. We are also providing training of field staff on the HUD/BIA/United Sates Department of Agriculture mortgaging process to increase Indian home ownership. If confirmed, I look forward to continuing to build and strengthen our relationship with HUD.

Question 21: If confirmed, how would you build and strengthen relationships with your counterpart in the Department of Health and Human Services, particularly Dr. Charles Grim, Director of Indian Health Services?

Answer: Methamphetamine abuse in Indian Country is growing at epidemic levels in many locations. If confirmed, I will meet with Dr. Grim and his staff to engage in a meaningful dialogue that may result in a Memorandum of Understanding that will outline our joint responsibilities in fighting drug abuse in Indian Country.

Question 22: If confirmed, how would you build and strengthen relationships with your counterpart in the Department of Education? How would you better coordinate the efforts of Thomas Dowd, BIA's Director of the Bureau of Indian Education, and Cathie Carothers, the Department of Education's Director of Indian Education?

Answer: As I stated in my opening remarks, the Department places a high priority on Indian education and improving student achievement under the No Child Left Behind Act. The Bureau of Indian Education (BIE) has established a positive and productive working relationship with the Department of Education. The BIE holds monthly conference calls with Education staff to review issues of common interest and to receive technical assistance. If confirmed, I will continue our commitment to collaborate with our colleagues in the Department of Education's Office of Indian Education.

Question 23: If confirmed, how would you approach strengthening the relationship and communication between the Department of Interior, the Office of Special Trustee and tribes?

Answer: I will work with the Secretary, the Special Trustee and the tribes to assess the issues and see what areas need improvement. Following my assessment I will identify appropriate remedies and make improvements if warranted.

Cobell Litigation

Question 24: Last year, you testified about how the trust litigation was "bogging down the Department." As you know, Committee spent much time and resources on trying to find a legislative solution to the Cobell litigation last session. The Chairman is currently awaiting a letter from the Department that includes a dollar figure for such a settlement. If confirmed, will you commit to working with the Committee in continuing to develop a solution to the Cobell litigation?

Answer: Yes.

Backlog on Land-Into-Trust Applications and other matters

Question 25: Several tribes have informed me that their applications to have lands placed into trust for NON-GAMING purposes (particularly housing) have been pending at the Department for years, in some cases almost a decade. I also understand that there are backlogs in several other matters, such as approval of land leases and probate matters. How will you address these backlogs and ensure decisions are made in a timely manner?

Answer: If confirmed, I will review the current processes to determine if there are more efficient ways to address the elimination of backlogs and ensure prompt decision-making.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Education

Question 26: What are your long-term goals for the Department's tribal college, Haskell Indian Nations University? For example, are there plans to use its existing technology or courses for the professional development of BIA employees or the website?

Answer: I am informed that the BIE's long-term goal is to support the Haskell Indian Nations University to continue the training of students to be highly qualified teachers. The University currently supports an excellent teacher preparation program. To the degree that they have the facilities, we would like to explore the use of distance learning opportunities to all Bureau-funded schools.

Question 27: Please explain why the funds that Congress directed to be released to the federally-chartered foundation—the National Fund for Excellence in Indian Education, created by Congress in the Omnibus Indian Advancement Act of 2000—have not been released. When will those funds be released?

Answer: I am aware of some of the problems the National Fund for Excellence in Indian Education (Fund) has encountered since enactment of the legislation in 2001. If confirmed, I will review this problem to determine the status of this issue.

Detention facilities

Question 28: In September of 2004, the Inspector General issued a report on the condition of BIA detention facilities. Can you tell me the status of the Department's efforts to address the findings and recommendations of that report?

Answer: The safety and security of detention facilities is very important to the integrity of the criminal justice system in Indian country. I understand that the BIA is working diligently to comply with the recommendations set forth in the Inspector General's report. If confirmed, I will be happy to see that a briefing is provided to the Committee by the Office of Justice Services to discuss the status of their compliance with the recommendations.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Relocation of Housing for the Sauk-Suiattle in Washington

Question 29: Mr. Artman, as you know, federally recognized Indian tribes in Washington state and throughout the nation face unique challenges when seeking to expand their property base or to relocate when necessary. In my state, the reservation of the Sauk-Suiattle tribe has been affected by a change in course of the Sauk River, and several housing units have been threatened by the river's increased flooding. The tribe is currently working to purchase of a parcel of United States Forest Service land – including eight housing units – for the relocation of tribal housing.

The tribe is seeking a Congressional appropriation to supplement tribal housing funds already designated for this purchase. Would you support a Congressional appropriation to assist the Sauk-Suiattle with the purchase of this land?

Answer: I am not familiar with this issue. However, if confirmed, I will look into it.

Question 30: As you know, placing land in to trust can be a difficult and time consuming process, even for a tribe with an established land base. However, placing the proposed acquisition into trust would be of significant advantage to the tribe. Would you support an expedited land-into-trust process for Sauk-Suiattle tribe?

Answer: Since I am unaware of the facts regarding the Sauk-Suiattle tribe, I cannot comment whether the process can be expedited.

Question 31: It is the policy of the United States Forest Service Washington Office to use competitive sales procedures in certain land transactions. Would you support the Sauk-Suiattle tribe in requesting a variance from this policy to purchase the United States Forest Service Parcel, which is part of the Tribe's aboriginal territory?

Answer: If confirmed, I will review this matter.

Bureau of Indian Affairs Attorney Fee Account.

Question 32: Mr. Artman, as you know, the Bureau of Indian Affairs maintains an account used to pay attorney fees in litigation filed by Tribal entities and pertaining to the trust resources or trust responsibility of the tribe. Last year, the BIA removed $2 million from the account and imposed a $1 million across-the-board cut on all BIA programs in order to pay attorney fees in the Cobell v. Kempthorne case. Because of this, many deserving tribes that had applied for funding from this account were informed that the funds were not available.

At a subsequent date, the Saginaw Chippewa tribe returned an appropriation of $3 million to the Bureau of Indian Affairs and specified that the funds were to refill the attorney's fee account and reverse the across the board cuts to Indian Country programs. At this time, most of the tribes that had applied to for funds from the attorneys' fees account finally received the funds. In my state, the Yakama Nation had applied for attorneys' fees to assist them in a CERCLA lawsuit involving the clean-up of nuclear waste at the Hanford Nuclear Site. It is my understanding that, prior to the distribution of funds to cover attorney's fees for the Cobell v. Kepthorne case, the Yakama Nation had received indication that they were in line to receive funds from the attorneys' fee account. It is my understanding that many tribes previously in line to receive attorneys' fees from the account recently received funding – with the exception of the Yakama Nation.

As Assistant Secretary, will you ensure that funds related to the Cobell v. Kempthorne case are not taken from other deserving tribes or from necessary Bureau of Indian Affairs programs?

Answer: If confirmed, I will weigh the issues on a case by case basis.

Question 33: Will you ensure that all tribes recommended for funding under the tribal attorneys fee's program, including the Yakama Nation, receive payment as recommended by the Office of Trust Responsibility?

Answer: If confirmed, I will weigh the issues on a case by case basis, and will follow the regulations governing such matters.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Indian Self Determination Act

Question 34: As you know, the Indian Self Determination Act, passed by Congress in 1975, was enacted to transfer planning, conduct, and management responsibilities for certain Indian programs normally carried out by federal agencies to tribal control. For instance, programs covered under this legislation included schools, health services, and clinics. The legislation also required agencies contracting with tribal organizations to devote no less funding to the tribally-operated programs than would have been spent on the program by the agencies themselves. Unfortunately, the legislation failed to authorize funding for administrative costs – known as contract support costs – incurred by tribes in the management of the programs.

Although Congress passed legislation attempting to remedy this situation in 1988, contact support costs continue to be under-funded and are often subject to explicit caps laid out in the appropriations process. Consequently, tribes are forced to either use program funds to cover the administrative costs incurred managing these programs, thus reducing their ability to provide program services, or to forgo receipt of administrative funding.

Do you believe that the Bureau of Indian Affairs and the Indian Health Service have a responsibility under the Indian Self Determination Act to fully fund contract support costs for participating tribes?

Answer: It is my understanding that the Indian Self-Determination Act, as amended, requires the payment of contract support costs, although Congress has capped the total dollars BIA can spend on contract support costs, and these costs continue to be identified as one of the major funding priorities of tribes.

During briefings with the Bureau of Indian Affairs, I have been made aware that the President's FY 2007 Budget request to the Congress included a substantial increase in contract support funds.

Question 35: What will you do to ensure that the Bureau of Indian Affair and Indian Health Service meet their contract responsibilities to Tribes managing programs under the Indian Self Determination Act?

Answer: One aspect of the BIA's responsibility is to provide training and technical assistance. I am informed that the President's 2007 budget request to Congress includes funding to meet this responsibility. If confirmed I will work with the BIA on the successful contracting of Federal programs.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Indian Water Issues

Question 36: It has been brought to my attention that the "Water Resources Technician Training Program" could be discontinued. Since 1992 this program has helped to train more than 500 American Indians in the area of water resources and surveying.

As you know, water is our most important and most scarce resource in the Southwest. The water situation in New Mexico is very important to me personally. Solutions to our water problems will be expensive and highly complex and will require a coordinated effort by federal, state, local and tribal governments.

It is my understanding that the tribes benefit greatly from the knowledgeable trainees who complete this program to manage and build water resources and environmental programs on their tribal lands. I also understand that through this program, the trainees graduate and return to work for their tribes thanks to a one-year sponsorship of employment.

Do you support the Water Resources Technician Training Program and its objectives?

Answer: I am not fully familiar with the program. I agree that water is a valuable resource and that providing tribes with the ability to employ tribal members to increase the capacity to manage water resources is worthy.

Question 37: Do you believe the program provides trainees with technical knowledge that improves the ability of tribes to better deal with water resource problems?

Answer: It is my understanding that the training provides basic skills as a water technician trainee, followed by one year of on-the-job training by the sponsoring tribe with partial funding provided by the BIA.

Question 38: If confirmed, will you commit to providing the committee with an expeditious and fair evaluation of the status of the BIA Water Resources Training Program?

Answer: Yes, if confirmed I will commit to fairly evaluate the status of the BIA Water Resource Training Program.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Economic development (non-gaming)

Question 39: In your opinion, what are the biggest challenges to Indian economic development, and how do you plan to meet these challenges?

Answer: One of the greatest challenges is educating non-Indian America on the opportunities and benefits of partnering with Indian Tribes and individual Indian entrepreneurs. In large measure, Indian Country is ready, willing and able to undertake economic development. By bringing the human and financial capital together with tribal governance and trust land and resources, I believe we can build robust economies on Indian reservations. We must improve Indian Country's access to capital. Job creation will be an inevitable result of a greater access to finance and credit.

As I said at my confirmation hearing, working through the Office of Indian Energy and Economic development, we will bring together influential leaders from Indian governments, finance, business, and business education to focus on the development of sustainable economies. I also said that I will promote communications between tribes that have realized financial success and those that strive for a fraction of that success to move beyond the provision of subsistence benefits for their members. The success of one tribe, either in business, government administration, or cultural preservation, is the best incubator for success of other tribes.

Question 40: What role should trust reform play in making conditions in Indian country more conducive to economic development?

Answer: Trust reform is the Department's effort to improve the Trustee's management of trust assets. One aspect of these improvements will result in improving and expediting the leasing process as well as providing trust beneficiaries with better information about their trust resources. These improvements can help make Indian country more conducive to economic development.

Question 41: It seems that having strong tribal government institutions are critical to economic success in Indian Country. How would you use the Office of the Assistant Secretary to encourage tribes to establish stronger governing institutions?

Answer: I plan to work with all offices and other Federal Agencies to improve tribal economic infrastructure I would also like to work to increase tribal business knowledge through training and education and provide tribes with information about existing tools and resources that are available to tribes and individual entrepreneurs at the Department, in other parts of the federal government and the private sector.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Indian Gaming Issues

Question 42: The issue of off-reservation gaming is a controversial one. You recently wrote a legal memorandum that was the basis for an "Indian Lands Determination" opinion under the Indian gaming law. The land at issue was for a California tribe and there has been much press about your legal opinion. Can you describe the process for the development of these "Indian Land Determinations" and any concerns that you have with the process?

Answer: The office of the Solicitor and the General Counsel at the National Indian Gaming Commission have negotiated an agreement where both offices review draft legal opinions regarding Indian lands determinations. The Solicitor's office discusses its legal views with its client agency and considers the client agency's input. Determinations are based on an interpretation of the statute, judicial precedent and the client's views on the matter.

Question 43: Last year, the Committee was made aware that there are no federal regulations in place that govern the application process for tribes seeking to establish gaming facilities off-reservation, specifically regulations to implement section 20 of the Indian Gaming Regulatory Act. Can you tell us what the status is of those regulations?

Answer: The public comment period closed on February 1, 2007. The Department will review those comments and make any necessary revisions. I anticipate they will be ready for final publication sometime in the spring.

Question 44: Please state your views on how local communities should participate in the processes for determining whether land may be taken into trust for gaming purposes.

Answer: Community participation is part of the land-into-trust process and the section 20 process. Under NEPA, the community participates in public meetings as well as providing comments. Under section 20 of IGRA, the Department solicits the views of the local community when determining whether a project is detrimental to the local community.

Question 45: Please state your views on how local communities should participate in the processes for determining whether land acquired after 1988 should be eligible for gaming under section 20 of IGRA.

Answer: Community participation is part of the land-into-trust process as well as the section 20 process. Under NEPA, the community participates in public meetings as well as providing comments. Under section 20 of IGRA, the Department solicits the views of the local community when determining whether a project is detrimental to the local community.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Question 46: What is "restored land to a restored tribe" under IGRA? Under IGRA, a tribe may not acquire land after 10/17/88 and use it for gaming purposes unless it the acquisition is approved by the Governor of the State and the Secretary of Interior OR unless certain exceptions apply. One exception is if land is deemed "restored land" to a "restored tribe." There have been several court decisions setting out the criteria that must be used to determine whether a tribe is "restored" and whether the acquired land is "restored" land. A number of tribes in California are seeking to utilize this exception and therefore avoid the two-part approval of the Governor and the Secretary that would otherwise be required. In your view, what criteria apply to whether a tribe is deemed "restored?"

Answer: Courts have made generally liberal interpretations of this section of IGRA, thereby forcing the Department to make these determinations in accordance with precedence set by various courts. The section 20 regulations will allow the Department, applicants, and communities to work from consistent guidelines that strictly interpret IGRA. The Department's proposed section 20 regulations provide the Department's interpretation of this statutory provision. The comment period on these regulations closed on February 1, 2007, and the Department will be preparing final regulations that detail the criteria. These regulations are expected to be published in spring of 2007.

Question 47: To be restored, a tribe must first have been recognized. What criteria are applied to determine if the tribe was ever recognized?

Answer: The Department's proposed section 20 regulations provide the Department's interpretation of this statutory provision. The comment period on these regulations just closed on February 1, 2007, and the Department will be preparing final regulations that detail the criteria.

Question 48: To be restored, a tribe must have lost its recognition (been "terminated") sometime after it was recognized. What criteria are applied to determine if the tribe was terminated?

Answer: The Department's proposed ection 20 regulations provide the Department's interpretation of this statutory provision. The comment period on these regulations closed on February 1, 2007, and the Department will be preparing final regulations that detail the criteria.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Question 49: In 1978, the Bureau of Indian Affairs adopted regulations that required all tribes to demonstrate with objective facts and historical evidence the basis for their claim of recognition. This process is called the "acknowledgment process" and applies to both new tribes and tribes seeking "re-recognition" or "restoration." What criteria are applied to determine if the tribe was "re-recognized" or "restored?"

Answer: The Department's proposed section 20 regulations provide the Department's view of the criteria for meeting the restored tribe requirement in IGRA. However, a tribe must be a federally-recognized tribe before it can be eligible for gaming. Therefore, the IGRA definition of restored has no bearing on the 25 C.F.R. Part 83 acknowledgement process and a group seeking Federal recognition must follow that process.

Question 50: Is it your opinion that some tribes can avoid the "acknowledgement process" in the regulations and be restored administratively by the Department of Interior or the NIGC?

Answer: No, a tribe must be federally-recognized before it can operate gaming under IGRA. Therefore, a group seeking Federal recognition must first become federally recognized through the acknowledgment process before seeking to engage in class III gaming as a tribe restored to Federal recognition.

Question 51: Ione Band of Miwok Indians – A Restored Tribe? In September of 2006, you determined that land purchased by an investor seeking to finance a casino for the Ione Band of Miwok Indians, in Amador County, California, was "restored land to a restored tribe" and therefore "Indian land" within the meaning of IGRA which the tribe could use for a gaming project.

In holding that the tribe was initially "recognized," you relied on a 1972 letter from BIA Commissioner Louis Bruce citing activities of the federal government concerning the Ione Band in the early part of the 20th century. No evidence was submitted by the current members of the Ione Band of a relationship with any of the Ione Indian members from that time. Is this a relevant fact, in your view?

Answer: The Department has hundreds of pages of documents related to the original effort to acquire a small parcel of land for the Band. In modern times both before and after Assistant Secretary Deer restored the Federal relationship with the Band, the Band has suffered internal disputes over leadership and membership claims. My understanding was that the current members of the Band had established links to the earlier residents of the land Commissioner Bruce promised to accept. Links between the current members and the earlier residents is relevant.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Question 52: In holding that the tribe was terminated, you relied on the change of heart by the Department when the Bruce letter was repudiated. You noted that after 1972 the United States advised the Ione Band that it would have to follow the administrative acknowledgement process and that the United States took the same position in defending against a lawsuit filed by the Ione Band. Can you explain why the acknowledgement process applied to the Ione Band after 1972 and why an obligation to follow that process constitutes "termination" of the tribe?

Answer: The Department adopted its acknowledgment regulations in 1978 in an effort to establish an orderly and uniform process for making determinations as to which groups of Indian descendants constituted an Indian tribe. The process that led to those regulations began shortly after Commissioner Bruce's letter. Once the Department began developing its regulations, the view was that they should apply to everyone if the Department was to achieve its goal of uniformity. The effect of the Department's decision was to deny that a Federal relationship existed with the Ione Band, that is, it terminated the government's relationship with the Band.

Question 53: In holding that the tribe was "restored," you relied on a 1994 letter from then-Assistant Secretary Ada Deer requiring the Ione Band be placed on a list maintained by the Department of those tribes eligible for federal services. What caused the Department to abandon its position that the Ione Band was required to follow the acknowledgement process set out in departmental regulations?

Answer: It is not clear to me what caused the Department to change its position. I do know that the Band never accepted the Department's recommendation that it should go through the acknowledgment process. I believe that the record of the Department's efforts after 1916 to acquire land for the Band is unique and that the only reason the land was not acquired for the Band at that time was a unique combination of unfortunate circumstances.

Question 54: Is it your position that the Department is free to administratively "recognize" or "restore" a tribe in its own discretion?

Answer: No, I don't believe the Department is free to administratively "recognize" or "restore" a tribe in its own discretion. The Department has adopted regulations for determining whether a group is entitled to be acknowledged as an Indian tribe and it should follow those regulations.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Question 55: In your view, what are the main criteria a tribe must establish in order to demonstrate that land it acquired after 10/17/88 is "restored land."

Answer: Courts have made generally liberal interpretations of this section of IGRA, thereby forcing the Department to make these determinations in accordance with precedence set by various courts. The section 20 regulations will allow the Department, applicants, and communities to work from consistent guidelines that strictly interpret IGRA. The Department's proposed section 20 regulations provide the Department's interpretation of this statutory provision. The comment period on these regulations closed on February 1, 2007, and the Department will be preparing final regulations that detail the criteria. These regulations are expected to be published in spring of 2007.

Question 56: Is the impact on a local community of any relevance to the decision of whether lands are "restored lands?"

Answer: At this point, the impact on the local community is a factor that is taken into account pursuant to the environmental laws in the decision to acquire lands. If confirmed I will review the current process for reviewing restored lands requests and where in the process the Indian lands opinion should be considered. The most important goal for the Department in this process is the development of the most complete record upon which decisions will be based.

Question 57: Is it necessary that the tribe demonstrate any previous connection to the land in order for the land to be deemed "restored?"

Answer: The Indian Gaming Regulatory Act did not give much guidance as to what Congress contemplated would be considered "restored lands" and several court decisions have given the term a very liberal meaning. I believe that a tribe should demonstrate some previous connection to the land for it to be considered "restored," but what the connection is and what the evidence of it might be will vary greatly. Many of these concerns will be dealt with in the final draft of the section 20 regulations.

Question 58: What is a Reservation? Under IGRA, in general a tribe may not use any land for gaming unless the land is part of a reservation or held in trust by the United States for the benefit of the tribe. In the case of the Buena Vista Rancheria and the Picayune Rancheria of the Chuckchansi Indians in California, the National Indian Gaming Commission determined that although the land on which the tribal casino is to be built is held in fee by the tribe and the tribe did not seek to place the land in trust, the land is nevertheless Indian land under IGRA.

Answer: There is no single, uniform statutory definition of "reservation" and the Supreme Court in recent years has recognized the existence of "informal reservations," that is, those that have not been proclaimed. I believe that the 1939 Solicitor's opinion is correct and that the rancherias are essentially reservations within the meaning of the Indian Gaming Regulatory Act.

Assistant Secretary for Indian Affairs
Designate Carl J. Artman

Question 59: In so finding, the NIGC relied on a 1939 Solicitor's office opinion, casually equating "Rancherias" (which were generally federal land in California acquired for homeless Indians in the first part of the 20th century) with "reservations." The NIGC went on to say that the if the casino was built on fee land that is within the exterior boundaries of a former Rancheria ("former" because at some point the Rancheria lands were sold) then the casino was deemed to be built on reservation lands – and it was not necessary for the tribe to seek to have the land put in trust, which would require compliance with NEPA, for one thing, and allow public comment on the acquisition and use of the land as a casino.

Do you agree with the NIGC's opinion on this issue?

Answer: The two NIGC opinions you mention, Buena Vista and Picayune, were issued in December 2001 and June 2005 before I joined the Department, so I am not familiar with the decisions or the records on which they were based.

Question 60: Do you believe that it was the intent of Congress to limit tribal gaming to actual reservation lands OR lands in which the federal government took land into trust for the benefit of a tribe?

Answer: Congress expressed its intent in the Indian Gaming Regulatory Act which lands Indian may conduct gaming on.

Question 61: Are you in agreement with a tribe acquiring fee land for gaming even though that is never subject NEPA or any other federal environmental review?

Answer: I believe that Indian gaming can have significant impacts on the surrounding environment. Those impacts should be carefully reviewed and addressed.

Question 62: The Confederated Tribe of the Grand Ronde has requested my assistance in addressing their Forest Management Deduction ("FMD") account and their request for a reconsideration of BIA's decision. In 1992/1993 The Tribe entered into a Memorandum of Agreement with the BIA regarding the Tribe's forest management deduction account. This agreement allowed the Tribe to establish a tribally administered account for FMD funds. After many years of successfully managing its FMD funds, The Office of Trust Review and Audit ("OTRA") invalidated this agreement because it was signed by the Bureau's Acting Portland Area Director, who reportedly did not have the authority to sign the MOU.

The BIA has reviewed and audited the account and has found no reason to question the Tribe's ability to properly manage this account. Under the remedy proposed by the Grand Ronde, the BIA would still have oversight of the account to fulfill its trust responsibilities.

Why is BIA terminating a positive example of sound fiscal management and responsibility in Indian Country?

Answer: I am not familiar with this issue. If confirmed, I would be happy to look into it.

Assistant Secretary – Indian Affairs – Designate Artman

Senator McCain

1. The job of Assistant Secretary–Indian Affairs requires, of necessity, the ability to make exceedingly difficult decisions--decisions that have no easy answer or that will inevitably leave someone, perhaps everyone, unhappy, and the safest thing to do is to make no decision at all. I think the Hoopa-Yurok matter may be an example of this.

Question. Are you willing to make these kinds of difficult decisions? We need to know this, because that is what this job is all about.

Answer: Yes, I am willing to make these difficult decisions, and I understand this position requires complex and difficult decision-making. As Associate Solicitor for Indian Affairs I have faced complex matters that emanate from Indian country, and advocated for or recommended solutions to matters that balance the legalities and equities of that issue, often contrary to certain stakeholders.

Question 2. With regard to the $90 million Settlement Fund established under the Hoopa-Yurok Settlement Act, we understand that the Department of the Interior is again reviewing its authority to administer that Fund. Could you please tell us the status of the Department's review?

Answer: The Office of the Solicitor's Division of Indian Affairs has reviewed the Department of the Interior's (Department) authority to distribute the money in the Settlement Fund pursuant to and in accordance with the Hoopa-Yurok Settlement Act. The memorandum and recommendation are under review in the Office of the Solicitor, and will be forwarded to the client-representative immediately after it is finalized. I expect this process to culminate shortly.

3. The Department of the Interior is engaged in a Rights-of-Way study regarding energy transmission.

Question: What is the Department of the Interior's role as to transmission and the price of energy?

Answer: The Department approves rights-of-way for transmission facilities across Indian trust lands. The Department has no role in setting the price of energy.

Assistant Secretary – Indian Affairs – Designate Artman

Senator McCain

The GAO recently released a report that was sharply critical of the great variation in how tribes' fee-to-trust applications are handled by the BIA. Some applications have languished before the BIA for many, many years.

Question 4: What are you going to do to expedite delays in BIA decision-making in land-into-trust applications?

> Answer: The Bureau of Indian Affairs (BIA) has drafted new regulations to govern the processing of fee-to-trust applications. The BIA also plans to develop a Fee-to-Trust Handbook that will describe how to process applications, including detailed guidance on the time frames for decisions and appeals.

Question 5: Can the process for applications for housing and non-gaming economic development be expedited? Can the process be expedited for tribes seeking land contiguous to their existing reservations?

> Answer: If confirmed I will study the current land-into-trust process and the impact the draft 151 regulations will have on it. In addition, I plan to evaluate the resource conflicts that have contributed to the slow pace of completing fee-to-trust decisions.

The Committee has received testimony that the BIA Title Status Report process which describes the ownership status of a tract is not where it should be. It has been described as a barrier to home ownership, slow, at best, and results in delays or denials of mortgages for Indian people.

> Question 6: What creative ideas would you bring to the BIA to help remedy this longstanding problem?
>
> Answer: The BIA has addressed this problem through improvements to the BIA Title System, one of which is the recently completed conversion to the Trust Asset and Accounting Management System (TAAMS) for processing Titles. The system is now being used at all Land Titles and Records program offices. The system has improved greatly our ability to provide accurate title information to tribes and Indian landowners in a timely manner.

Senator McCain

Mr. Artman, in your testimony you speak movingly of the great potential tribal governments have to help their people.

Question 7. Can you describe what "tribal sovereignty" means or should mean in the year 2006 and what rights or responsibilities are associated with sovereignty?

Answer: In the case *Cherokee Nation vs. Georgia*, the Supreme Court established the principal of self-government. I support self-determination and the government-to-government relationship between the United States and Indian tribes. It is the policy of this government to recognize and support tribal leaders and officials. It is the responsibility of tribal leaders to set priorities for programs and funding, as well as to interact with federal and non-federal entities in the pursuit of opportunities to move their communities to self-sufficiency.

Question 8. How has tribal sovereignty changed through time and how should non-Indian people understand the impact that tribal sovereignty may have on their lives?

Answer: The government-to-government relationship between the United States and tribes has evolved. In recent years the courts have recognized and protected tribal sovereignty and Congress has enacted statutes to facilitate the development and exercise of that sovereignty through well organized and responsible tribal governments. Sound tribal governments will benefit both tribal members and the surrounding non-Indian community.

Congress amended the BIA Self-Governance Title IV in 1996 to foster more uniform and efficient tribal administration of contracts and agreements.

Question 9. What further revisions do you think should be made to self-governance to improve tribal administration and should they be more consistent with the Self-Governance provisions for the IHS?

Answer: If confirmed I will research the necessity of further revisions to self-governance. I know the Department has been working with the Title IV Tribal Task Force to explore the need for amendments to Title IV. I think that the consistency and approach embodied in Self-Governance provisions applicable to the Department and those applicable to the IHS should be evaluated carefully.

Assistant Secretary – Indian Affairs – Designate Artman

Senator McCain

Indian tribes have raised concerns that program funding levels have been diverted to pay for trust management. For example, tribes have raised concerns that water resource funding has, in recent years, been diverted to litigation activities of the BIA and away from tribal water program operations. This appears to be discouraging tribes from expanding their Self Governance program participation.

Question 10: Can you explain what steps the Department could take to ensure programmatic funding will be safeguarded against diversions?

> Answer: If confirmed, I will work with the tribes during the budget formulation process so that their concerns and priorities are addressed. Once the budget has been submitted, I will work with Congress on the appropriate funding for both trust and non-trust programs. At the same time, I am committed to fulfilling the Department's fiduciary trust responsibilities. Managing the Indian trust is one of the greatest responsibilities faced by the Department of the Interior, and we must fulfill our responsibilities to our beneficiaries.

Six years ago, Congress established the National Fund for Excellence in American Indian Education and authorized the Secretary to transfer certain funds to the Fund to support the education of Indian children in BIA-funded schools. But, six years later, those funds have yet to be transferred.

Question 11: When will the Department transfer those funds so that the National Fund can facilitate its mission of supporting the education of Indian children at BIA funded schools?

> Answer: If confirmed, I will work with the Foundation to help it fulfill its mission. The Bureau of Indian Education's (BIE) new director met with the Foundation's representative on August 2, and is scheduled to conduct a follow up meeting on September 18 to discuss a strategic business plan, including administrative support for the Foundation. We are also working with the Foundation to help them comply with requirements that will allow for the transfer of individual endowment funds.

Assistant Secretary – Indian Affairs – Designate Artman

Senator McCain

According to the 2005 National Assessment of Education Progress report issued this summer, test scores of many Indian children fell below proficiency standards in math and reading.

Question 12: What is your plan for improving these results for Indian children?

Answer: As you are aware, the Department of the Interior is supporting an improved management structure for Indian education. The new Bureau of Indian Education will improve the effectiveness of educational services by providing the oversight necessary to ensure that all schools make progress in student academic achievement. BIE has worked with tribes and the Department of Education to develop an action plan, with goals and milestones, to achieve Adequate Yearly Progress at all Bureau-funded schools.

If confirmed, I will continue to support necessary changes to ensure that all students meet proficiency standards in math, reading and language.

The Committee is concerned about the safety of Indian children at BIA schools, particularly in the areas of school violence and behavioral health, such as suicide risks.

Question 13: What comprehensive plans do you have for addressing school safety, including coordination with the Indian Health Service?

Answer: I am concerned about the safety of Indian children in Bureau-funded schools. I have been informed that the Bureau of Indian Education Director has implemented measures to ensure Bureau-funded schools are safe, secure and provide healthy learning environments for students. As of September 15th I understand all Bureau-funded schools have submitted assurances stating that there are no holding cells on their properties and that there is no use of restraints, e.g. on students. All schools will conduct a "stand down" exercise to provide safety awareness training on the proper handling of unruly students and students who have consumed drugs or alcohol. I also understand that all schools will ensure that every school employee is issued a card with instructions and emergency numbers to contact in case of emergency. Every school is required to have an agreement in place with local law enforcement and emergency medical services.

Also, as a result of a meeting between the Department of the Interior and the Indian Health Services last spring, the agencies have established working committees to address the health concerns in the Bureau-funded schools.

Safe schools are a priority for me and I will work with the Director of the BIE to make additional necessary improvements.

Assistant Secretary – Indian Affairs – Designate Artman

Senator McCain

The Department of Interior, Office of the Inspector General 2004 report on Indian Detention Facilities, stated that the Bureau of Indian Affairs, Office of Law Enforcement Services (OLES) was unable to produce any annual budget submissions for Indian detention facilities. These fiscal management failures have affected every aspect of detention facility operation from providing the adequate number of detention personnel and personnel training, to the ensuring the health and safety of inmates and the detention officers, to building maintenance and construction of new facilities. I understand much progress has been made to address this problem.

Question 14: How do you intend to address this situation? Where do you intend to start?

> Answer: The Office of Law Enforcement Services (OLES) has already begun taking actions to address the issues with Detention facilities. Beginning in October 2005, as part of an overall program improvement plan, a budget for the Detention program was allocated, separate from the policing operations side of OLES. This plan, which included a Staffing Analysis, has brought about more accountability and monitoring of the Program. We have also hired more staff at detention facilities with critical staffing shortages.
>
> I understand that OLES is conducting on–site assessments at the BIA facilities and that corrective action plans are in place and being monitored for progress. The Professional Standards Division has now inspected all BIA facilities and is now in the process of inspecting the facilities of the P.L. 93-638 Contracted Programs. OLES has shifted resources to the Indian Police Academy (IPA) and has more classes at IPA to address the Basic Correctional Officers Training Program and the Correctional Armed Transport Training.
>
> If confirmed, I intend to meet with staff immediately and oversee the implementation of these improvements.

Several of the juvenile detention facilities were closed, and correctly so, due to lack of adequate staffing or from poor building conditions. New detention facilities are being built, for example the new detention facility at Peach Springs, Arizona, on the Hualapai Tribe reservation, but in the interim, transportation of juveniles to remote temporary holding facilities is quickly becoming a crisis in Indian county.

Question 15: How do you intend to address this transportation problem?

> Answer: I am informed that the Division of Corrections currently utilizes police officers to conduct transports due to shortage of trained correctional personnel. I am also informed that to address this issue, the Division of Corrections is acquiring new transport vehicles and, in partnership with the Indian Police Academy, created a Correctional Armed Transport Training (CATT) program and recently graduated its first class.

Assistant Secretary – Indian Affairs – Designate Artman

Senator McCain

Question 16: How do you intend to ensure that new detention facilities open as quickly and safely as possible?

> Answer: If confirmed, I will work with the Division of Corrections and the Office of Facilities Management and Construction to review facilities and resolve any safety issues so that facilities can open. I will also work to properly staff facilities for which BIA has direct responsibility.

At least one of your predecessors recused himself from some very important responsibilities of the Assistant Secretary, for example, delegating to others decisions on Indian gaming and tribal recognition. You have informed me personally that you will retain full responsibility for the duties of the office.

Question: 17: Your commitment to take responsibility for all issues over which your office has jurisdiction is still valid, correct?

> Answer: If confirmed, I will take full responsibility over issues that fall within the jurisdiction of the Assistant Secretary for Indian Affairs. I will not participate in any matter involving specific parties in which the Oneida Tribe of Indians of Wisconsin is also a party. I will adhere to the August 21, 2006, letter addressed to Ms. Shayla Freeman Simmons, the Department of the Interior's designated agency ethics official and director of the ethics office. This letter, attached to the submitted Biographical and Financial Information questionnaire, addresses this narrow recusal and the other statutorily mandated recusals.

I understand that the Department has been engaged in drafting regulations to implement Section 20 of IGRA which limits the circumstances on which tribes can conduct gaming on lands acquired after 1988 and which has been the source of many tribes attempting to conduct gaming off their traditional reservations.

Question 18: What is the status of these regulations?

> Answer: The Department sent draft regulations to tribal leaders on March 15, 2006, and subsequently conducted extensive government-to-government consultations with Indian tribes to solicit comments. The Department has incorporated a number of comments in the proposed regulations. We hope to publish a proposed rule in the Federal Register soon.

Assistant Secretary – Indian Affairs – Designate Artman

Senator McCain

Question 19: What effect would the regulations have on the approximately 70 Section 20 applications that we understand are pending before the BIA?

> Answer: Indian tribes with pending Section 20 applications would have to comply with new regulatory requirements imposed through the regulations. The Department has decided against including a "grandfather" clause in the proposed rule that would exempt pending applications from new regulatory requirements.

Congress enacted SAFETY-LU two years ago to authorize and allocate road construction funding by formula to states and tribes through FY 2009 from the Highway Trust Fund. It also added express authority for a tribe to use its annual road funding to pay the debt service on loans used to finance roads projects.

Question 20: Upon what basis has the Department relied in its determination that an Indian tribe may use no more than 50% of its annual roads funding allocation for roads loan payments?

> Answer: Tribes determine if they wish to use flexible financing. They can use this method in the same manner as States to finance Indian Reservation Road transportation projects. We believe a tribe should reserve at least 50 percent of its annual roads funding allocation for other projects the tribe may wish to pursue because the roads inventory is constantly changing. Since the inventory determines the amount of the tribe's allocation, that amount will fluctuate with changes in the inventory, and could drop in future years. If a tribe devotes its entire allocation to the debt service and then has a reduced allocation, it may be unable to fully repay the debt using its road funding allocation.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Conrad

Tribal Colleges

I am a strong supporter of our nation's tribal colleges. Over the last three decades, 34 tribal colleges have been established to help Native Americans of all ages reach their fullest potential. More than 30,000 students from 250 tribes nationwide attend tribal colleges.

Federal resources – especially core funding support from the Department of the Interior – are vital to these colleges. These colleges do not receive state support, as other community colleges do, and their students and communities can provide only modest financial support. The federal investments in tribal colleges have already paid great dividends in terms of employment, education, and economic development; continuation and expansion of this investment makes sound fiscal sense.

Question 21: Under your leadership, will the Department of the Interior begin more adequately fund the programs of the nation's tribal colleges? Will you commit to working toward providing the colleges with the $6,000 per student authorized funding level?

> Answer: I am committed to working with the tribes, the Administration, and the Congress with regard to the funding for tribal colleges. Under the new Bureau of Indian Education's management structure, a senior position has been created to supervise the Bureau's responsibilities for post-secondary institutions, including funding issues. As a former member of the President's Board of Advisors on Tribal Colleges and Universities, I am particularly interested in the success of these institutions.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Conrad

Tribal colleges continue to operate on shoestring budgets. Because they are not forward funded, the chronic delays in getting funds to the tribal colleges each year pose a considerable problem. Often the colleges must take out lines of credit to pay bills and meet payroll until their annual funding is distributed. Last year, the Interior appropriations bill was signed into law prior to the August recess, yet it was well into November before the first payments were made. The BIA's process for distributing funds is in serious need of an overhaul. One way to expedite this process would be to separate requests for institutional operations under the Tribal College Act I the annual budget, one for the 26 institutions funded under Title I and one for Diné College funded under Title II. This would allow for separate appropriations for each of these titles, eliminating the extra step of having to determine how much each Title is to receive in any given year.

Question 22: To address these two issues, would you agree to designate a senior BIA official, someone with authority to reform the process, to work with Congress to 1) forward fund the tribal colleges institutional operating grants; and 2) to seek separate requests for institutional operating grants for Title I (26 reservation based colleges) and Title II (Diné College)?

> Answer: Under the Bureau of Indian Education's new management structure, a Deputy Director for Policy and Evaluation, and Post Secondary Education, along with a Division Chief, Post Secondary Education will provide policy leadership, and management for all post secondary education issues. I will ask the Bureau of Indian Education to examine these issues.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Conrad

United Tribes Technical College

For the past five years, the Administration has proposed eliminating funding for United Tribe Technical College in Bismarck, North Dakota. United Tribes is the only intertribally-controlled postsecondary vocational institution in the country. Prior to this Administration, funding was provided for the college in every budget since 1981.

UTTC provides valuable educational opportunities to students from over 40 tribes across the nation, as well as services for their families. The college has a retention rate of 85 percent, a placement rate of 95 percent, and a projected return on federal investment of 20 to 1. UTTC does not receive assistance under the Tribally Controlled College or University Assistance Act; therefore it is dependent on funds from the BIA to keep the college up and running.

Question 23: Do you believe that UTTC is a valuable institution and will you commit to providing funding for the college in future budget requests?

> Answer: I believe that tribal colleges are valuable institutions. If I am confirmed, I will meet with the BIA/Tribal Budget Advisory Council, OMB and Congress to gain an understanding of the budget priorities.

Education

I continue to be concerned about the backlog of new school construction in Indian country. While we have made progress in recent years in tackling the $1 billion school construction backlog, more must be done. We have children attending schools that are in abominable condition, and I believe this is preventing them from receiving a quality education.

Question 24. What new ideas do you have to help address this problem, and how do you plan to implement them?

> Answer: I believe I need a better understanding of the backlog before I can offer my opinions on how it should be addressed. If confirmed, I plan to meet with appropriate BIA staff in gaining the necessary insight and visit with tribes on the issue.

Senator Conrad

Economic Development
Slow economic growth and limited employment opportunities have typified life in Indian Country for far too long. While some tribes have seen success with gaming and other business opportunities, far too many tribes still suffer from a lack of jobs, high unemployment, and poverty. Despite a national unemployment rate of 6.1 percent, the jobless rate on the reservations in my state of North Dakota averages 63 percent.

Question 25. What creative ideas do you have to spur economic development in Indian Country?

> Answer: An office of Indian Energy and Economic Development has been officially established in the office of the Assistant Secretary for Indian Affairs. This office is charged with being innovative, collaborative, and results-oriented in working with tribes to maximize their economic potential. I plan on working closely with and supporting this office as it establishes its programs and projects with tribes.

Mandaree Streets Project: For the past three years, I have been working with the Bureau of Indian Affairs on the Mandaree Streets project. At issue was whether the project plans produced by the Bureau were defective, and, if so, did those defects result in increased project costs for the subcontractor that should be reimbursed?

As agreed to by all parties, a Professor in the Engineering Department at the University of North Dakota began reviewing the project to provide an independent analysis of the subcontractor's claim. The professor began his work in September of last year. Despite repeated requests for information from the BIA, the Professor did not receive the information he needed to reach a final amount owed to the subcontractor as a result of the defective plans. Now, BIA is attempting to gather the information that was requested on several occasions over the past year, further delaying resolution in this matter.

Question 26: Will you commit to working with me to reach a quick resolution on this longstanding matter?

> Answer: If confirmed, I will research this issue further.

Senator Dorgan

General Qualifications

Question: The vast majority of your professional career has been spent working for one tribe. Yet, if confirmed, you will be responsible for overseeing the Bureau's activities with regards to ALL tribes in the Nation. Can you describe your familiarity with the various issues that face all tribes, including those that are regionally based, and how your work experience has prepared you to address these wide-ranging issues?

> Answer: In the positions I held with Oneida, and in my current post of Associate Solicitor for the Division of Indian Affairs, I have been exposed to and advocated for national issues of great importance to Native Americans. This includes addressing the health care needs of Indian Country, increasing education funding ranging from Head Start funds to Johnson O'Malley appropriations, and developing professional benefits for law enforcement personnel. Working within the government structure of Oneida Tribe of Indians of Wisconsin and representing the needs of my fellow tribal members made me empathetic to the needs of Indians, Alaska Natives and tribal governments.
>
> If confirmed, I will seek input from the tribal leaders as well as the regional and national leadership. Armed with the empathy learned while representing a medium-sized, upper Midwest tribe, I will listen carefully for the nuances and distinctions that make each tribe and each region unique.

Question 28: Your two predecessors both resigned after serving less than 18 months each? Are you committed to serving the remainder of this Presidential term?

> Answer: If confirmed, I plan to serve the remainder of the Presidential term.

Question 29: What role do you believe Congress plays in fulfilling the federal trust responsibility?

> Answer: Under the Constitution, Congress has plenary authority over Indian affairs; therefore, Congress must assume ultimate responsibility for Indian affairs and for defining the nature and extent of the federal government's trust responsibility.

Question 30: How would you describe the Department of the Interior's trust responsibility to Indian tribes and Indian individuals?

> Answer: The Department of the Interior is the primary executive branch agency tasked by Congress with carrying out the trust responsibilities of the United States to Indian tribes and individual Indians. The federal government's trust responsibility to Indian tribes and individual Indians is founded in treaties between our government and the representatives of Indian governments and in the express statutory mandates from Congress defining that responsibility.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Dorgan

Question 31: There have been many lawsuits brought recently involving the scope of the federal trust responsibility to Indian tribes. Plaintiffs in many of these lawsuits argue that the common law of trusts applies to the federal government in its dealings with Indian tribes and Indian individuals. The federal agencies, in many cases, have argued that the duties of the federal government as trustee is limited to only those duties expressly stated in the relevant laws. Mr. Artman, how do you view the federal trust responsibility to (1) Indian tribes, and (2) Indian individuals? Do you believe the common law of trust applies in all cases involving Indian tribes and individual? If not in all cases, then what kinds of cases?

Answer: I view the federal trust responsibility as a solemn obligation of the United States that Congress in the exercise of its constitutional authority has tasked primarily to the Department of the Interior to protect and implement. In some instances, Congress has given the Department express statutory guidance on how to carry out that responsibility and in other instances Congress has left the decisions on how to carry out that responsibility to the discretion of the Secretary, recognizing that the Department may be a more flexible and responsive vehicle for discharging those responsibilities. I believe that the federal trust responsibility is defined in the first instance by the treaties ratified and statutes enacted by Congress because a breach of those responsibilities exposes the United States to liability, and only Congress has authority to waive the sovereign immunity of the United States. It is only when Congress does not define the nature and extent of the federal trust responsibility that courts are justified in applying the common law of trusts.

Question 32: The federal trust responsibility is one that has developed out of the historic relationship between the federal government and Indian tribes, but specifically a responsibility established by early decisions of the United States Supreme Court. The Supreme Court in Cherokee Nation v. Georgia (1831) specifically states that Indian tribes "are in a state of pupilage: their relation to the United States resembles that of a ward to his guardian." Do you believe the federal trust responsibility to Indian tribes and individuals needs to change? If so, how would you change it?

Answer: I believe the federal trust responsibility arises out of a dynamic relationship that has evolved and changed over time and will continue to do so. In the last 100 or so years we have seen the allotment policies give way to the tribal revitalization policies of the 1930s and, later, the termination policies of the 1950s and 1960s. For the last 30 years the trend has been to define the federal trust responsibility largely by the policies of self-determination and self-governance. I see more and more tribes willing to manage matters previously handled by the Department and accept the responsibility of that management. I would continue to encourage and facilitate this direction.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Dorgan

Question 33: Your responses to the Committee's questionnaire emphasize the importance of the federal government's trust responsibility to American Indians, though you also state the need for federal and tribal government partnerships to address economic development, education, and law enforcement needs of individual Indian communities. Can you elaborate on the factors that make-up a successful federal-tribal partnership?

Answer: The federal trust responsibility arises out of a dynamic relationship that has evolved and changed over time and continues to do so. For the last 30 years the trend has been to define the federal trust responsibility largely by policies of self-determination and self-governance. While I see more tribes willing to manage matters previously handled by the department and accept responsibility for that management, I believe tribes will benefit by working or partnering with the Department, and other government agencies, as they develop foundational systems needed by their tribes to support economic development, education, or law enforcement.

Question 34. Tribes have stressed to us time and time again that government-to-government consultation is very important and key to furthering policy objectives for Indian Country. However, too often I am told by tribal leaders that consultation does not happen until AFTER the Department has decided what the problem is and developed a solution WITHOUT tribal involvement. Will you commit to consulting with Indian tribes PRIOR to developing initial regulations or initial proposals to matters that directly impact Indian tribes? Too often tribes feel they do not have a voice in the decision-making on matters directly relevant to them because the Department fails to consult with them in the actual development of solutions. Another concern is that once tribes are given the opportunity to provide their comments, there is no meaningful response by the Department to those comments. This leads tribes and some lawmakers to believe that the Department has made up its mind prior to consulting with tribes. Will you commit to ensuring that meaningful responses are provided to tribal comments, and that tribal consultation becomes a meaningful dialogue.

Answer: If confirmed I will consult with tribes in a meaningful manner. I will actively listen and respond meaningfully whenever possible in order to promote a more effective government-to-government dialogue.

Senator Dorgan

***Cobell v. Kempthorne* Litigation**

Question 35. As you know, Senators McCain and Dorgan introduced a bill, S.1439, in July 2005 that would settle the *Cobell* litigation and related claims regarding the mismanagement of trust funds and assets (including lands and natural resources). Over the last several weeks, representatives from the Departments of the Interior, Treasury, and Justice have met with our staff in an effort to obtain passage of a settlement bill this congressional session. If confirmed, are you committed to obtaining a timely settlement of this litigation? Do you support a legislative settlement of the litigation and related claims in this congressional session?

Answer: As Secretary Kempthorne has indicated, the Department is committed to working with the Committee to find a just resolution to the *Cobell* litigation. If confirmed, I look forward to supporting that effort.

Question 36. Should the *Cobell* litigation be resolved, how do you propose dealing with similar claims that may arise in the future?

Answer: The *Cobell* litigation should be resolved, and any settlement should be comprehensively enough to ensure that similar claims are addressed.

Impact of *Cobell* Litigation on Indian Program Funding

Question 37. Please tell us what steps you might take to ensure that funding levels for tribal operating programs are protected during a time when defending the *Cobell* lawsuit raises pressures on federal officials to harbor funds to pay for defensive trust management practices? For example, tribes have raised concerns that more and more of the approximately $15 million in recurring water resource funding has, in recent years, been diverted to litigation activities of the BIA and away from tribal water program operations. The tribal program allocation in the Midwest Region has gone from $950,000 in 2000 to $200,000 in 2006, even as the national water program funding account, Water Rights Planning & Pre-Development, has been steadily requested and funded at $7.5 million. This would appear to be a result of pressures related to the *Cobell* lawsuit strategy rather than an objective distribution of funding according to need at the Reservation level.

Answer: If confirmed, I will work with tribes during the budget formulation process so that their concerns and priorities are addressed. Once the budget has been submitted, I will work with Congress on the appropriate funding for both trust and non-trust programs. At the same time, I am committed to fulfilling the Department's fiduciary trust responsibilities. Managing the Indian trust is one of the greatest responsibilities faced by the Department, and we must fulfill our responsibilities to our beneficiaries.

Senator Dorgan

Question 38: In your response to the Committee questionnaire, you state that you "have witnessed the ramifications of and sought resolution to lawsuits against the Department, [lawsuits] that debilitate the Department, the tribes engaged in the lawsuit, and the rest of Indian Country. These suits impede, directly and indirectly, Departmental initiatives and processes that benefit the whole of Indian Country." Can you describe with greater particularity the lawsuits you reference in your statement and explain these and other suits that impede the Department's work? In light of your view that litigation is debilitating to the Department, why does the Department continue to pursue litigation instead of negotiated settlements? If confirmed, would you continue to purse litigation or would you recommend other solutions for resolving pending litigation?

Answer: I do not contest the correctness of these suits, only that the litigation places an enormous strain on the Departmental personnel and impedes it from achieving its goals.

The most compelling example is the *Cobell* litigation. The multiple and voluminous requests for production of documents required many Department employees to suspend their normal duties for days and weeks on end in order to conduct searches for and reviews of documents responsive to those requests. To date, over 6 million documents have been produced. Many other employees, including a number of high-level managers, had to take large amounts of time out of their schedules to prepare for and engage in depositions and to give testimony in the various hearings over the years. Last summer's hearing about information security technology lasted for 59 days, during which other projects had to be delayed. In the course of this litigation there have been approximately 270 days of such hearings. Disconnection of some bureaus from the internet has caused huge inefficiencies, dramatically slowing down the normal processing of information necessary to fulfilling our responsibilities to Indian beneficiaries.

Tribal trust lawsuits cause similar disruption. The typical evaluation of the tribal claim involves a team of historians and economists traveling to one or more Departmental offices and spending two or three days interviewing employees and gathering documents. The document productions also must often occur at multiple locations throughout the Department and are often similar to those in the *Cobell* suit in terms of effort and time needed. Other examples include the Indian water rights litigation and lawsuits over education and reorganization issues.

The Department encourages the negotiated settlement of matters, but is often forced into litigation, either by the inability to reach agreement or to protect a principle important to the United States government. If confirmed, I will work with the Secretary, the Solicitor and the Department of Justice to determine the best solution to the lawsuits on a case by case basis. I will support the path that provides the best solution for all stakeholders.

Senator Dorgan

Land Fractionation and Probate

Question 39. The highly fractionated nature of Indian lands makes it difficult to manage and make productive. Do you believe that fractionation is a problem? What do you think can be done to minimize the land fractionation problem? What role should tribes and individual Indians play in the solution to the land fractionation problem?

> Answer: Fractionation is a problem that plagues Indian country, and I believe that it should be attacked in three ways. The first is through decreasing the transfers of interests to multiple owners through probate. The second is to conduct an aggressive re-purchase program. The third is to encourage individual Indians to consolidate their holdings.
>
> I would encourage the direct participation of the tribes and individual Indians in solving the fractionation problem. Current federal law allows owners of a highly fractionated parcel to request a sale of the parcel. Additionally individual owners may consolidate their interest through consolidation agreements and prepare wills to reduce the number of beneficiaries.

Question 40: Two reasons why land fractionation is such a problem is (1) the lack of wills being used by individual Indians, and (2) the long period of time the Department takes in probating Indian estates. How do you believe these two problems can be addressed?

> Answer: The American Indian Probate Reform Act created a uniform probate code for Indian Country which includes a single heir rule. In addition, through drafting a will, an individual Indian can designate a beneficiary, thereby helping to prevent additional fractionation of an already highly fractionated parcel.
>
> The Department recognizes the need to quickly and accurately distribute trust estate assets and has taken aggressive steps to reduce the backlog of probate cases. Through the continued dedication of additional resources and holding managers accountable for specific quotas, the Department is working to complete all backlog cases by the planned completion date of September 30, 2008.

Senator Dorgan

Question 41: Until this year, the Department provided will writing services to individual Indians. Why has the Department stopped providing those services? Do you believe providing individual Indians with assistance in writing wills is part of the federal trust responsibility? Even if you don't believe it is part of the trust responsibility do you believe it is assistance that the Department should provide given the problem of land fractionation?

Answer: Due to limited resources and the potential conflict of interest in advising an individual Indian to will his or her interest to fewer heirs, I believe the Department should not be involved in providing will drafting advice.

I do not believe it is part of the federal trust responsibility to provide will writing assistance to individual Indian landowners. One of the principal causes of fractionation is intestate succession in accordance with state law. Through the drafting of a will, an individual Indian can designate a beneficiary, thereby helping to prevent additional fractionation of an already highly fractionated parcel. We will assist individual Indians in finding competent legal counsel to draft a will, but I do not believe that Departmental staff should provide that service.

Economic Development

Question 42: Tribal communities continue to be the poorest in the nation. This is in part due to the high unemployment rate on reservations and the lack of sustainable economies in many tribal communities. You stated that economic development would be priority for you. What economic development initiatives do you think would help tribal communities?

Answer: An office of Indian Energy and Economic Development has been officially established in the office of the Assistant Secretary for Indian Affairs. This office is charged with being innovative, collaborative, and results-oriented in working with tribes to maximize their economic potential. I plan on working closely with and supporting this office as it establishes its programs and projects with tribes.

Senator Dorgan

Question 43: Do you agree that the limited ability of tribal governments to tax individuals and enterprises on Indian lands hinders the ability of tribes to develop infrastructure to support strong economies? If so, how can the Department assist in resolving this problem? Do you believe Congress should play a role in resolving this problem, and if so, what options should Congress consider?

Answer: If confirmed, I will look forward to learning more about and working with Congress and the rest of the Administration on this issue.

Question 44: Some tribes have come to Congress stating that it is difficult for them to develop their lands due to the trust or restricted status of their lands. Many tribes are finding it difficult to obtain conventional financing because of the status of their lands. In some cases, tribes are asking Congress to take a portion of their lands out of trust. Do you believe that the trust or restricted status of Indian lands has also been a factor in the limited development of tribal economies? If so, how can this problem be resolved?

Answer: It is true that most Americans have the ability to monetize their real property in the financial markets, giving them access to capital for investment, and that tribes lack this ability. However, this is an issue that needs to be addressed, discussed, and resolved by the tribes themselves as they look at their needs and plan their future.

Education

Question 45: In our responses to the Committee's questionnaire, you state that increasing school construction is a priority for you. How do you intend to increase school construction?

Answer: If confirmed, I plan to meet with appropriate personnel in the Facilities and Education offices to get an understanding of the school construction process so that I can further this goal.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Dorgan

Question 46: As you know, a federal court in South Dakota recently ruled that the Department cannot move forward on plans to reorganize Education Line Officers. This decision was based, in part, on the Department's failure to adequately consult with impacted Indian tribes and provide sufficient information to the tribes. A similar lawsuit has now been filed in federal court in New Mexico. If confirmed, how do you plan to proceed with the reorganization of the Education Line Officers? Does the Department plan to initiate more consultation with impacted Indian tribes in this matter?

Answer: The Department is complying fully with the Preliminary Injunction issued by Judge Schreier of the U.S. District Court for South Dakota on July 14, 2006. I am informed that the Bureau of Indian Education has scheduled additional consultation meetings to be held in Fort Yates, North Dakota on Thursday, September 28, 2006 and in Pierre, South Dakota on Friday, September 29, 2006. The BIE will provide the tribes with information and answer questions regarding any aspect of the restructuring plan, e.g., office locations, staff positions, and rationale. We look forward to suggestions and alternative proposals presented by the tribes that will assist the BIE with supporting BIE-funded schools, and improve student learning and Adequate Yearly Progress requirements under the No Child Left Behind Act.

Additionally, BIE staff have held two settlement meetings with the Navajo Nation to help resolve their complaint. We have received a ruling from Judge Johnson of the U.S. District Court for New Mexico on Friday and are examining his decision.

Question 47: Six years ago, Congress established the National Fund for Excellence in American Indian Education. If confirmed, you will be an honorary board member of this Foundation. The Department is authorized to provide startup funds for the Foundation, but has yet to do so. The Committee understands the funds have been identified for transfer to the Foundation. If confirmed, will you commit to locating and transferring startup funds to this Foundation in a timely manner?

Answer: If confirmed, I will work with the Foundation to help it fulfill its mission. The Bureau of Indian Education's new director met with the Foundation's representative on August 2, and is scheduled to conduct a follow up meeting on September 18 to discuss a strategic business plan, including administrative support for the Foundation. We are also working with the Foundation to help them comply with requirements that will allow for the transfer of individual endowment funds.

Senator Dorgan

Land into Trust Process

Question 48: Mr. Artman, the GAO recently released a report that was sharply critical of the great variation in how fee to trust land applications are handled by the BIA. What are you going to do to streamline the land-into-trust process so that applications are no longer taking years to have a decision? Do you support the concept of expediting applications for housing and non-gaming economic development on lands within reservation boundaries or contiguous to existing reservation land?

Answer: If confirmed, I will study the current land-into-trust process and the impact the draft 151 regulations will have on it. The draft regulations will result in expedited procedures; however, I will continue to seek methods to improve the process.

Federal Recognition

Question 49: This Committee is aware that the administrative process for acknowledging an Indian tribe is a solemn undertaking, as it establishes a government-to-government relationship between a newly recognized tribe and the federal government. While it is important that a petitioning group substantiate that it meets the mandatory criteria for recognition, we also know that petitioners may be in the process for decades, and that groups that sought status clarification in the 1970s still have not received even a preliminary determination. Yet, repeatedly, the BIA opposes legislative recognition, saying that groups should go through the administrative process. What are your thoughts on how the federal acknowledgement process might be improved to give petitioning groups a more timely decision as well as be a fair process?

Answer: I agree that acknowledgment of the continued tribal existence of another sovereign is one of the most solemn and important responsibilities delegated to the Secretary of the Interior. Although Congress has the authority to recognize a "distinctly Indian community" as an Indian tribe, it is important that all interested parties have the opportunity to review all the information available before recognition is granted. I therefore support the regulatory process it provides a deliberative, uniform and fair mechanism to review and consider groups seeking Indian tribal status. I do, however, recognize that some legislation may be needed given unique historical circumstances of certain Indians throughout the United States.

I will review the General Accountability Office's (GAO) report on improvements needed in the federal acknowledgment process and its recommendations of timeliness and transparency. I believe that increased staffing, appropriate contracting, and improved technology for the federal acknowledgment process will lead to speedier review and evaluation of the petitioners' voluminous documentation, as well as increasing the transparency of the decisions. I will work with the Committee and officials to look for other ways to improve the federal acknowledgment process.

Senator Dorgan

Expanded Self-Governance Authority

Question 50: As you know, the Indian Self-Determination Act has proven to be a successful tool in allowing tribes to conduct self-governance. Currently, tribes may only contract for those programs under the Bureau of Indian Affairs and the Indian Health Service. Do you believe that the contracting authority of tribes should be expanded beyond the Bureau of Indian Affairs and the Indian Health Service? If so, what programs do you believe contracting authority should be expanded to?

Answer: The contracting authority of Indian tribes under the Indian Self-Determination Act already goes beyond programs of the Bureau of Indian Affairs and the Indian Health Service. It currently extends to programs administered by either Secretary for the benefit of Indians for which appropriations are made to agencies other than the Departments of the Interior or Health and Human Services, and to programs for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

Energy Development on Indian Lands

Question 51: Energy development is an issue that many tribes are looking at for economic development. Those tribes that have been successful in energy development have usually done so with the assistance of private sector energy companies. How do you think the Department can assist tribes in the development of energy resources on tribal lands?

Answer: The Department has recently formed the Office of Indian Energy and Economic Development. This office was specifically formed to combine the resources within the Department that focus on economic advancement and energy development, allowing these resources to work in concert to foster energy development. This office also has the responsibility of administering the Department's portion of Title V of the recently enacted Energy Policy Act of 2005—including Tribal Energy Resource Agreements—which will provide significant opportunities for tribal self-management of energy development. Draft regulations implementing the Tribal Energy Resource Agreements section of the law were recently published and will be finalized by the end of the year.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Dorgan

Question 52: Do you think there needs to be changes to federal law to increase the level of energy development on tribal lands, and if so, what changes do you think need to be made?

Answer: If confirmed I will review the existing federal laws to see if revisions should be proposed.

Question 53: Do you believe tribal utilities are helpful in the development of energy resources on tribal lands? How do you believe the Department can strengthen and assist tribes in developing more tribal utilities?

Answer: I consider formation of tribal electrical utilities to be of critical importance in developing self-sustaining economies not wholly dependent upon energy sources outside the reservation. I understand that, on March 13 and 14, 2006, the Office of Indian Energy and Economic Development sponsored a tribal workshop hosted by the Aha Macav Power Service, a tribal utility of the Ft. Mojave Indian Tribe in Mohave Valley, Arizona. Numerous tribes attended this conference to learn about acquiring electric utility assets from incumbent cooperatives, municipalities, or investor owned electric utilities; how utilities contribute to the economic health and sovereignty of a tribe; and how to access transmission capacity. I also understand that the Office is working with individual tribes on development of electrical utilities.

Question 54: Do you believe it would be beneficial for the Department to work with people with energy experience at the Department of Energy to develop and strengthen energy development on tribal lands?

Answer: The Office of Indian Energy and Economic Development has been working extensively with their counterparts at the Department of Energy (DOE), as well as DOE laboratories such as the National Renewable Energy Laboratory, Argonne National Laboratory, and Sandia National Laboratories over the last few years. I will support the efforts of the Office of Indian Energy and Economic Development in pursuing these types of collaborations on Indian energy development.

Question 55: During your tenure at the Department, did the Department work with the Indian Energy Office at the Department of Energy? If confirmed, will you commit to working with the newly created Indian Energy Office at the Department of Energy?

Answer: My understanding is that the Department of Energy is currently in the process of establishing the DOE Indian Energy Office and selecting its leadership. If confirmed, I will ask my Office of Indian Energy and Economic Development to establish the same good working relationship with the DOE Indian Energy Office that it currently has with DOE.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Dorgan

Question 56: Section 1813(b)(1) of the Energy Policy Act of 2005 requires the Department to conduct an analysis of historic rates of compensation paid for energy rights on tribal lands. After conducting the analysis what conclusion was reached in the draft report regarding the historic rates of compensation paid to tribes? To what extent was the Bureau of Indian Affairs responsible for or instrumental in setting these historic rates of compensation? In conducting your analysis did you find any rights of way that were granted in perpetuity? If so, when were these rights of ways granted and under what authority? What compensation did the tribe receive at the time the right of way was granted, and what compensation is the tribe currently receiving for that right of way in perpetuity?

Answer: I have been informed that, due to time and resource constraints, the Department was unable to perform a comprehensive analysis of the tens of thousands of energy rights-of-way across tribal land. In addition, access to both tribal and company proprietary information limited our ability to develop a comprehensive analysis. Therefore, we used a "case study" approach based upon volunteer information from four tribes and one company. Compensation for energy rights-of-way vary considerably based upon what terms were negotiated and consented to by the tribes. Consent from the tribe for a right-of-way has been a requirement for Department approval since 1934 for tribes organized under the Indian Reorganization Act, and since 1951 for all tribes. The research did reveal cases of rights-of-way that have been issued in perpetuity, and if confirmed I will collect, review, and share with you the information regarding authority and compensation for perpetual grants.

Question 57: In the draft Section 1813 report, the Department never mentions its trust responsibility to Indian tribes. Why doesn't the report include a discussion of trust responsibility and how the trust responsibility influences energy policy on tribal lands? Because the Department is involved in the approval of rights of ways across tribal lands do you believe the report should include a discussion of how the Department's involvement fulfills its trust responsibility to Indian tribes?

Answer: We have received many thoughtful comments on this draft report, including comments on the trust responsibility of the United States. As we develop the final report, we intend to include additional information on a number of issues.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Dorgan

Question 58: The draft Section 1813 report makes little to no mention of treaties with Indian tribes and their relationship to federal energy policy and use of tribal lands. Why do you think this is, and do you believe the draft report should include a discussion on these issues? Although every treaty is different and not all tribes have treaties, do you believe a discussion of these issues would be informative and relevant to the overall report? And even though each treaty is unique, wouldn't you agree that examples from specific treaties would be information or relevant to the analysis in the report?

Answer: We have received many thoughtful comments on this draft report, including comments on treaties. As you are aware, there are a significant number of treaties and they vary significantly with respect to their terms. As we develop the final report, we intend to include additional information on a number of issues, including treaties.

Question 59: Section 1813 specifically requests recommendations for appropriate standards and procedures for determining compensation for rights of ways on tribal lands. Why do you believe the Department failed to include recommendations? The draft report characterizes the suggestions offered in it as "options", rather than recommendations. Don't you believe that Congress would have been informed by any recommendations you could have made based on your agency expertise and study of this issue?

Answer: This is a draft report where we solicited input on the information that had been collected and presented. We are currently in the process of analyzing all of the information provided during the comment period. We will give careful consideration to the many useful and informative comments we received and they will guide our development of the final report.

Question 60: The draft Section 1813 report provides an option for Congress to condemn tribal lands. The citations in the report are unclear and inadequate. Under what specific authority do you believe Congress has to condemn lands, and please be more specific than what is cited in the draft report?

Answer: The Department believes that this authority resides under the plenary power of Congress under the Constitution, which includes the power to abrogate treaties and condemn land within the United States. The inherent right of the United States to condemn both allotted and tribal lands has been recognized by Congress in 25 U.S.C. 341; Congress also specifically authorized condemnation of allotted lands at 25 U.S.C. 357. The Supreme Court has upheld Congress's power to authorize specific rights-of-way across particular tribal tracts.

Senator Dorgan

Development of Tribal Water Systems

Question 61: In your responses to the Committee's questionnaire, you state that development of tribal irrigation systems is an issue that you intend to address if confirmed as Assistant Secretary. Adequate tribal irrigation systems are critical to tribes in the West, but are also very costly. How do you intend to increase the development of tribal irrigation systems?

Answer: If confirmed, I will meet with tribes and the BIA irrigation personnel to expand my understanding of tribal irrigation systems and associated issues so that I can make an informed decision on appropriate development.

Question 62: Will you commit to developing stronger relationships between the Bureau of Indian Affairs and other bureaus within the Department on matters relating to Indian tribes, including the development of tribal water systems? If confirmed, will you commit to providing the Committee with a progress report on the efforts you have taken within your first six months on strengthening the Bureau of Indian Affairs relationship with other bureaus within the Department?

Answer: Strong working relationships and effective communication between the Bureau of Indian Affairs and its sister bureaus within the Department of Interior on all matters relating to Indian tribes, are crucial to the successful discharge of the Department's responsibility to Indian tribes. As Associate Solicitor, I have formed good working relationships with many senior-level officials outside of the Bureau of Indian Affairs. I am committed to strengthening the Bureau's relationship with the Department's other bureaus and, if confirmed, I look forward to updating the Committee on my efforts.

Water Litigation

Question 63. In your responses to the Committee questionnaire, you stated that litigation, including litigation over Indian claims to water, is stymieing the Department. How many Indian water rights cases and/or settlements are currently pending before the Department? How do you propose resolving these matters in a timely fashion?

Answer: There are approximately 26 active adjudication cases that involve the Department. The Department has established 19 water rights negotiation teams. The process established by the "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims," 55 Fed. Reg. 9223 (March 12, 1990) is an appropriate way to proceed with resolving water rights issues.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Dorgan

Question 64: Have you been involved in the negotiation and/or implementation of Indian water rights settlements during your tenure at the Department?

Answer: I have had no direct involvement with the negotiation or implementation of water rights settlement during my tenure in the Department.

Question 65: What is your view of the well-established role of the federal team for making settlement recommendations to the Secretary and the guidelines that govern the formulation of the federal team's recommendation to the Secretary?

Answer: The Criteria and Procedures provide a workable process that allows the federal team to make a recommendation to the Department's Working Group on Indian Water Settlements. After a thorough vetting of issues and consultations with the Office of Management and Budget and the Department of Justice, the Working Group then makes a recommendation to the Secretary. This process allows the Secretary to exercise his discretion in formulating a federal negotiation position.

Question 66: Do you view the federal guidelines for negotiating water settlements (as set forth in the Code of Federal Regulations) as strict rules to follow or as advisory principles that can be reinterpreted differently for each settlement? Do you believe it is appropriate for the federal government to apply the federal guidelines in a way contrary to administrative precedent, and if so, what do you think should be the legal standard of review applied to the new application of the guidelines?

Answer: The Criteria and Procedures are guidelines that provide a structure for federal involvement in negotiations and for development of a federal position. They are guidelines, not legal principles, with the flexibility to meet the unique needs of each settlement and allow the Secretary to exercise his discretion.

Question 67: Have the federal guidelines for negotiation water settlements, as written or applied, changed during your tenure at the Department? If so, please explain how.

Answer: No. My understanding is that the Department has been consistent in its application. See answers to above questions.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Dorgan

Question 68: What is your view of the proper role of the Office of Management and Budget and the Department of Justice under the federal settlement guidelines set forth in the Code of Federal Regulations?

Answer: The Criteria and Procedures provide a workable process that allows the federal team to make a recommendation to the Department's Working Group on Indian Water Settlements. After a thorough vetting of issues and consultations with the Office of Management and Budget and the Department of Justice, the Working Group then makes a recommendation to the Secretary. This process allows the Secretary to exercise his discretion in formulating a federal negotiation position. If confirmed, I will review this process to determine, for the stakeholders, the efficiency of the process.

Question 69: If confirmed, how will you work with other federal agencies and offices to resolve the pending water litigations?

Answer: If confirmed, I will be an active member of the Department's Working Group on Indian Water Settlements and work closely with the Secretary's Office, the Office of Management and Budget, and the Department of Justice.

Assistant Secretary – Indian Affairs – Designate Artman

Senator Dorgan

Question 70: This question is over thirty year relicensing battle over the Cushman Dam Hydroelectric facility on the Skokomish River, in Washington State. I understand that the D.C. Circuit Court of Appeal for the D.C. recently issued an opinion upholding the Department interior's absolute authority to issue mandatory 4(e) conditions. For the Cushman Project, the Interior Department issued its mandatory 4(e) conditions in 1997, which were intended to protect the Skokomish Reservation. The Tribe views this recent decision as a major victory in its efforts to address the many impacts that this Project has had on the Tribe's Reservation, its people, and its Treaty protected resources. The Court in upholding Interior's 4(e) authority, remanded the Cushman license back to FERC to reissue the license or to engage in a debate with Interior on the merits of the conditions and seek to change Interior's view of these conditions. The Skokomish Tribe wants to ensure that Interior continues to support the original conditions and that it advocates as the Tribe's trustee for them in any discussions with FERC. Does the BIA, the Tribe's most important advocate within Interior, intend to work to ensure that the original 4(e) conditions remain in place and are ultimately included in the final license?

Answer: The Bureau of Indian Affairs is currently consulting with the Skokomish Indian Tribe to address the most appropriate response to the recent D.C. Circuit opinion regarding the Cushman Hydroelectric Project.

Senator Dorgan

Telecommunications

Question 71: The service penetration rate in tribal communities continues to be dramatically lower than the rest of the nation. Tribal communities are the very last communities to receive equitable service and universal access to telecommunications service promised by the Communications Act of 1934. Given your experience in telecommunications, how do you think tribes can obtain increased access to telecommunications services for their tribal communities? How do you think the Department can be helpful in increasing access to telecommunications services on Indian lands?

Answer: Introduction of new technologies obviates pulling wire to each house to deliver telecommunications services, an obstacle to provision of telecommunications services in previous generations to sparsely population and vast reservations. Today, high speed data and voice communications may be delivered wirelessly over large swatches of land, either through traditional cellular infrastructure, newer 802.11 wi-fi technology, satellite delivery, or a hybrid of the aforementioned or other systems. This reduces substantially cost, manpower, and time for creation of a modern telecommunications infrastructure. The Federal Communications Commission and other government agencies are studying this topic and developing solutions. Some tribes invested in their own solutions and can provide valuable insight into this dialogue. If confirmed, I will work with other departments, agencies, commissions, and tribes to contribute to this process and commence delivery of solutions to the Indians and Alaska Natives.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF DEPARTMENT/AGENCY NOMINEES

Instructions: Nominees are asked to provide typed answers to each of the following questions. It is requested that the nominee type the question in full before each response. Do not leave any questions blank. Type "None" or "Not Applicable" if a question does not apply to the nominee. Please return printed answers to Committee.

Begin each section (i.e., "A", "B", etc.) on a new sheet of paper.

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names or nicknames used.)
Carl Joseph Artman, III

2. **Position to which nominated:**
United States Department of the Interior, Assistant Secretary for Indian Affairs

3. **Date of nomination:**
August 1, 2006

4. **Address:** (List current place of residence and office addresses.)
7 Pipestem Court, Potomac, Maryland 20854

5. **Date and place of birth:**
March 15, 1965, Des Moines, Iowa

6. **Marital status:** (Include maiden name of wife or husband's name.)
Married, Wendy Sue Artman (Daugs)

7. **Names and ages of children:** (Include stepchildren and children from previous marriages.)
Bennett Hunter Artman, 5; Caleb Joseph Artman, 2

8. **Education:** (List secondary and higher education institutions, dates attended, degree received, and date degree granted.)
University of Denver, College of Law, Denver, Colorado; 2001-2003, LLM (Natural Resources and Environmental Law), 2003
University of Wisconsin School of Business, Madison, Wisconsin; 1997-1999, MBA, 1999
Washington University School of Law, St. Louis, Missouri; 1988-1991, JD, 1991
Columbia College, Columbia, Missouri; 1985-1987, Bachelor of Arts, 1987
University of Missouri, Columbia, Columbia, Missouri; 1983-1984

9. **Employment record:** (List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment, including any military service.)

Employer	Title or description	Location	Employment Dates
U.S. Department of the Interior	Associate Solicitor of Indian Affairs	Washington, D.C.	February 2006 to Present
Oneida Tribe of Indians of Wisconsin	Chief Counsel	Oneida, WI	December 2002 to February 2006
Self - Sole Practitioner	Attorney	Golden, CO	September 2001 to December 2002
Qubit Technology	General Counsel	Golden, CO	April 2000 to September 2001
VoiceStream Wireless	General Manager	Milwaukee, WI	November 1999 to April 2000

Self - Consultant	Consultant	Milwaukee, WI	April 1999 to October 1999
Airadigm Communications	Vice President - Chief Operating Officer	Little Chute, WI	October 1995 to April 1999
Oneida Tribe of Indians of Wisconsin	Director of Federal Affairs	Washington, D.C.	October 1994 to October 1995
Wiffel Communications (Williams Companies)	Director of Government Affairs	Washington, D.C.	February 1994 to October 1994
Representative Michael Oxley	Legislative Assistant	Washington, D.C.	August 1991 to February 1994
Representative Michael Oxley	Intern	Washington, D.C.	January 1991 to May 1991
Weiss and Associates	Law clerk	St. Louis, MO	January 1990 to December 1990
American Bar Association	Legal Intern	Washington, D.C.	June 1989 to August 1989
U.S. Department of Education	Assistant in Office of Legislation and Office of Intergovernmental and Interagency Affairs	Washington, D.C.	September 1987 to August 1988
U.S. Committee on the Bicentennial of the Constitution	Administrative Assistant	Washington, D.C.	Summer 1987

10. **Government experience:** (List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments, other than those listed above.)

Presidents Board of Advisors on Tribal Colleges and Universities, Board Member, July 2002 to May 2006

11. **Business relationships:** (List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.)

Board Positions

Haskell Indian Nations University, Board of Regents, alternate, Winter 2005 to February 2006
Oneida Nation Electronics, Board of Directors, April 2003 to October 2003
Qubit Technology Inc., Secretary, Board of Directors (a non-voting position), July 2000 to April 2001

Airadigm Communications, Inc., Board of Directors, 1996 to 1999
Personal Communications Industry Association, Board of Directors, 1998 to 1999
Personal Communications Industry Association, Chairman, Small Business Committee, 1998
GSM-Ericsson User Group, Chairman, Regulatory Subcommittee, 1998
GSM Alliance, Management Committee, 1998

Officer
Airadigm Communications, Chief Operating Officer, 1995 to 1998

Consultancies
Lucent Technologies, April 1999 to August 1999
Oneida Tribe of Indians of Wisconsin, June 1999 to October 1999

12. **Memberships:** (List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable and other organizations.)

Wisconsin State Bar Association, Current member
Colorado State Bar Association, Current member

13. **Political affiliations and activities:**

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.

None

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

Bush-Cheney '04 Wisconsin Steering Committee, Vice Chair

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $500 or more for the past 10 years.

None

14. **Honors and awards:** (List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.)

- Keystone Scholarship, 1985 – 1986
- Cornerstone Scholarship, 1985 – 1987
- Lucinda van Meter Haynie Scholarship, 1985 – 1987
- Oneida Tribal Scholarship, 1986 – 1987
- (The above scholarships were received in college and the dates are approximate)

15. **Published writings:** (List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.)

- Wireless Week, April 28, 1997: "Guest Opinion: Brand Identity Critical"
- Federal Communications Law Journal, volume 46, December 1993: "The Cable-Telco Cross-Ownership Provision: First Amendment Infringement Through Obsolescence" (researched and contributed to writing of primary author Congressman Michael Oxley) (Please see attached).

16. **Speeches:** Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of on topics relevant to the position for which you have been nominated.

Please see attached three (3) speeches.

17. **Selection:**

(a) Do you know why you were selected for the position to which you have been nominated by the President?

The President nominated me to this position because of my experience working with and for tribal governments and Native Americans.

(b) What in your background or employment experience do you believe affirmatively qualifies you for this particular appointment?

The following affirmatively qualifies me for the position of Assistant Secretary for Indian Affairs:

I have experience working with tribes in numerous positions, thereby gaining a multi-faceted perspective on the problems and opportunities in Indian Country, how tribes position themselves to cope with these issues, and the Federal Government's interaction with tribal governments and Indians.

As Associate Solicitor for Indian Affairs, I work within the legal parameters of the Department of the Interior's unique relationship with tribes. In this position, I have worked with the Department's policy makers to craft solutions to tribes' unique needs while ensuring the legal integrity of the Department's actions. I have witnessed the ramifications of and sought resolution to lawsuits against the Department, that debilitate the Department, the tribes engaged in the lawsuit, and the rest of Indian Country. These suits impede, directly and indirectly, Departmental initiatives and processes that benefit the whole of Indian Country.

As chief counsel for the Oneida Tribe of Indians of Wisconsin, I represented the Tribe and dealt with obstacles faced by the Tribe within the Bureau of Indian Affairs. These obstacles may have been caused by ongoing litigation, bureau processes bogged down by lack of funding or personnel, an unanticipated increase in tribal participation, or other issues. As tribal counsel, I avoided interminable court battles, by seeking instead expeditious resolution to matters through imaginative solutions that perhaps changed the

onus of responsibility or developed partnerships focused on the accomplishment of a single task.

I have managed and engaged, at varying levels, in business development within Indian Country as Chief Counsel and Chief Operating Officer at Airadigm Communications (a telecommunications company fifty percent owned by the Oneida Tribe). Indian Country has unique business development and managerial issues in which I have experience, which I can bring to the fore when dealing mediating a path between tribal needs and the Department's role as the trustee, facilitator, liaison, or other role it may play in working with the tribes to realize their goals.

I come to this nomination as a lawyer, manager, and business person that has realized both success and failure with businesses. From the former I have garnered humility and noted the path that led to the success; from the latter I relish the lessons taught by the failures and look at a proposal's potential failure with an even more jaundiced eye, seeking to develop both a measured and balanced progression. I understand well that neither a person nor an organization can become paralyzed within the dichotomy of success or failure, but must progress with measured expeditiousness, especially when participating or leading in the resolution of many of the crises within Indian country.

In addition, my experience in the legislative process and executive policymaking contributes to an overall understanding of what opportunities face the Assistant Secretary for Indian Affairs.

Conclusion:

Both my experience and education have prepared me to be the Assistant Secretary for Indian Affairs by providing me with a unique insight into tribal government operations, the needs of Indian country, experience in many facets of organizational and financial management, and the legal and policy penumbra under which all this resides.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations, or business organizations if you are confirmed by the Senate?

I serve currently as the Associate Solicitor for Indian Affairs for the U.S. Department of the Interior and will terminate duties associated with that position if confirmed.

2. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, please explain.

No, I do not have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service with the Government.

3. Do you have any plans, commitments, or agreements after completing government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization?

No, I do not have any plans, commitments, or agreements after completing government service to resume employment, affiliation, or practice with any previous employer, business firm, association, or organization.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

No person or entity has made a commitment to employ me in any capacity after I leave government service.

1. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

Yes, if confirmed, I expect to serve out my full term or until the next Presidential election.

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers.

I am constrained by no financial arrangements, deferred compensation agreements, or other continuing dealings with business associates, clients, or customers. Please see the attached Ethics Agreement for additional information.

2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

I have no investment, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which I have been nominated. Please see the attached Ethics Agreement and financial disclosure information.

3. Describe any business relationship, dealing, or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

I was Chief Counsel for the Oneida Tribe of Indians of Wisconsin prior to the appointment as Associate Solicitor for Division of Indian Affair and to this nomination to the position of the Assistant Secretary for Indian Affairs. Potential conflicts of interest issues were reviewed by the Department's Ethics Office as part of the appointment to Associate Solicitor and subsequent to the nomination. Please refer to the attached Ethics Agreement for formal resolution.

4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy.

I have not engaged in activity in the past 10 years in which I have directly or indirectly influenced the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy.

5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.)

In addition to the assertions made in the Ethics Agreement, I will consult with the Department of the Interior's Ethics Office if potential issues arise.

6. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?

Yes, a written agreement has been drafted by the Department's ethics officer and submitted to the Committee.

D. LEGAL MATTERS

Have you ever been disciplined or cited for a breach of ethics by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, please explain.

No, I have not been disciplined or cited for a breach of ethics by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group.

Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county, or municipal law, regulation, or ordinance, other than for a minor traffic offense? If so, please explain.

No, I have not been investigated, arrested, charged, or held by any Federal, State, tribal or other law enforcement authority for violation of any Federal, State, county, tribal or municipal law, regulation, or ordinance.

Have you or any entity, partnership or other association, whether incorporated or unincorporated, of which you are or were an officer ever been involved as a party in an administrative agency proceeding or civil litigation? If so, please explain.

No entity, partnership, or association has been involved in an administrative agency proceeding or civil litigation while I served as an officer.

Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, please explain.

No, I have not been convicted of any criminal violation.

Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination.

I know of no additional information that should be disclosed in connection with my nomination.

E. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by congressional committees?

If confirmed as Assistant Secretary for Indian Affairs, I will comply, to the best of my ability, with deadlines for information set by congressional committees.

2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistle blowers from reprisal for their testimony and disclosures?

If confirmed as Assistant Secretary for Indian Affairs, I will comply with the laws, regulations, and Departmental manual guidelines and mandates associated with the protection from reprisal of congressional witnesses and whistle blowers for proffered testimony or disclosures.

3. Will you cooperate in providing the committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee?

If confirmed as Assistant Secretary for Indian Affairs, I will cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee.

4. Please explain how it confirmed, you will review regulations issued by your department/agency, and work closely with Congress, to ensure that such regulations comply with the spirit of the laws passed by Congress.

If confirmed, the Office of the Assistant Secretary for Indian Affairs will achieve the following when drafting regulations:

1) Compliance with the laws passed by Congress;
2) Tribal input through the tribal consultation process prior to and during the drafting of regulations;
3) Communications with the relevant congressional committees, when appropriate, prior to and during the drafting of regulations; and
4) Inclusive review of the public comments.

5. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?

If confirmed, I will, when appropriate, appear and testify before any duly constituted committee of the Congress when requested.

F. GENERAL QUALIFICATIONS AND VIEWS

1. How does your previous professional experiences and education qualify you for the position for which you have been nominated?

In addition to the answer to A(17)(b), the following serves to illustrate how my professional experiences and education qualify me to serve as the Assistant Secretary for Indian Affairs.

Experience

My management experience has exposed me to a broad array of workplace scenarios, organizational objectives, and human resources. Each experience has offered me another facet of how the people in an organization work to achieve a goal. For example, the law office illustrates a situation in which people, with a generally uniform set of skills, work within the deep complexities of a law suit or legal question to achieve uniformly the goals of the client. In the telecommunications arena, I worked with a large group of people whose skills ranged from engineering to finance to marketing or to real estate. The challenge, in such a scenario, was to focus and organize these disparate skills into separate, but cohesive, units that achieved a single goal in a timely and cost-efficient manner.

The common denominator in any management situation is proactive and transparent communications throughout the organization and leadership. Without such communications, people work without understanding the importance of the milestones. Global understanding of the interim and final goals, and alterations therein, promotes ownership of the goals by the whole organization, and allows the best ideas and people to rise to the challenges presented to them. In addition, experience that elucidates leadership is critical to good management.

In addition to the management and business experience, I served as both Chief Counsel and Director of Federal Affairs for my Tribe, the Oneida Tribe of Indians of Wisconsin. In those positions I worked to promote the betterment of the Tribe, developed insight into the acute needs of all tribes, came to understand how tribal governments perceive the Department of the Interior, and fought to achieve the realization of the tribal expectations of the relationship between the tribes and the Department of the Interior. By serving my Tribe in the above positions and serving my country and Indian Country as Associate Solicitor for the Division of Indian Affairs, I have coalesced the intricacies of this relationship, both expressed through laws and treaties and understood through years of working with one another. As such, I am prepared to serve both the Secretary of the Interior and his fiduciary constituents in Indian Country.

Education:

I have a law degree from Washington University School of Law, a master of law in natural resources and environmental law and policy from the University of Denver College of Law, and a master in business administration from the University of Wisconsin School of Business. The law degrees provide an academic foundation for the work that interests me and force me to approach

issues from a particularly methodical manner. The education attained during the business masters program has helped me tackle successfully issues ranging from finance and financial management, marketing, and organization management.

Conclusion:

Both my experience and education have prepared me to be the Assistant Secretary for Indian Affairs by providing me with a unique insight into tribal government operations, the needs of Indian country, experience in many facets of organizational and financial management, and the legal and policy penumbra under which all this resides.

2. Why do you wish to serve in the position for which you have been nominated?

I view the opportunity to serve as Assistant Secretary for Indian Affairs as a critical chance to participate in ending some of the issues that have debilitated the Department of the Interior's role in Indian Country and evolving the foundational relationship between tribal governments and the Department. The Secretary has made positive attempts to ascertain the goals and needs of tribal governments. However, ongoing litigation overshadows the benefits Indian Country derives from the Department. If the Assistant Secretary's office expects to improve services it provides to tribes, it must emerge from the shadows of litigation and face head-on the challenges that lie before it. If confirmed as Assistant Secretary, I will promote proactive interaction with the tribal governments and the individual Indians they serve. I will promote proactive development of new initiatives and better execution of current programs within the statutes, regulations, treaties, and common law that guide our actions.

3. What goals have you established for your first two years in this position, if confirmed?

I will work with the Secretary of the Interior and the relevant congressional committees to develop the specific goals for my tenure, if confirmed, as Assistant Secretary for Indian Affairs. I expect the goals will include methods to improve education and jump-start school construction projects throughout Indian Country; water issues including the identifying specific Indian water settlements to conclude and ascertainable methods to mitigate or eradicate the ongoing degradation of tribal irrigation systems; actionable plans to increase law enforcement presence on reservations, and a cooperative, multi-party plan to eliminate the cause and symptoms of methamphetamine abuse on the reservation.

4. What skills do you believe you may be lacking which may be necessary to successfully carry out this position? What steps can be taken to obtain those skills?

I cannot assess at this pre-confirmation juncture the skills I may not possess to successfully carry out this position, if confirmed. Upon discovery of a need to compensate for lack of necessary skills, I will take the necessary steps to obtain those skills for myself, or for the organization through the hiring of personnel with the requisite skills set or through use of education resources within the Department, such as the National Indian Programs Training Center in Albuquerque, NM.

5. Please discuss your philosophical views on the role of government. Include a discussion of when

you believe the government should involve itself in the private sector, when society's problems should be left to the private sector, and what standards should be used to determine when a government program is no longer necessary.

My views, within the context of this questionnaire will be limited to interaction of the United States government with tribal governments. Even with such a limitation, a discussion of the intertwined relationships between two sovereigns could encompass volumes, as has been illustrated by many historical and legal scholars.

From earliest treaties signed between the tribes and representatives of a new-born country to the development of the trust doctrine in the acts of the three branches, and in the acts that dot the historical landscape shared by the sovereigns, the Federal Government has exerted a strong involvement in Indian Country. The depth of the involvement has changed through eras. In the current era of self-determination and self-governance, Federal Government involvement has not lessened, but the purpose of such acts has changed.

While tribal governments tackle many of the issues within the reservation and of great pertinence to their membership, some problems are too large for many of these governments to face on their own. Some of the problems may be traced back to promises made or actions taken a century or more ago by the Federal Government, and the latter cannot abandon Indian country to deal with the ramifications. In addition, many of the issues can only be dealt with on a global level and through a partnership between the Federal Government and tribal governments. These include the critical need to improve education throughout all grade levels in Indian Country, ceasing the viral spread of methamphetamine abuse, and building a foundation for economic development on Indian lands.

Congress has, through its plenary powers over tribes, promulgated standards to determine the level of the Federal Government's involvement with tribal governments. If confirmed, I will adhere to these laws and regulations.

Describe the current mission, major programs, and major operational objectives of the department/agency to which you have been nominated.

The mission of the office of the Assistant Secretary for Indian Affairs is two fold. From the perspective of the Bureau of Indian Affairs, the mission is to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect the trust assets of the American Indians, Indian tribes, and Alaskan natives. The Bureau of Indian Affairs accomplishes this through the delivery of quality services while maintaining government-to-government relationships within the spirit of Indian self-determination.

In addition, a large part of its budget is dedicated to meeting the education needs of Indian Country. Through the Bureau of Indian Education, the office of the Assistant Secretary for Indian Affairs seeks to unite and promote healthy communities through lifelong learning. It seeks to provide quality education opportunities from early childhood through life in accordance with the tribes' needs for cultural and economic well-being and in keeping with the wide diversity of Indian tribes and Alaskan Native villages as distinct cultural and governmental entities.

7. What do you believe to be the top three challenges facing the department/agency and why?

The Department faces many challenges in Indian Country, and three of the largest challenges are:

1) Improving the quality of education throughout the continuum starting at early childhood learning and spanning to the post-secondary level;
2) Ending the debilitating spread the methamphetamine and other drug abuse; and
3) Developing a foundation and promoting economic development on reservations and other Indian lands.

8. In reference to question number six, what factors in your opinion have kept the department agency from achieving its missions over the past several years?

If confirmed, I will determine what factors have prohibited the Department of the Interior from achieving all of the goals within its mission over the past several years. From my current vantage point, it appears the rash of breach of trust lawsuits has become a substantial hindrance to the Department achieving its milestones.

9. Who are the stakeholders in the work of this department/agency?

The primary stakeholders in the work of the Assistant Secretary for Indian Affairs are the tribes, tribal members and Alaskan natives for whom the Department serves as a trustee. A large subset of the former creates an additional stakeholder as recipients of the benefits of programs the Department oversees, such Indian education or law enforcement. Laws mandate additional shareholders at times, such as states or communities within or near Indian lands or reservations.

10. What is the proper relationship between the position to which you have been nominated, and the stakeholders identified in question number nine?

The proper relationship between the Department and the stakeholders depends on the situation. For example, sometimes the Department is trustee; at other times it manages a relationship meant to promote self-governance and self-determination. In other situations, the Department is recipient of comments and arbiter of the impact those comments will have in a determination or regulation.

11. The Chief Financial Officers Act requires all government departments and agencies to develop sound financial management practices.

a) What do you believe are your responsibilities, if confirmed, to ensure that your department/agency has proper management and accounting controls?

If confirmed I will work with the proper Department offices to ensure the Office of the Assistant Secretary for Indian Affairs has the proper management and accounting controls for the matters it oversees.

b) What experience do you have in managing a large organization?

I have managed organizations ranging from eight attorneys and support staff to 125 employees from disparate disciplines.

12. The Government Performance and Results Act requires all government departments and agencies to identify measurable performance goals and to report to Congress on their success in achieving these goals.

a) What benefits, if any, do you see in identifying performance goals and reporting on progress in achieving those goals?

Identifying performance goals offers managers and employees a valuable tool to improve the efficiency of a program. It allows the manager to create program goals, establish methods to measure performance in achieving such goals, and may highlight a specific delta, and the cause thereof, between goals and performance.

b) What steps should Congress consider taking when a department/agency fails to achieve its performance goals? Should these steps include the elimination, privatization, downsizing, or consolidation of departments and/or programs?

Any steps Congress may take as a result of a Department failing to achieve its performance goals should be tailored to the goals of the Department and the needs of its stakeholders.

c) What performance goals do you believe should be applicable to your personal performance, if confirmed?

If confirmed, I will work closely with the necessary Department personnel to develop performance goals applicable to the Office of the Assistant Secretary for Indian Affairs.

13. Please describe your philosophy of supervisor/employee relationships. Generally, what supervisory model do you follow? Have any employee complaints been brought against you?

My management experience has exposed me to a broad array of workplace scenarios, organizational objectives, and human resources. Each experience has offered me another facet of how the people work in an organization to achieve a goal. For example, the law office illustrates a situation in which people, with a generally uniform set of skills, work within the deep complexities of a law suit or legal question to achieve uniformly the goals of the client. In the telecommunications arena, I worked with a large group of people whose skills ranged from engineering to finance to marketing or to real estate. The challenge, in such a scenario, was to focus and organize these disparate skills into separate, but cohesive, units that achieved a single goal in a timely and cost-efficient manner.

The common denominator in any management situation is proactive and transparent communications throughout the organization and leadership. Without such communications, people work without understanding the importance of the milestones. Global understanding of the

interim and final goals, and alterations therein, promotes ownership of the goals by the whole organization, and allows the best ideas and people to rise to the challenges presented to them. In addition, experience elucidates leadership is critical to good management.

No employee complaints have been brought against me.

14. Describe your working relationship, if any, with the Congress. Does your professional experience include working with committees of Congress? If yes, please explain.

In my current position, I do not have consistent communications with Members of Congress or its committees. I have participated in meetings or conversations with staff from Members offices regarding various constituent concerns. Over a decade ago, I met with Senators, Representatives and staff in my previous positions as Director of Federal Affairs for the Oneida Tribe of Indians of Wisconsin and as Director of Government Affairs for WilTel.

15. Please explain what you believe to be the proper relationship between yourself, if confirmed, and the Inspector General of your department/agency.

In my current position as Associate Solicitor and, if confirmed, as a Assistant Secretary for Indian Affairs I am a public servant, and as such I must and will cooperate with the Office of the Inspector General as it engages in its duties in accordance with the Inspector General Act and the Department of the Interior Departmental Manual.

16. In the areas under the department/agency's jurisdiction to which you have been nominated, what legislative action(s) should Congress consider as priorities? Please state your personal views.

The Department of the Interior and Congress, through the Senate Indian Affairs Committee and the House Resources Committee, focus extensively on the critical matters relevant to tribal governments and Native Americans. It is difficult to highlight a set of priorities from the large number of Indian issues.

For example, Congress could tackle the spectrum of issues afflicting Indian education or the range of the problems under the penumbra of Indian Country law enforcement, such as the stopping methamphetamine abuse and distribution to addressing the staffing and funding deficits within the BIA jails system. Congressional hearings on economic development within Indian Country will enumerate the issues as well as yield excellent ideas to promote such development. Congress could address also the array of problems within trust reform.

If confirmed, I will work with both chambers and tribal representatives to develop a set of priorities to address in the upcoming congressional session.

17. Within your area of control, will you pledge to develop and implement a system that allocates discretionary spending in an open manner through a set of fair and objective established criteria? If yes, please explain what steps you intend to take and a time frame for their implementation. If not, please explain why.

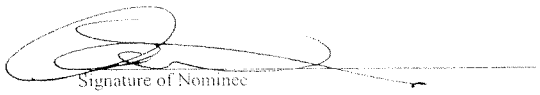
If confirmed, I will, immediately and expeditiously, work with the proper Department personnel to develop and implement a system that allocates discretionary spending in an open manner, and one subject to fair, objective and established criteria.

G. FINANCIAL DATA (Will not be released to the public.)

(Nominee is to include this signed affidavit along with answers to the above questions.)

Affidavit

Carl Altman being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.



Signature of Nominee

Subscribed and sworn before me this 6th day of Sept, 2006

Wanda C. Franklin
Notary Public

WANDA C. FRANKLIN
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires June 14, 2008

CARL J. ARTMAN

EDUCATION

University of Denver, College of Law, Denver, Colorado, LL.M. (Natural Resources and Environmental Law), 2003

University of Wisconsin School of Business, Madison, Wisconsin, MBA, 1999

Washington University School of Law, St. Louis, Missouri, JD, 1991

Columbia College, Columbia, Missouri, Bachelor of Arts, 1988

EXPERIENCE

United States Department of the Interior, Washington, D.C., February 2006 to Present
Associate Solicitor - Indian Affairs

- Oversee and manage legal affairs pertaining to the Department's oversight of Indian affairs.
- Manage Office of Solicitor's Division of Indian Affairs.

Oneida Tribe of Indians of Wisconsin, Green Bay, WI, December 2002 to Present
Chief Legal Counsel

- Oversee and manage all legal affairs of the tribe.
- Manage in-house law office attorneys and staff, and non-conflicting external attorneys.
- Provide legal guidance for Tribal-wide reorganization and development of corporate entities.

Sole Practitioner, Denver, CO, September 2001 to December 2002

- Practice Areas included Oil and Gas, Corporate, Emerging Technologies, Telecommunications.

Qubit Technology, Denver, CO, April 2000 to September 2001
General Counsel

- Oversaw and managed legal matters of the company, including management of external firms.
- Assisted in business development.

VoiceStream Wireless, Milwaukee, WI, November 1999 to April 2000
General Manager of Development and Operations

- Managed $45 million wireless network deployment project.
- Directed negotiations with city zoning boards, city councils, and landowners.

Airadigm Communications, Little Chute, WI, October 1995 to October 1999
Vice-President of Legal Affairs

- Coordinated legal and corporate development affairs of the company.
- Represented company before Federal Communications Commission and state and local governments.

Chief Operating Officer

- Managed company through start up, deployment, and commercial rollout phases.
- Negotiated agreements with vendors, investors, strategic partners, and roaming partners.

Oneida Tribe of Indians of Wisconsin [illegible]
Director of Federal Affairs

- Represented and advocated the position of the Oneida Tribe [illegible] and federal agencies.

WilTel/Williams Companies, Washington, D[illegible]
Director of Government Affairs

- Advocated company's position on legislation [illegible]
- Represented company at the Federal Communications [illegible]

Congressman Michael G. Oxley, Washington [illegible]
Legislative Assistant

- Focused on telecommunications issues
- Drafted legislation, composed speeches and [illegible]

CONSULTANCIES

Lucent Technologies, April 1999 to August 1999
Advised Lucent on entering the Indian reservation market through [illegible] partner [illegible] with the Indian Nations, equipment vendors, and tangential cellular providers.

Oneida Tribe of Indians of Wisconsin, June 1999 to [illegible]
Consulted on political, financial, and telecommunications [illegible] before the Federal Communications Commission, United States [illegible]

LICENSES AND AFFILIATIONS

- Licensed to practice law in Wisconsin, Colorado, and [illegible]

CURRENT AND PREVIOUS PROFESSIONAL ACTIVITIES

Bush-Cheney '04 Wisconsin Steering Committee, Co-Chair

Presidential Board of Advisors on Tribal Colleges and Universities, Board Member

Haskell Indian Nations University, Board of Regents, alternate

Oneida Nation Electronics, Board of Directors

Qubit Technology Inc., Secretary, Board of Directors (non-voting position)

Airadigm Communications, Inc., Board of Directors

Personal Communications Industry Association, Board of Directors

Personal Communications Industry Association, Chairman, Small Business Committee

GSM-Ericsson User Group, Chairman, Regulatory Subcommittee

GSM Alliance, Management Committee

SPEECHES AND PUBLICATIONS

Land Tenure Center, University of Wisconsin-Madison, The Oneida Land Claim, History and Status.

Law Seminars International, Developing Tribal Utilities

Land Tenure Center, University of Wisconsin-Madison, Impact of Land Claims Issues on Tribal Policy-making

Denver Journal of International Law and Policy, Editor

Global Reach: Telecommunications in the New Century (conference title), Preparing the Foundation for Advance Services and Beyond - Competition - Impact of Tomorrow's Services on the Local Jurisdiction

United States Small Business Administration Roundtable, "Broadband Deployment by Small Entities"

Federal Communications Commission Hearing, "**Overcoming Obstacles to Telephone Service for Indians on Reservations,**" witness on the Solutions Panel

GSM In North America Conference: Successful Marketing Strategies - Targeting the Business Users

PCS '98 Speech: State of the Industry

PCS '98 Panel Moderator: Branding the Wireless Commodity

National American Indian Telecommunications Workshop Speech: How Wireless Systems Can Enhance or Improve Communication Capabilities in Tribal Communities

PCS '97 Speech: PCS Up and Running - An Insider's Account

Wireless Week, April 28, 1997: "Guest Opinion: Brand Identity Critical"

Federal Communications Law Journal, volume 46, December 1993: "The Cable-Telco Cross-Ownership Provision: First Amendment Infringement Through Obsolescence" (co-authored with Congressman Michael Oxley)

Remarks of Carl J. Artman
Associate Solicitor of Indian Affairs, U.S. Department of the Interior
National Congress of American Indians 2006 Annual Convention
Sacramento, California
October 5, 2006

Good morning, everyone. Before I begin my remarks, I would like to thank Governor Garcia and the National Congress of American Indians board of directors for giving me this opportunity to speak with you.

I'm glad to be here and see many individuals with whom I've worked and developed good relationships. But for those who don't know me, let me introduce myself.

First and foremost, I am a member of the Oneida Tribe of Indians of Wisconsin, one of six Indian nations of the Haudenosaunee, or Iroquois Confederacy.

I was selected as President Bush's nominee for Assistant Secretary, for which I am greatly honored, while serving as the Interior Department's Associate Solicitor for Indian Affairs. While invaluable in helping me prepare for my current position, it is not my only experience.

Over the past 15 years, I have served my tribe as chief legal counsel, performed legal and public policy work for several telecommunications companies, and run my own law practice. During that time, I also added to my law degree with a Masters in Business Administration from the University of Wisconsin and a degree in Natural Resources and Environmental Law from the University of Denver.

I have seen first-hand the challenges that tribal leaders face in building sustainable tribal economies. These challenges often come in the form of questions.

How can tribal lands and resources be made more productive? How can tribal members get the training and jobs they need? What will it take to curb substance and alcohol abuse in tribal communities? How can the environment be protected and cultural traditions preserved?

These are profound questions that are asked in one way or another in every Indian community every day.

Fortunately, the Interior Department has already taken several steps toward helping tribes meet these challenges.

This week you heard Secretary Kempthorne on his willingness to partner with tribal leaders to improve life for Indian communities. You also heard Tom Dowd discuss why reorganizing the Bureau of Indian Education is important to improving student learning.

I would like to add to their examples of what the Department has been, and will be, working on to assist tribes and Alaska Native communities in developing their natural, political, and socio-economic infrastructure.

A crucial component in this development is strong tribal government. I believe that sovereignty is best exhibited in a vibrant tribal government – one that understands judicious exercise of its jurisdiction for the benefit of its members and the Seventh Generation.

Tribal government is the face and represents the hope of its people. It embodies the power of sovereignty. It cares for the present and plans for the future. It can accomplish great things. But, it must have the capacity to carry out the serious responsibilities of governance.

One of the pillars of governance is justice. Justice ensures that individual rights are protected, provides a system where conflicts can be resolve peacefully, enforces existing laws, and creates stability that businesses require. To better assist tribes, the BIA's Office of Law Enforcement Services has been reorganized as the Office of Justice Services and has added the Bureau's tribal courts program to its coterie of justice programs.

The philosophy of the new Office of Justice Services is that the full spectrum of BIA's justice programs – training, law enforcement, tribal courts, and corrections – will work together for the benefit of tribal communities.

The biggest challenge facing the justice system today at all levels – federal, state, and tribal – is the epidemic of methamphetamine in too many of our communities. For Indian country, meth is threatening the very fabric of tribal cultures by destroying individual lives, families, businesses, and communities. Even tribal governments have not remained untouched.

The past fiscal year, the Office of Justice Services has helped bring down major methamphetamine distribution rings that have plagued the Wind River reservation in Wyoming and the Chickasaw Nation in Oklahoma. These two operations alone netted 184 suspects who have since been indicted with many having already been convicted. Working with the Yakama Nation, two BIA special agents helped in the seizure of the largest marijuana crop site in Washington State history that was discovered on the tribe's reservation.

During the same period, OJS closed 4 old, unsafe jails while opening 3 new state-of-the-art correctional facilities. More than 8 new jails are in the pipeline – some of which are scheduled to open before the end of December 2006.

Through the Office of Justice Services, we are working hard to bring meth dealers to justice, encourage and assist tribal courts to explore effective sentencing alternatives, and to provide safe and secure correctional services.

No government can function without financial resources. Lacking large tax bases, tribal government operations rely largely on a combination of federal dollars and revenue from tribal businesses. Building sustainable tribal economies would go a long way to ensuring that tribes can meet their financial needs while trying to improve the lives of their members.

As Secretary Kempthorne stated in his remarks this week, "We must reverse the chronic economic depression and joblessness that has become endemic to many parts of Indian Country." He recognizes the unique challenges that tribes face to becoming economically self-sufficient

when they cannot offer job skills training to their tribal members, have ready access to markets for their products, and raise capital to fund business development.

The Indian Affairs Office of Indian Energy and Economic Development has been working steadily to support tribal economic development through the 477 Program. Its outside-the-box approach to leveraging federal dollars for economic development is one of its most attractive features.

This past year, the IEED funded innovative projects that could become models for other tribes:

- The Pueblo of Laguna Utility Authority for a feasibility study on providing affordable electricity service throughout the tribe's lands.
- The Aleutian Pribilof Islands Association in Alaska to develop a hybrid wind/diesel electrical generating regime for six Aleutian Islands Native communities.

In addition, the Spokane Tribe and Tulalip Tribes in Washington State, who were approved for 477 participation this year, see the program as key to helping them address their economic and workforce development needs.

Another of IEED's efforts to support greater flexibility for tribes has been in the area of tribal energy resource agreements. Designated under the Energy Policy Act of 2005, TERAs offer tribes a new alternative for overseeing and managing energy and mineral resource development on their lands without having to first secure DOI Secretarial approval. IEED published proposed regulations on August 21 seeking public comment.

IEED also has entered into a partnership agreement with the Transportation Department's Federal Highway Administration for a two-year pilot project to develop an American Indian/Alaska Native Business Opportunity and Workforce Development Center. The center will [*do what?*].

According to the U. S. Department of Labor, one million jobs will be added in construction by 2012. IEED and its other key partners in the pilot program – the Council for Tribal Employment Rights, financial institutions, bonding firms, and tribal and individual Indian contractors – want to ensure that Indian Country positioned to take advantage of this tremendous opportunity.

The 477 Program has proven its importance as a means of preparing tribal members for the world of work.

Education, however, is the key to ensuring that tribal government will work efficiently and effectively for the good of all tribal members.

As you know, the Bureau of Indian Education has the responsibility for managing and overseeing a $1 billion dollar, nation-wide Indian education school system covering 23 states on 63 reservations. The system serves almost 48,000 students in 184 elementary and secondary day and boarding schools. It is also responsible for implementing the No Child Left Behind Act of 2001, the most far-reaching and significant education act in recent memory.

As someone who appreciates the value of education, I take the Act's requirement to hold schools accountable for the performance of their students very seriously. I also recognize the tremendous challenge Tom Dowd and his team face in trying to help all BIE-funded schools meet their Adequate Yearly Progress requirement.

Currently, only 30 percent of our schools have met AYP. Our students must not pay the price for poor or under-performing schools.

If they are to assume the responsibilities of family, community, tribal, or cultural leadership, they must be well prepared to do so. I ask for your support for BIE's efforts to improve our schools and prepare our students for their future lives.

In keeping with its policy on government-to-government consultation, the Department held tribal consultation sessions this year on several important topics including revisions to Indian trust management regulations and proposed regulations for Section 20 of the Indian Gaming Management Act. [*Add announcement about Section 20 regs here?*]

In a letter to tribal leaders dated September 19, 2006, the Office of Indian Gaming Management's announced its series of tribal consultation meetings on the development of an amendment to regulations implementing IGRA's Section 11. Section 11 concerns the distribution of net gaming revenues from class II and class III gaming in the form of per capita payments to tribal members. The first will be held October 26, so please be sure you have received and read your packet.

At my confirmation hearing, I described to the members of the Senate Committee on Indian Affairs my goals during my administration:

- To assist in the development and implementation of a resolution to the trust litigation.
- To lay the foundation for an era that will provide the Interior Department and Indian Country with a fresh start and new commitments.
- To foster an interaction between Interior and Indian Country born of a partnership and mutual goals, not just fiduciary requirements.
- To use my office to promote communications between tribes who have realized financial success and those that strive for a fraction of that success for the benefit of their members.
- To use my office to promote more vibrant and goal-oriented communications between tribes and their neighbors, be they local or state governments or a business that seeks to partner with a tribe for their mutual benefit.
- To foster the growth of tribal governments.

As a member of the Haudenosaunee, the oldest continuous participatory democracy on earth, I can say with certainty that tribal governments can accomplish great things. I know this because the authors of the American system of government, Benjamin Franklin and Thomas Jefferson, were inspired by the Iroquois Confederacy, its inner workings, and the Constitution of the Iroquois Nations known as the Great Binding Law, GAYANALAGOWA.

The Founding Fathers' inspirations, rooted in the Haudenosaunee, guide all of our lives today and continue to motivate people across the globe to achieve a greater freedom for themselves and their countrymen.

Secretary Kempthorne and I are committed to bringing forth the potential of the breadth and depth of the Department of the Interior and, specifically, the Office of the Assistant Secretary for Indian Affairs so that the American Indian and Alaska Native people can use these resources – their resources – to conquer the problems bearing down on them and their governments, to gain the foothold that will propel them upward, to preserve cultures and build legacies, and to provide a future for their Seventh Generation that is as great as their past.

By working in partnership, we are stronger together than apart. And strong partnerships are critical if we are to successfully win the fight to secure Indian Country's future.

Thank you.

Remarks of Carl J. Artman
Associate Solicitor, U.S. Department of the Interior
Federal Bar Association
Washington, D.C.
October 20, 2006

Good afternoon, everyone. Before I begin my remarks, I would like to thank Elizabeth Kronk and the Federal Bar Association for giving me this opportunity to speak with you.

I'm glad to be here and see individuals with whom I've worked and developed good relationships. But for those who don't know me, let me introduce myself.

First and foremost, I am a member of the Oneida Tribe of Indians of Wisconsin, one of six Indian nations of the Haudenosaunee, or Iroquois Confederacy.

I was selected as President Bush's nominee for Assistant Secretary, for which I am greatly honored. And I currently serve as the Associate Solicitor for Indian Affairs at the Department of the Interior. The Senate Committee on Indian Affairs approved my nomination on September 14, 2006, and I await confirmation by the full Senate.

Over the past 15 years, I have served my tribe as chief legal counsel, its representative in Washington, D.C. and as Chief Operating Officer of its telecommunications venture. During that time, I also added to my law degree with a Masters in Business Administration from the University of Wisconsin and a LLM degree in Natural Resources and Environmental Law from the University of Denver.

Most importantly, I have seen first-hand the challenges that tribal leaders face in building sustainable tribal infrastructures. These challenges often come in the form of questions.

How can tribal lands and resources be made more productive? How can tribal members get the training and jobs they need? What will it take to curb substance and alcohol abuse in tribal communities? How can the environment be protected and cultural traditions preserved?

These are profound questions that are asked in one way or another in every Indian community every day.

The Interior Department has already taken several steps toward helping tribes answer these questions.

Secretary Kempthorne has stated and exhibited his willingness to partner with tribal leaders to improve life for Indian communities. The Office of the Assistant Secretary of Indian Affairs reorganized recently its Indian education programs into the newly formed Bureau of Indian Education to help focus its efforts. ASIA's economic development arm is rolling out new programs to spur economic development; and BIA law enforcement personnel are stepping up its war on drug proliferation.

I would like to show examples of how the Department has been, and will be, working to assist tribes and Alaska Native communities in developing their natural, political, and socio-economic infrastructure.

A crucial component in this development is strong tribal government. I believe that sovereignty is best exhibited in a vibrant tribal government – one that understands judicious exercise of its jurisdiction for the benefit of its members and the Seventh Generation.

Tribal government is the face and represents the hope of its people. It embodies the power of sovereignty. It cares for the present and plans for the future. It can accomplish great things. But, it must have the capacity to carry out the serious responsibilities of governance.

One of the pillars of governance is justice. Justice ensures that individual rights are protected, provides a system where conflicts can be resolve peacefully, enforces existing laws, and creates stability that businesses require. To better assist tribes, the BIA's Office of Law Enforcement Services has been reorganized as the Office of Justice Services and has added the Bureau's tribal courts program to its coterie of justice programs.

The philosophy of the new Office of Justice Services is that the full spectrum of BIA's justice programs – training, law enforcement, tribal courts, and corrections – will work together for the benefit of tribal communities.

The biggest challenge facing the justice system today at all levels – federal, state, and tribal – is the epidemic of methamphetamine in too many of our communities. For Indian country, meth is threatening the very fabric of tribal cultures by destroying individual lives, families, businesses, and communities. Even tribal governments have not remained untouched.

The past fiscal year, the Office of Justice Services has helped bring down major methamphetamine and marijuana distribution rings that have plagued several reservations.

During the same period, OJS closed 4 old, unsafe jails while opening 3 new state-of-the-art correctional facilities. More than 8 new jails are in the pipeline – some of which are scheduled to open before the end of December 2006.

Through the Office of Justice Services, we are working hard to bring meth dealers to justice, encourage and assist tribal courts to explore effective sentencing alternatives, and to provide safe and secure correctional services.

No government can function without financial resources. Lacking large tax bases, tribal government operations rely largely on a combination of federal dollars and revenue from tribal businesses. Building sustainable tribal economies would go a long way to ensuring that tribes can meet their financial needs while trying to improve the lives of their members.

As Secretary Kempthorne stated in his remarks at the recent National Congress of American Indians annual convention: "We must reverse the chronic economic depression and joblessness

that has become endemic to many parts of Indian Country." He recognizes the unique challenges that tribes face to becoming economically self-sufficient when they cannot offer job skills training to their tribal members, have ready access to markets for their products, and raise capital to fund business development.

The Indian Affairs Office of Indian Energy and Economic Development has been working steadily to support tribal economic development through the 477 Program. Its outside-the-box approach to leveraging federal dollars for economic development is one of its most attractive features.

This past year, the IEED funded innovative projects that could become models for other tribes. Take for example:

- The Pueblo of Laguna Utility Authority feasibility study for providing affordable electricity service throughout the tribe's lands, or
- The Aleutian Pribilof Islands Association in Alaska effort to develop a hybrid wind/diesel electrical generating regime for six Aleutian Islands Native communities.

In addition, the Spokane Tribe and Tulalip Tribes in Washington State, who were approved for 477 participation this year, see the program as key to helping them address their economic and workforce development needs.

Another of IEED's efforts to support greater flexibility for tribes has been in the area of tribal energy resource agreements. Designated under the Energy Policy Act of 2005, TERAs offer

tribes a new alternative for overseeing and managing energy and mineral resource development on their lands without having to first secure DOI Secretarial approval. IEED published proposed regulations on August 21 seeking public comment

Education, however, is critical to ensuring that tribal government will work efficiently and effectively for the good of all tribal members.

As you know, the Bureau of Indian Education has the responsibility for managing and overseeing a $1 billion dollar, nation-wide Indian education school system covering 23 states on 63 reservations. The system serves almost 48,000 students in 184 elementary and secondary day and boarding schools. It is also responsible for implementing the No Child Left Behind Act of 2001, the most far-reaching and significant education act in recent memory.

I take the Act's requirement to hold schools accountable for the performance of their students very seriously. I also recognize the tremendous challenge Tom Dowd and his team face in trying to help all BIE-funded schools meet their Adequate Yearly Progress requirement.

Currently, only 30 percent of our schools have met AYP. Our students must not pay the price for poor or under-performing schools. If they are to assume the responsibilities of family, community, tribal, or cultural leadership, they must be well prepared to do so. I look forward to working with the BIE in its efforts to improve our schools and prepare our students for their future lives.

In keeping with its policy on government-to-government consultation, the Department held tribal consultation sessions this year on several important topics including revisions to Indian trust management regulations and proposed regulations for Section 20 of the Indian Gaming Regulatory Act, which were published, for comment, in the Federal Register in early October. These regulations will clarify the provisions of 25 U.S.C. 2719 and make the land-into-trust process, as it relates to gaming, more defined. Additionally, the regulations clarifies the consultation process with local officials and nearby tribes, articulates the factors the Department weighs in the two-part determination, and delineates the times constraints on the state officials.

In a letter to tribal leaders dated September 19, 2006, the Office of Indian Gaming Management's announced its series of tribal consultation meetings on the development of an amendment to regulations implementing IGRA's Section 11. Section 11 concerns the distribution of net gaming revenues from class II and class III gaming in the form of per capita payments to tribal members. The first will be held October 26.

The Department's Regualtory Initiatve is still moving forward. Through this initiative the Department will amend regulations in the areas of land acquisition, leasing, grazing, and rights-of-way. It will develop regulatory language to address trust fund accounting and appeals, incorporate AIRPA changes into the probate process and improve service to beneficiaries. These regulatory changes and additions will give the Department the tools it needs to better serve beneficiaries and standardize procedures for consistent execution of fiduciary responsibilities across the BIA regions. You have seen some of the proposed changes roll out for consultation and further changes will continue through next year.

At my confirmation hearing, I described to the members of the Senate Committee on Indian Affairs my goals if confirmed:

- To assist in the development and implementation of a resolution to the trust litigation.
- To lay the foundation for an era that will provide the Interior Department and Indian Country with a fresh start and new commitments.
- To foster an interaction between Interior and Indian Country born of a partnership and mutual goals, not just fiduciary requirements.
- To use the office to promote communications between tribes who have realized financial success and those that strive for a fraction of that success for the benefit of their members.
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The Founding Fathers' inspirations, rooted in the Haudenosaunee, guide all of our lives today and continue to motivate people across the globe to achieve a greater freedom for themselves and their countrymen.

Secretary Kempthorne and I are committed to bringing forth the potential of the breadth and depth of the Department of the Interior and, specifically, the Office of the Assistant Secretary for Indian Affairs, so that the American Indian and Alaska Native people can use these resources – their resources – to conquer the problems bearing down on them and their governments, to gain the foothold that will propel them upward, to preserve cultures and build legacies, and to provide a future for their Seventh Generation that is as great as their past.

By working in partnership, we are stronger together than apart. And strong partnerships are critical if we are to successfully win the fight to secure Indian Country's future.

In closing, please know that I look forward to the challenges of the office of the Assistant Secretary of Indian Affairs; I look forward to working with all of you to address the problems and capitalize on the opportunities within Indian Country; I look forward to working with Secretary Kempthorne as he works to deliver benefits to American Indians and Alaska Natives; and I am hopeful for a speedy confirmation by the Senate.

Thank you.

Tribal Utility Formation

Law Seminars International
October 2004
Minneapolis, MN

A broad spectrum exists for the services offered by a tribal utility, the organization of the tribal utility, and its place within the overall Tribal structure.

Prior to commencing the formation of a tribal utility, the tribe will have completed a feasibility study to determine the true level of need on the reservation and, if applicable, the environs surrounding the reservation.

Oneida does not transmit electricity or gas to its membership within the reservation boundaries. It does provide water and wastewater utility services. The Tribe explored the feasibility of providing telecommunications services to tribal members both through wireline and wireless services. The Tribe has struggled since its introduction to utility provision with the perfect balance of administration and control. In fact, it recently concluded the dissolution of its utility commission, thereby bringing the provision of services, billing and collections, and construction and maintenance within the government structure.

Water and wastewater utility services were provided to the Oneida community by two entities, the Oneida Utilities Commission and the Oneida Utilities Department.

The Commission was governed by seven members – five appointed by the Oneida Business Committee, the central governing body of the tribe, and two nominated by the town boards of Oneida and Hobart for staggered three year terms. The five members appointed by the Oneida Business Committee are required to reside or own property within the reservation.

The Commissions was established in 1990 and had three full time employees. It was a separate entity from the Oneida Tribe, and according to the Oneida Tribal Sanitary Ordinance, was to serve as the administrative commission for the sanitary district. The Commission had 248 customers within the boundaries of the sanitary district.

The Oneida Utilities Department is a governmental unit of the Tribe and reports to the Department of Public Works. The Department served originally 203 customers outside of the Commission's boundaries. The Department was established in 1968 and currently has 9 full time employees.

The Commission contracted with the Department for services related to the operation and maintenance of the water and wastewater utilities that serve the commission's customers. In addition, the Department provides administrative services,

such as billing, to the Commission. A service agreement entered into in 1995 broadly outlined the terms of the contract between the Commission and the Department.

The original intent behind the creation of the Commission can be gleaned, in part, from the enabling legislation adopted by the Business Committee when the Commission was created in 1990. These included:

Commission and Sanitary District Ordinance	Charters the commission as a subordinate organization for economic purposes and establishes the sanitary district ordinance.
Utilities agreement for wastewater treatment services	Approves the agreement negotiated between the Tribe, Commission ,and Green Bay Metropolitan Sewage District for constructing a sewage collection system for the central Oneida community and connecting the system to the District.
Commission authority to apply for loans	Designated the Commission as the appropriate body to administer a water and sewer system of the Tribe and authorizes the Commission to administer and apply for loans to maintain and operate a public water system.
Commission Sanitary District Ordinance	Amends a previous resolution to give the Commission the complete authority to manage, operate and maintain financial accountability for the sanitary district ordinance.
Farmers Home Administration Loan Guaranty	Approves the Commission borrowing funds for water and sewer loans
State Department of Natural Resources loan guaranty	Tribe agrees to execute and deliver a guaranty for payment of principal and interest on loan and bond when due.
Lease for school construction	Tribe leases land to Commission and directs the Commission to build a k-8 tribal grade school

Public Facilities lease agreement	Executes previous lease agreements for public facilities
Public facilities financing guaranty	Provides guaranty for repayment of the revenue bonds issued by the Commission for the construction of the public facilities 9in the previous lease agreements
Amended sanitary district ordinance	Amends original ordinance to authorize Commission to issue tax-exempt bonds for purposes other than sewer and water projects.
Services agreement	Defines services to be provided by the Department to the Commission and the payment for those services
Commission by-laws	Establishes governance of the Commission.
Amendment to Sanitary District Ordinance	Amends original ordinance to authorize the Commission to contract and/or provide for safe collection of solid waste refuse and recyclable waste and to charge and/or seek grants for these services.

This dichotomy resulted, in part, from a desire to create a separate entity to bond, invest, and construct. The Commission received its authority from the various ordinances listed above, and the bylaws gave it the authority to provide water and sewer service to certain peoples within a specific boundary. The bylaws further defined its purpose as that of regulating,. Administering, and advising on all actions related to the creation of the Commission,. In carrying out this purpose, the bylaws emphasized the separateness of the Commission from the Tribe, and indicate the Commission's policy to be self-supervised, whereby the Tribe shall remove itself from eh activities of the Tribe.

By contrast, the department is part of the overall tribal organization and receives its authority from that structure and the applicable tribal rules and regulations. As stated in its own annual report, the Oneida Utilities Department has an obligation to the Oneida Tribe to provide safe drinking water and environmentally safe wastewater treatment.

Efforts are focused on reviewing the needs of the Tribe and making provision to meet both current and future generation needs.

In retrospect, the Tribe should have clarified the roles and focus of each entity. For example, the Commission could have retained its fiscal role of accepting debt for the establishment of utilities, in could have further established itself as an oversight and policy-making entity for the utilities within the reservation. The Department could have assumed responsibility for the daily administrative and operations of the utilities. With the Oneida Tribe, a similar model could be found in the relationship between its Land Commission and the Land Management Department. This model could have been easily adopted from a political and organizational perspective.

The policy making role of the commission would have been logical with its board make-up – that of political appointees, as opposed to individuals with operational experience.

Tribal Utility Models:

There are several different models for utilities management and organization. The ones most relevant to a discussion of the preferred model for the Oneida Utilities are described below.

Tribal models:

In May 1996, representatives from the commission, department, and Tribe held several fact-finding, meetings and on-sire visits with members of other Native American Tribes which operate utilities. These visits included the reservations of Tohono O'odham, Fort Mojave, and Navajo.

Based on these visits, the organizational charts and plans of operations of the respective utility authorities, the Commission drafted a proposal for an Oneida Tribal Utility. It would be managed as a business separate from the Tribe (discuss pros and cons of this – bonding, but government would still have to guarantee, losses, taxes, loss of sovereign immunity). Under the draft plan, the Commission would re-define its role as a special entity to serve in an oversight capacity over all existing utilities services areas and all new service areas (like electricity, telephone/telecom, natural gas, etc.). In addition, the role of the commission would include acting as an agent of the Oneida Tribe in obtaining federal and state funding to avoid compromising the sovereignty of the Tribe.

Due to the new service areas included in the draft plan, the proposed organizational structure for he utility authority would have consisted of five different departments reporting to an executive director, The departments included were: water/sewer department, electric department, finance department, gas operations, and laboratory operations.

This tribal model has the advantages of creating a separate entity to be operated as a business enterprise, consolidating fragmented utilities functions, and establishing management and oversight of utilities operations. Its disadvantages include the presumption of inclusion of other utilities service areas which have not been approved, creating potential conflict and confusion in the management of the utilities by potentially creating a dual reporting structure.

Municipal Model:

The Tribe looked at municipal models for possible direction. It found, generally, these models fell into one of two categories.

Committee Structure

Under this model, the city council or village board designates a standing committee to oversee utilities operations. This standing committee of the governing body can be one whose oversight responsibility is limited to the utilities or one whose oversight includes other public works or planning and development functions in addition to the utilities. Committee members are generally elected representatives who serve on the municipal governing body.

Advantages, assuming the committee is comprised of city council or village board members:

- Membership answers directly to the public via the election process.
- Enhances communication with government operations, since the same individuals have oversight responsibility.
- Creates greater sensitivity on the part of the utilities oversight body to other municipal issues, policies, and processes.

Disadvantages:

- Creates a structure which is more likely to subject decisions affecting the utilities to political influence and short-term solutions.
- Dilutes attention committee members can devote to the utilities, due to additional municipal government commitments, meetings, etc.
- Limits ability of municipal pointing authority to ensure individuals with specific skills and experiences beneficial to the oversight of utilities will serve.
- Leads to grater turnover and less continuity of service, if elected officials are not re-elected.

Commission Structure

Under this model, the municipal governing body appoints individuals to serve on an entity to oversee utilities, which is separate from municipal governance and

operations. Commission members can be selected from various disciplines to broaden the perspective and enhance the decision-making ability of the Commission as a whole.

Advantages:

- Improves continuity of service, since commissioner is an appointed person.
- Enables the governing body to appoint individuals with specific skills and experience more suitable to the needs of utilities.
- Creates structure whereby decisions affecting the utilities are made at the commission level, thereby reducing or removing political influence on decisions n and promoting greater emphasis on longer-term perspectives in decision-making.
- Enhances ability to focus on utilities, since oversight responsibility is limited only to this area as opposed to other municipal issues and functions.

Disadvantages:

- Increases challenge and requires greater effort to maintain strong communication between the commission and municipal governing body.

Impact of the Above Models on the determination of a Tribal model:

Of the two primary municipal models for utility operations outlined above, some communities have switched from one model to another for various reasons. It is relatively easy for municipalities to switch between the two different utility organizational models, once a decision to do so has been made. However, the relevance of this experience to the future of a tribal utility, in this case Oneida, was of limited value since Oneida did not operate under a true commission structure like that found in municipal organizations. Furthermore, the multiple funding sources may make the transition to one of these models more difficult.

The development of an organizational model for a tribal utility should take into consideration existing organizational models for other tribal or municipal utilities and , most importantly, incorporate the unique characteristics and availability fo the broader resources of the tribe.

A hybrid model would consolidate utility functions under one umbrella organization, with legislative and oversight functions performed by a utilities commission and operational functions performed by a utilities department. Consolidation of utiulity functions is the guiding principle of the various tribal and municipal organizational models. Such a consolidation is the best way for utilities to achieve an integrated and coordinated approach necessary for long-term planning purposes.

Ideal model for Oneida:

When Oneida had both the Commission and the Department, it should have reorganized in the following manner, a manner which may provide insight for other tribal utilities.

The Commission should have had the following roles or attributes:

- Function as a separate, autonomous entity and function as a self-sufficient business enterprise.
- Contact with the Tribe and outside service vendors to supplement the staff resources of the utilities in areas critical to the administration and operations of the utilities.
- Exercise oversight, policy-making and rate setting authority.
- Continue to function as the fiscal agent for the Tribe in various non-utility areas, as directed by the Tribe to avoid compromising tribal sovereignty in financial transactions.
- Act as a a liaison to the Oneida Business Committee regarding utility matters.
- Serve as the regulator body to enforce ordinances and other requirements governing the utilities.
- Act as the initial hearing body for customer disputes regarding utilities.
- Recommend enabling legislation necessary to implement functions.
- Adopt by-laws for the governance and operations of the utilities.
- Appoint mangers for the utilities divisions.

TRIBAL UTILITY FORMATION

Carl J. Artman
Oneida Tribe of Indians
of Wisconsin

Overview

- Review of specific phases in formation of tribal utilities
- Focus on specific tribal utility – Oneida Tribe of Indians of Wisconsin
- Questions

Feasibility Study

- In-depth analysis of market needs
- Critical for setting parameters for utility services
- Initial investigation into economic benefits and risks
  - Budgets and the impact on cost of service
  - Short- and long-term financial commitment
  - Cost/benefit to controlling quality of service

Post-Feasibility Study Choices

- Which services to provide
- Build or Buy
- Wholesale or Retail
- Principal or Partner

Tribal Government Role

- Tribal government determines level of involvement in utility operations
  - Politics of rate setting, collections, and disconnections
  - Politics of success or failure of utility

Tribal Government Role
Oversight and Operations

- Form of Utility Oversight
  - Commission
  - Committee
- Form of Utility Operations
  - Department
- Combined Oversight and Operations Entity
- Shared responsibility

Tribal Government Role Financing

- Commission
  - Or other enabled non-corporate government entity
- Corporate Business Structures
  - Joint ventures
  - Incorporation
    - Tribally chartered
    - State chartered
    - Section 17

Tribal Government Role – Regulation

- Organization
  - Commission, Committee, Department
  - Regulated corporation
- Legislation
  - Enabling
  - Regulatory

Laws, Ordinances, Regulations

- Exercise of sovereignty
- Foundation for all future determinations
  - Oversight
  - Funding
  - Jurisdiction
  - Partnerships with external entities
  - Treatment by external governmental authorities

Tribal Utility Regulations

Utility Ordinance	Finance Authority
Debt Authority	Loan Guaranty Authority
Service Agreement Ordinance	By-laws
Rate setting	Billing and metering
Disconnection procedures	Reporting Procedures
Customer Service Procedures	Low Income Policies
Environmental Impact Requirements	Energy Conservation Mandates
Sustainable Development Mandates	Land Use Rights (authority to enter, condemnation)
Right-of-Way Ordinance	Facility/Capacity Leasing or Acquisition

The Oneida Utility Experience

Feasibility Study

- Electric
  - Current utility overlap
  - Level of service by outside providers
- Natural Gas
  - Provision and level of service by outside provider
- Sewer and Water
  - Provision and quality of service to growing area

Feasibility Study continued

- Costs to Tribe
  - Cost of providing electric or natural gas
    - Structure of distribution system
    - Operations, personnel and training
  - Cost of providing sewer and water
    - Development of infrastructure
    - Operations, personnel and training
  - Costs of retaining status quo
  - Return on investment

Selection of services

- Presentation to community/public feedback
- Legal feasibility study
- General Tribal Council vote
- Plan system operations
- Financing
- Organization
- Implementation

Utility Structure

- Utilities Commission
  - Governance
  - Purpose
- Utilities Department
  - Management
  - Purpose
- Relationship between Commission and Department
  - Oversight
  - Service agreements

Legislation and Regulation

- Department and General Utilities
  - Waste Disposal Ordinances
  - Oneida Tribal Sanitary District
  - Water Resources Ordinance
  - Real Property Law (amendments)

Legislation and Regulation

- Commission
  - Sanitary District Ordinance
  - Utilities Agreement for Wastewater Treatment Services
  - Authority to Apply for Loans
  - Loan Guaranty (various)
  - Public Facilities Leasing Agreements
  - By-Laws

Ramifications of Structure Choice

- Growth and needs outpaced organization
- Not well suited to effectively and efficiently meeting service needs
- Inability to rapidly respond to expanding service needs

Specific Issues within Utilities Structure

- Lack of a common goal or vision
- Inadequate communications between utility entities
- Interpersonal and territorial conflicts
- Fragmentation of administrative duties
- Lack of defined expectations
- Excessive crisis management

Proposed Improvements

- Clarification of roles
  - Commission: policymaking and financing
  - Department: operations
- Reorganization of human resources to match clarified roles
- Benchmarking and performance measurements throughout organization
- Eliminate overlap of service areas through cooperation
- Improved financial management controls
- Consideration of alternate models of organization

Oneida Utilities Structure Today

- Utility Commission eliminated
- Department ad hoc committee assumed Commission responsibilities
- Streamlined administration and oversight
- Increased government control
- Provision of service unchanged
- Quality of service: undetermined impact

Conclusion and Questions

Land Tenure Center
Madison, WI
May 2005

The Oneida Law Office represents the tribe and its subsidiaries in all legal matters, including those pertaining to acquisition, development, maintenance, and litigation related to its reservation property, both here and now, more so, in New York. These issues range from the mundane to those of great historical and precedential value. Pre-eminent amongst the latter is the negotiation and settlement of the Oneida land claim in New York.

The claim involves land stolen by the New York government over 20 years ago. It is marked by decades of litigation, negotiation, and squabbling between tribes, within tribes, and between states, counties, and citizens. The Supreme Court has left its mark on the land claims three times since 1974. The introduction of gaming brought new tribes and new special interests to the scene.

In some aspects, the potential culmination of the land claims represents and end to an era, an end marked by sadness because of the finality of the loss and yet another submission to the people and governments that stole our land in the first place. In some respects, it has empowered traditional governments, and in other aspects it may have minimized or diminished their role in the future. The process has allowed a new sort of thief onto the reservation, in the form of management companies, a thief which threatens to steal the identity and authority of the tribal governments, and sell short their beliefs and culture.

Fortunately, Oneida has emerged relatively unscathed from the divisiveness, and may have even become stronger because of it.

The land claim impacts three communities of the Oneida Nation: The Oneida Tribe of Indians of Wisconsin, the Oneida Indian Nation of New York, and the Onieda of the Thames, in Canada. The Oneida Land Claim represents 75 percent of the lands claimed in the State of New York and the Oneida Tribe represents 93 percent of all Oneida people in the United States. The Oneida Land Claim is the largest pending land claim in the United States. The Oneida settlement is a fair and just one. Under the settlement, the Tribe receives a thousand acre ceremonial homeland from the State of New York, one that will forever remain Oneida land and non-taxable. Under the settlement, the cloud on title of over 20,000 non-Indian property owners in the Oneida Reservation goes away and the claim is forever resolved. Under the settlement, the Tribe is authorized to develop a casino in the Catskills for the purpose of settling the monetary portion of the Oneida land claim without the necessity of appropriating state or federal funds.

The Oneida Dispossession and Diaspora

Our view of Oneida land and our world predates this State, this Nation, and certainly Indian gaming. Oneida believe that the Creator placed us on our land in the modern day New York State. We have been here forever. Archeologists support that Oneidas resided on this land for at least 11,000 years. We assert that with 11,000 years of ancestors buried beneath the soil, the land is much more than real estate - it is our home.

When Europeans first arrived on these shores, we occupied and owned a vast territory in the middle of modern day New York State, estimated at 5.5 million acres and running from the St. Lawrence River to the now Pennsylvania border. Early on we established treaty relations and military alliances with Great Britain. We supported Britain in the French and Indian War against France and helped preserve the northern boundary of what became the United States.

Initially, we viewed the American Revolutionary War as one between brothers and one in which we desired no role. At the urgent request of the Colonies, though, we Oneida eventually broke with other members of the Iroquois Confederacy and sided with the Colonists. Serving as officers, soldiers, and allies in the war on the side of the Colonists, we had a significant impact. During the winter of 1777, when General Washington criticized the ambivalent Continental Congress as having little feeling" for the starving and undersupplied soldiers at Valley Forge, the Oneida ensured their survival by supplying them with food. As we had done in the French and Indian War, the Oneida preserved the boundaries of New York State by thwarting a British attempt to divide and conquer the State.

For our service in the Revolutionary War, we received assurances from the United States in three separate treaties that our land would be forever secured to us - the 1784 Treaty of Fort Stanwix, the 1789 Treaty of Fort Harmar, and the 1794 Treaty of Canandaigua. Despite these assurances, New York State took the bulk of our land in two early transactions: 300,000 acres in 1785 and nearly five million acres in 1788. The Indian Claims Commission described these transactions as coerced and duplicitous. The second of these transactions, the 1788 Treaty of Fort Schuyler, left us with the Oneida Reservation in modern day Madison and Oneida Counties - the same reservation that was confirmed in the 1794 federal Treaty of Canandaigua.

Passage of the Indian Trade and Intercourse Act in 1790 (and its continuous re-enactment since) changed how governments related to tribal lands. All treaties were now reserved to the federal government. From 1790 forward, should any other entity negotiate a land acquisition with an Indian nation, any agreement would only be binding if and when confirmed or ratified by the United States.

Even so, the State of New York in 1795 negotiated the first of a series of transactions with the Oneida Nation acquiring portions of the Oneida Reservation without first gaining the approval (or later ratification) of the United States. This particular transaction was an important one. It was the largest out of the series of 26 transactions that left the Oneidas homeless, involving approximately 100,000 acres. It also left the Oneida so impoverished and defenseless that the loss of the rest of the reservation became inevitable. And it was also the subject of repeated warning and admonitions from federal officials that such transactions violated federal law - including a formal opinion by the Attorney General of the United States that year. The last transaction occurred in 1846, which left only 350 acres of the Oneida Reservation that were then divided up among the handful of Oneida left in the area. Even those few acres were lost through mortgage and tax foreclosures.

From 1795 until 1805, the State poorly paid all Oneidas for all lands ceded under the guise of a treaty transaction. These transactions included the largest one, that in 1795, by which Oneida lost possession of 100,000 acres of the reservation. In total, the Oneida had lost two-thirds of the reservation before 1805, with paltry payments diluted through distribution to the individual tribal members instead of the tribal government. In 1805, the State purported to divide the remaining Oneida Reservation between two Oneida factions. From that time on, the State entered into separate transactions with the two parties of Oneidas with respect to the portion of the reservation allocated to each.

Eventually, a reservation was created in Wisconsin and two-thirds of the Oneida relocated there out of desperation, including most of the Oneida chiefs. Ever since, the Tribe has continuously asserted its title to the Oneida territory in New York, along with our brothers in

New York. Ever since, the Tribe has continuously received annuity payments under the Treaty of Canandaigua from the United States, along with our brothers in New York. Of the annuity payments made to Oneida, the Tribe receives approximately 90 percent and the Oneida Indian Nation of New York receives the remaining 10 percent - right up to this day. This annuity payment represents our historic and legal tie to the Oneida Reservation in New York.

The Land Claim and the Courts

For more than fifty years now, the Tribe has pressed its claim to the Oneida Reservation in various courts. Shortly after the passage of the Indian Claims Commission Act in 1946, the Tribe and its New York brothers organized to assert a claim against the United States for breach of its treaty and trust responsibility to protect the Oneida in the possession of our New York land.

When we filed our petition before the Indian Claims Commission in 1951, we included an allegation that title had not been extinguished to our New York lands, that we asserted a claim against the United States only for failure to protect us in possession of those lands, not for a taking. This, of course, has been our continuous and historical position and, as far as we know, our petition is the only one filed before the Indian Claims Commission taking this position. We continued this claim against the United States until the mid-1970's when it was dismissed out of concern that it might eventually prejudice our claim to actual ownership of the land.

In 1970, the Tribe, along with its New York brothers, filed a claim in federal district court in Utica asserting our claim for continuing title to our land. This suit, known as the test case, was a challenge to the 1795 state transaction and asked only for two years worth of trespass damages for those lands occupied by Madison and Oneida Counties. In 1974, the Tribe and its New York

brothers filed a second suit where we challenge all the other state transactions that dispossessed the Oneida. The test case reached the Supreme Court in 1974, which held unanimously that federal district courts have to authority to hear such tribal land claims. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974). On remand and after a trial by Judge Port, the district court held that the 1795 state transaction had violated the Indian Trade and Intercourse Act and, as a result, the counties were liable to the Oneida for trespass damages. The test case reached the Supreme Court a second time in 1985 and the Supreme Court again upheld the Oneida claim to the their New York territory. 470 U.S. 226. The 1974 suit remains in court.

History and these Supreme Court decisions demonstrate the strength and merit of the Oneida land claim. Thus far, the Oneida have prevailed on every major legal point. If we continue to prevail and press the matter to final judgment, the potential liability of New York State could easily exceed $2 billion. The settlement agreement executed by the Tribe and Governor Pataki resolves the land claim the way it should be resolved - through settlement terms agreed upon by the affected governments. The settlement agreement ends the cost and risk of continued court action, it resolves for all time the cloud on title arising from the land claim, it provides substantial land and other benefits for the Oneida people, and it is premised upon a respectful, government to government relationship between Oneida and New York State.

The mediation and settlement

Almost immediately after the 1985 Oneida Supreme Court decision, representatives of the State of New York approached us about negotiating an out of court settlement of the claim. The court suits were put on hold and we began talks. We talked for ten years and resolved

nothing. During this time, we put several proposals on the table, only to have the State reject them and make no counter-offer. Throughout this time, we consistently expressed the view that settlement required two things: land upon which the Oneida culture could continue for all times and money for the loss of use of our lands for the past two hundred years.

In 1998, we went back to court out of frustration and the United States intervened to support our claim. When the United States intervened in the Oneida land claim, it did so in its capacity as trustee for both the Tribe and the Oneida Indian Nation of New York. The United States acknowledged at the time that the Tribe and the Oneida Indian Nation of New York are successors to the Oneida Nation signatory to the Treaty of Canandaigua. Since this treaty confirmed a New York land base for the Oneida Nation, both the Tribe and the Oneida Indian Nation of New York are New York tribes.

Shortly after the United States intervened, the federal court appointed a mediator, in the hope that a supervised negotiation would be more productive. In this mediation, the Tribe consistently insisted upon and the United States' representatives from the Department of the Interior consistently support a ceremonial land base for the Tribe in New York. This mediation did resolve certain issues: the parties agreed in principle that the United States and the State of New York would make $500 million available to settle trespass damage claims, the Tribe would obtain a ceremonial homeland in New York, and the Oneida Indian Nation of New York came close to resolving its treaty land issues. In the end, though, the mediator declared an impasse over differences between the local governments and the Oneida Indian Nation of New York. Once again, the parties returned to court.

In 2002, the federal court appointed a second mediator, who hoped to build on progress

made during the first mediation. However, the United States then advised the parties that it would not offer any appropriated federal funds to facilitate a settlement and, as a result, the State of New York withdrew its offer of matching appropriated funds. The Oneida Indian Nation of New York had, in the meantime, made progress on its differences with the local governments, but no funding source existed to resolve the trespass damages claims. To fill this void, the State offered Indian casinos to generate the necessary income. After intense negotiations over the terms, the Tribe accepted the State's substitute offer for the money damages portion of the settlement.

The resulting settlement agreement is honorable, fair, and comprehensive. It is honorable because it settles the Oneida land claim based upon terms negotiated at arms length by all the parties - it provides a substantial land base for the Oneida Indian Nation of New York that would be governed by it; it provides for a ceremonial homeland in Oneida territory for the Tribe; it provides for the negotiation of service and tax agreements between the Oneida governments and local and/or State government; it provides for the clearing of the cloud on title of over 20,000 property owners currently residing in the Oneida claim area; and it provides for gaming as the economic engine to compensate the Oneida governments for trespass damage claims as a substitute for appropriate state and federal funds. It is fair because it provides benefit for both Oneida governments in the United States, although in a greater share to the Oneida Indian Nation of New York than its population would justify. And it is comprehensive because it provides for a final and permanent resolution of the Oneida land claim.

As though getting the settlement agreement was not difficult enough, on March 28, 2005,

the U.S. Supreme Court issued its decision in *City of Sherrill v. Oneida Indian Nation of New York*, and it ruled against the Oneida Nation, holding that while the Nation maintains a valid claim for damages for reservation lands sold in violation of the Nonintercourse Act, it may not assert tax immunity on repurchased lands within the reservation boundaries until those lands are placed into trust by the Secretary of Interior.

In 1997 and 1998, the Oneida Nation repurchased several tracts of land within the reservation boundaries and asserted immunity from local property taxes because the land is "Indian country" -- reservation land where tribal title and authority was never extinguished by any act of Congress.

Justice Ginsburg wrote the opinion in the 8-1 decision against the Nation: "Given the longstanding distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders."

The Court's decision invoked the equitable doctrine of laches -- that the long passage of time and the Oneida's inaction during that time prevents the Nation from asserting its tax immunity. The Court made clear that it was not invalidating the land claim, but only the remedy available for the claim. The Court's reliance on this doctrine, which was never presented or briefed by the parties, betrayed a complete lack of understanding of the legal and historical realities that prevented

many tribes from being able to vindicate their rights until recent decades. While the decision should be construed as a narrow decision regarding the remedies that are available for land claims under the Nonintercourse Act, it raises concerns that states will try to use the laches doctrine to diminish the remedies available in other tribal claims.

The Court's decision also tramples on at least two fundamental principles of federal Indian law. First, that only Congress has the power to diminish or disestablish an Indian reservation. Second, that tribal lands are immune from state government taxation until that immunity is specifically revoked by Congress.

The Court based its decision on concerns of "disruptive practical consequences": "If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." The Court specifically noted that other tribes in New York had already sought to invalidate local zoning and land use laws to build a bingo hall "located within 300 yards of a school."

Conclusion

As usual, the Oneida Law Office looks forward to working with the Land Tenure Center and its intern. Our experiences in the past have been positive for the Oneida, and I hope this has been mutual.

Land Tenure Center
Madison, Wisconsin
May 2004

Much of what is believed in America about the rights in Indian country is mistakenly hinged upon race and not law/government. Where there is consideration of treaties, the common understanding is that treaties are "ancient documents" that are anachronistic to contemporary America. "Cowboys and Indians" is how most Americans think the country evolved, and in that red and white view of the world...it's really too bad but the Indians lost.

Critical points here include the foundations of federal-Indian law and the vibrancy of treaty language relative to contemporary policy. Some of the historic points and legal benchmarks follow.

Traditionally, our beliefs include that the lands in modern-day New York State were the site where we were placed by the Creator. We have therefore been there "forever." Archeologists support that we resided there for at least eleven thousand years. We have asserted that with eleven thousand years of ancestors buried beneath that soil, that is our home...our place...it is much more than real estate.

Most of New York was Iroquoian or Hotinosaunee territory. The original five nations of the Iriquois Confederacy are Mohawk, Oneida, Onondaga, Cayuga, and Seneca. Around 1714 the Tuscarora (known as the People of the Shirt) joined the Confederacy as they migrated North from the Southeast. Other tribes and colonies were encroaching on their lands and they sought protection. Oneida carried their voice in the Longhouse.

The hotinosaunee entered into treaties among their member nations and among other nations prior to contact. Our trade region included most of the northeast and extended west to the Mississippi and south to the Carolinas and Georgia. Although not members of our governmental sphere, the Cherokee are Iroquoian linguistically.

With the arrival of the Europeans, it was logical for us to enter treaties with those people as well. Conversely, the evolution of International Law in Europe set a similar foundation from the other side. In the 1530's the concepts of Just War and mutual consent treaties evolved as the two ways in which a sovereign could acquire concessions from another sovereign. The early relations were totally unbalanced relative to military might and sheer numbers, and the Europeans sought mutual consent and support of the Indian nations. Early relations hinged more on military protections and mutual support than on land acquisition by the colonials.

When Europe's wars found their way to these shores, we were treaty bound to support the British. The French-Indian War was the American extension of the Seven Years War in Europe. We engaged in support of the British with her allies against the French and their counterparts. We helped preserve the northern boundary of what became the United States.

In regard to the name "Iroquois"...this term comes from the French. The Hurons were our historic enemies. Our names for ourselves is u^kwehu.weh or real/original people. The Hurons referred to us as snakes. The Hurons were allied with the French who began to call us Iroquois...the "Real Adders."

The Revolutionary War was a critical time in our history. At its outset, the Confederacy was strong. In fact, it was that strength that led to its crisis. Our efforts at neutrality--seeing this as a war between brothers in which we had no role--was a logical position. Both the Colonies and the British, however, recognized that we could be a pivotal participant if we chose to fight with the other side. This led to both sides attacking us, burning our crops and orchards, and attempting to ensure that we could not aid the enemy.

Serving as officers as well as soldiers in the war, on the side of the Colonists, Oneidas had a significant impact. For this service, we were assured by President Washington that our lands in New York were to be protected forever. Forever lasted until the 1820's when Andrew Jackson's administration committed to Indian Removal. The intent was to militarily or otherwise relocate all Indian nations east of the Mississippi to the west. Enemies of Indian nations wanted the land, friends believed that we could preserve ourselves and our ways of life by doing so.

Passage of the Indian Trade and Intercourse Act changed how various levels of government were to interact with the Indian nations. All treaties were now to be reserved to the federal government. Prior, treaties had been negotiated with state governments and in early cases even with powerful corporations like the Hudson Bay Company. From 1790 forward, however, should a lesser entity than the federal government negotiate terms with an Indian nation, any agreement would only be binding if and when confirmed or ratified by the United States. New York did not do so. That is the basis for our claims in New York

Many of our transactions with New York were conducted before the formal adoption of the U.S. constitution. Much of our 5.5 million acres was ceded under dubious agreements. The court has basically foreclosed us from pursuing those claims however claiming that the Articles of Confederation should somehow not afford us protection or standing to require the U.S. to meet its commitments. The last parcel of land which is now known as our reservation in New York is approximately 250,000 acres and comprises the counties of Oneida and Madison.

As we assert legal rights we are bound in the federal court system to precedents building from the Marshall Trilogy. McIntosh v. U.S., Cherokee Nation v. Georgia, and Worcester v. Georgia when taken collectively, provide the footing which shaped Indian policy to this date. McIntosh stood for the right of the United States to own Indian land by right of conquest...even though most lands were not acquired by conquest and much of the land had yet to even be seen. Cherokee Nation evolved the concept of Domestic Dependent Nations and eroded the sovereignty of Indian nations...basically moving

Indian governments from nations with a big "N" to nations with a small "n." Worcester was a "push back" to those who thought they could simply now run over Indian country. The concept of retained sovereignty and the preservation of the right to self-governance--basically those rights not specifically given up by treaty--restored some elements of balance and established a totally unique relationship among Indian (aboriginal) peoples and any colonizing power.

Although law stood on the side of the Cherokee they were nonetheless force-marched to Oklahoma where the government claimed it could protect their interests (even though they had been allies of the US). Jackson was quoted as saying that Marshall had made the law...now let him enforce it. This was the environment at the time of our departure to Wisconsin. All Oneidas were dispossessed of their lands. Those who remained in New York moved in with the Onondagas and Mohawks primarily. We came to Wisconsin in three waves...the First and Second Christian Parties and the so-called Pagan party. Some had remained in southern Ontario near the Six Nations Reserve. Some from here actually reverse-migrated back to Canada. The key thing is that all were dispossessed and all received the same level of compensation.

Upon our arrival in the early 1820's, we engaged in negotiations with the Menominee and HoChunk for joint occupancy of their holdings. In a treaty negotiated among the tribes with the United States as observers, an agreement was struck. The Menominee later challenged the terms, and asserted that the agreement was for us to live here only on a limited basis. They pursued this with the federal government which was very unwise. The Menominee's holdings were reduced from approximately 10 million acres to 250,000 acres, we received 65,430 acres, and the balance was made available for non-Indian settlement.

Treaty-making with Indian nations concluded in 1871. I believe the last Indian treaty was confirmed in 1869. The reason had more to do with American politics than anything else. The Senate was engaging in treaties which required payments and other concessions for which the House had to appropriate the funding. When the policy was changed so that the House and Senate would both be involved in issues affecting Indian country, the assurance was that there would be no diminishment of the terms of existing treaties. The treaties were still good law.

In 1887 there was passage of the Dawes Allotment Act. This was another piece of legislation that saw support from both ends of the political spectrum. The "good guys" supported allotment because they felt that Indian were being held back from melting in the Melting Pot by outdated concepts of communal land holding. The argument went that if they each had their own piece of land they would understand the "American model." The land speculators and other bad guys recognized that once the land was out from under federal protection that it was vulnerable. The Dawes Act was used on us in 1892 over the objection of many Oneida citizens. By 1900 almost all of the land was gone.

In the 1920's most tribes were in dire straights. Many had lost all or most of their land. In the west, the tribes were land rich, but had no money. Tribes had been compacted into the territories that were the traditional homelands of other nations who were forced further west or required to accommodate more tribes on less land. From the turn of the Century to the late 20's historians wrote of "the Vanishing American." Indians were fading away. When you look at the "Indian Head Nickle," you see two related images that noted America's nostalgia about the extinction of both.

The 1920's also saw the return of many American Indian WWI veterans. As they came home to their reservation communities, they were now American citizens by virtue of having served. They were, however, returning to wives and children who were still not eligible to become citizens. The Indian Citizenship Act of 1924 conferred U.S. citizenship upon all American Indians. Like the end of treaty-making, however, this did not eliminate the unique status held by virtue of the treaties. Indians essentially became dual citizens. They were both citizens of the U.S. and citizens of their respective Indian nations.

In 1934 we were impoverished. Our people were selling baskets and locally-picked seasonal fruit. Men were working as lumberjacks. Most of the timber had been sold off. The resulting agricultural land was now in the hands of non-Indians. There were virtually no jobs on the reservation. Our circumstance relative to other tribes was not atypical.

The federal government recognized that there were dramatic needs in Indian country and that the past policies had essentially doomed this whole segment of society. While not without significant flaws, Congress passed the Indian Reorganization Act. This legislation provided meager funding for economic development activities on reservations as a carrot while requiring tribes to vote on the adoption of new elective forms of government that would thereafter be recognized by the United States. We obviously supported the measure...and with the money we received, we repurchased as much land as we could. Going for quantity rather than quality, Oneida repurchased nearly 3,000 acres. Although much of it was low and wet (and not suitable for most uses) this was what we could afford.

In the 1940s Congress was shamed for what had occurred in Indian country and how there was no remedy for tribes. The Indian Claims Commission was established to provide a legal forum for redress. The problem, however, was that this body had no authority to award anything but land. This decade and into the 1950s saw a number of significant policy shifts. Relocation had an impact here as people were relocated to major urban centers away from the reservation. They received funds to help with the move and one month's rent once in the new location. This contributes significantly to the numbers of Oneidas across the country. Termination and P.L. 280 had significant ramifications all nations in Wisconsin.

The Termination era is best known for the 1953 Termination Act, which terminated the existence of tribes, including the Menominee Tribe in Wisconsin, from their federal

relationship. The Oneidas were not one of these tribes. Congress has never abandoned the termination policy expressly, but termination has been repudiated implicitly by the recent self-determination policy. Further, Congress has restored to federal status the Menominee tribe and others.

In 1953, Congress passed Public Law 280. This greatly diminished the potential authority of the fledgling elected Oneida tribal government. The Law extended state jurisdiction to Indian Country, which included the entire reservation of the Oneidas. Jurisdiction over most crimes and many civil matters was given to the State of Wisconsin. The Law specifically exempted from state jurisdiction the regulation and taxation of trust property and the hunting and fishing rights of Indians. By 1976, after a plethora of state/tribal cases were filed, the Supreme Court concluded that Public Law 280 civil jurisdiction did not include taxation of Indian-owned personal (non-trust) property, but was limited to adjudication of individual civil cases. The Oneida Division of Land management is the tribal watchdog for the state taxation of lands and members within the Oneida Reservation.

Most attorneys familiar with Indian Law agree recognition and application of the powers of tribal self-government has expanded in the last few decades. Progress has not been uniform throughout Indian Country, but most Indian tribes and individuals have benefited from more favorable federal legislation and judicial decisions during the 1970's and the 1980's than any other period in the country's history. The Oneidas have been able to take advantage of the opportunities presented and have steadily grown both economically and politically since the 1960's. The Oneida tribe is presently the second largest employer in Brown County, with 3,000 employees. The Oneida Tribe has had significant impact on the stable growth of an Oneida reservation economy by accessing federally funded programs, developing successful enterprises, and implementing numerous taxing, permitting and leasing programs, which assisted in providing a return on the tribal investment in land and buildings.

The Indian Civil Rights Act of 1968 extended protections of the Bill of Rights to tribal members in their dealings with the tribal government. This law also included important provisions allowing states that had assumed jurisdiction under Public Law 280 to "retrocede", or transfer back, jurisdiction to the tribes and the federal government. The Oneida tribe, through its judicial system under the Oneida Appeals Commission, has succeeded in the gradual retrocession by the State courts on certain civil issues where there is presently concurrent jurisdiction. Because the Division of Land Management handles all transactions involving tribal land, the protection of individual due process rights is threaded through all their policies and procedures. The provisions of the Indian Civil Rights Act have more meaning and impact to tribal government as each Division works to implement its requirements.

Another major self-determination law is the Indian Self-Determination and Education Assistance Act of 1975. Through this Act, the Oneida tribe has assumed administrative responsibility for such programs as education, health, and realty from federal agencies delegated with the responsibility to provide beneficial services to the

Tribes. Since 1996, the Oneida Division of Land management has compacted with the Bureau of Indian Affairs to process transactions on Oneida trust lands. A great deal of effort has been spent within the Division to devise a complete title plant, where information on Oneida land transactions is readily available. In order to do this, the Oneida Division of Land Management provides title registry, land acquisition, title search, leasing, training, residential loans and probate/will preparation.

Agreements between the Oneida Tribe and the various state political subdivisions within the reservation are a recognition of the increased leverage, which the tribe wields in this era. It is confusing to many people, even within our local area, that the Oneida Reservation completely encompasses the towns of Hobart and Oneida, and parts of the Village of Ashwaubenon, City of Green Bay and Town of Pittsfield. On land owned by the Oneida Tribe, these state subdivisions have little or no jurisdiction. On land owned by non-Oneidas, the Oneida tribe has little or no jurisdiction. Throughout the reservation there are countless levels of concurrent jurisdiction.

Since 1996, the Oneida Tribe has negotiated service agreements with the Local municipalities and Brown County. The Oneida tribal officers have also negotiated Compacts with the State of Wisconsin regarding the tribal Casino and Bingo enterprises, as required by the Indian Gaming Regulatory Act. These interlocking relationships between tribal, state and local governments can be exceedingly complex, and relies heavily on the title to land. The status of land ownership within the reservation is constantly changing because of an aggressive Acquisition Plan approved by the Oneida General tribal Council. The ownership of land is key to the amount of leverage each government brings to the negotiating table. Today, the Oneida tribe owns about 25% of the reservation, with another 2%, more or less, owned by individual tribe members.

The legal intern who will work with the Oneida Division of Land Management for the summer will get experience in many of the areas discussed. Other areas in which the intern will gain experience include the integration of historical easements, development of federal regulations, land-based due process issues, development of new internal land policies, and traditional legal analysis.

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The Cable-Telco Cross-Ownership Prohibition: First Amendment Infringement Through Obsolescence

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INTRODUCTION

The United States stands at the brink of a revolution. Telecommunications technology evolves at a pace that makes even the most contemporary systems obsolete. This technological revolution could yield tremendous results in fields as diverse as education and health care.

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Unfortunately, the positive results of this change are fettered by government policies that were meant to regulate a different time and a less complex telecommunications field. As Congress grapples with the proper method to regulate the interactions between companies that are on the forefront of change, other nations are allowing the entrepreneurial spirit to flourish. These restrictive U.S. policies hinder the advancement of the United States as the telecommunications standard-bearer of the global village. These policies also retard growth in other industries and occupations that rely on communications.

Cable television companies and telephone companies in the United States are well situated to deploy a nationwide interactive broadband communications network. Congress, by not allowing these two forces to compete or cooperate, is missing a tremendous opportunity to expedite the process. Congress's rationale for its overreaching policy is rooted in an obsolete notion that telephone companies (telcos or common carriers) would use their financial power to thwart cable operators' technological advancement.

This Article analyzes how the changing marketplace and technology has made unconstitutional the cross-ownership ban prohibiting the telephone companies from entering the highly profitable business of video programming distribution. Although many constitutional attacks exist, this Article will analyze the ban's constitutionality against the backdrop of prior restraint and commercial speech jurisprudence. It will then outline a regulatory approach that is more consistent with the contemporary technology and the business atmosphere. Finally, it will review the potential benefits of competition and cooperation between the emerging leaders of wire-based telecommunications.

I. HISTORY OF THE CABLE-TELEPHONE COMPANY OWNERSHIP RESTRICTIONS

Telephone company provision of cable television service has concerned the Federal Communications Commission (FCC or

Commission) for over two decades.[1] In 1969, the Commission initiated a rulemaking proceeding in order to determine whether telephone companies should be able to provide cable television service, and if so, what conditions should be attached to any such authorization.[2] The Commission subsequently determined that a central problem in the evolving cable television marketplace was the

> anomalous competitive situation between CATV [community antenna television] systems affiliated with the telephone companies, and those which have no such affiliation, but have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities.[3]

In 1970, when the cable industry was in its infancy, the Commission adopted rules that prohibited all telcos from providing video programming to subscribers in their respective local service area, either directly or indirectly through an affiliate.[4] The restrictions barred telcos from having any sort of business or financial relationship with cable operators, other than a carrier-user arrangement.[5] The Commission was concerned that telcos would engage in improper cross-subsidization, hinder the development of broadband cable services, and use control of telephone poles and conduit space to prevent or hinder competition from independent cable companies.[6]

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1. *In re* Telephone Co.-Cable TV Cross-Ownership Rules, §§ 63.54-63.58, *Further Notice of Inquiry and Notice of Proposed Rule Making*, 3 FCC Rcd. 5849 (1988) [hereinafter Telco-Cable Cross-Ownership Rules] (to be codified at 47 C.F.R. §63.54).

2. Applications of Tel. Cos. for Certain Certificates for Channel Facils., *Notice of Inquiry and Notice of Proposed Rule Making Regarding Community Antenna TV Sys.*, 34 Fed. Reg. 6290 (1969).

3. *In re* Applications of Tel. Cos. for § 214 Certificates for Channel Facils. Furnished to Affiliated Community Antenna TV Sys., *Final Report and Order*, 21 F.C.C.2d 307, para. 43 (1970).

4. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEP'T OF COMMERCE, GLOBALIZATION OF THE MASS MEDIA 141 (1993) [hereinafter NTIA, GLOBALIZATION] (discussing the history of the cable-telco cross-ownership prohibition).

5. *Id.*

6. *Id.*

Congress codified these rules, in a less restrictive manner, in the 1984 Cable Act.[7] The statutory language provided that the Commission could waive the provisions in areas where the delivery of video programming would not otherwise exist or upon a showing of good cause.[8]

The 1984 Cable Act essentially deregulated cable television, allowing it to enjoy uninhibited growth. Subscriber rates rose rapidly and the quality of service declined.[9] A 1990 FCC report concluded that the cable industry enjoyed very little market pressure in the local service area.[10] Soon thereafter, Congress and the Commission began to ponder whether reregulation was necessary, or whether a competitive marketplace would encourage lower prices, improved service, and the distribution of advanced technologies.

Since passage of the 1984 Cable Act, the cable industry has undergone rapid growth. It has evolved from mere community antenna television into an industry that generates billions in annual revenues. "Nearly 56 million households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase."[11] Cable service is now accessible to more than 95 percent of the television households, and approximately 60 percent of those households subscribe to

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7. *Id.*; *see also* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.).

8. 47 U.S.C. § 533(b)(4) (1988). This, according to the legislative history of the law, overruled the previous rural exemption under the FCC rules. Congress intended to permit telcos into rural areas to provide cable television service without qualification. Therefore, a telco could deliver video programming in its service area even if there was a preexisting system or one under construction. This was prohibited in the FCC rules. *See* H.R. REP. NO. 934, 98th Cong., 2d Sess. 56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4693-94.

9. *See In re* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable TV Serv., *Report*, 5 FCC Rcd. 4962, para. 6 (1990) [hereinafter Policies Relating to the Provision of Cable TV Serv.].

10. *Cf. id.* paras. 69-70 ("Generally there is no close substitute for that steadily expanding complement of specialized program services offered by the typical cable system at this time.").

11. H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 56 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1238.

cable service.[12] Today over nine thousand cable systems exist.[13] However, the large number of cable systems has not promoted local competition. The quality of service has decreased while the prices have increased. In fact the General Accounting Office has concluded that since deregulation, cable systems have raised rates for basic service an average of 43 percent.[14]

Congress's goal of allowing growth in the cable industry was realized. However, competition fell to the wayside. In fact, the 1992 Cable Act[15] codified a strict review of local laws that prohibited awarding a competing franchise in a locality that already had a pre-established cable franchise.[16]

These changes did not go unnoticed by Congress. In creating the Cable Act of 1992, Congress found that "competition to cable from alternative multichannel video technology ha[d] failed to materialize."[17] This resulted in undue market control for cable operators as compared to that of consumers and providers of video programming.[18] After the passage of the 1984 Cable Act, not only did cable rates increase at three times the rate of inflation,[19] but, in addition, Congress found that cable operators were increasingly vertically integrated into programming, and had the ability to discriminate in favor of their affiliated programmers.[20]

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12. *See* H.R. REP. NO. 628, 102d Cong., 2d Sess. 30 (1992). It is estimated that more households in America have televisions than telephones. Industry studies have concluded that 98% of U.S. households have a television set, Gregory Cerio & Lucy Howard, *Tale of the Tube*, NEWSWEEK, Aug. 2, 1993, at 6, 6; 93% of U.S. households subscribe to telephone service, Sandra Sugawara, *Firm Urges FCC to Alter Phone Policy, 'Universal Service' Revision Proposed*, WASH. POST, Nov. 2, 1993, at C4.

13. L.J. Davis, *Television's Real-Life Cable Baron*, N.Y. TIMES, Dec. 2, 1990, § 6 (Magazine), at 16, 52.

14. *Id.*

15. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.A. §§ 521-611 (West Supp. 1993)).

16. 47 U.S.C.A. § 541(a)(1) (West Supp. 1993).

17. H.R. REP. NO. 628, *supra* note 12, at 26.

18. *Id.* at 14.

19. *Id.*

20. *Id.*

This power produced an effective barrier to entry by potential competitors.[21]

The dramatic changes in the video services marketplace led the three agencies responsible for administering the cable-telco ban—the FCC, the National Telecommunications and Information Administration (NTIA), and the Department of Justice (DOJ)—to independently conclude that the cross-ownership ban was obsolete. The FCC examined the status of the cable marketplace and rejected reregulation as a solution to the problem. Instead, it favored policies that would encourage competition in the marketplace.[22]

The NTIA supported the FCC's 1992 decision to amend its rules to permit telcos to have a greater role in the distribution of video programming.[23] It also supported the FCC's recommendation to Congress that it repeal the cable-telco cross-ownership prohibition.[24] The benefits of telco entry into the video programming business would outweigh the potential costs of telco provision of video programming. These costs were either overstated or could be effectively ameliorated by adapting existing regulatory safeguards to suit the video programming marketplace.[25] The NTIA also concluded that telco provision of video programming would offer direct competition to incumbent cable systems, thus expanding competition in the provision of home video programming and multiplying opportunities for entry by independent program providers.[26]

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21. *Id.*

22. *Cf.* Policies Relating to the Provision of Cable TV Serv., *supra* note 9, para. 91 ("[W]e find it unnecessary to propose any specific structural limitations."). This is consistent with the Commission's earlier conclusion that "greater participation in the provision of cable television service by telephone common carriers pursuant to appropriate safeguards would result in greater, not lesser, competition in cable television service and, therefore, in greater public interest benefits to consumers." Telco-Cable Cross-Ownership Rules, *supra* note 1, para. 1.

23. *See* NTIA, GLOBALIZATION, *supra* note 4, at 144.

24. *Id.*

25. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEP'T OF COMMERCE, TELECOMMUNICATIONS IN THE AGE OF INFORMATION 235 (1991) [hereinafter NTIA, AGE OF INFO.].

26. *Id.*

The Department of Justice concluded that telco ownership and operation of video programming would have procompetitive benefits that would outweigh any anticompetitive risks.[27]

> Telephone company entry, according to DOJ, would introduce a needed competitor to the video programming market; provide greater incentives for telephone companies "to take the financial risk of developing" improved telephone networks capable of carrying video programming because relief "will insure an affordable source of programming for their new networks"; and allow telephone companies to compete more effectively with cable operators, which are already vertically integrated.[28]

Most importantly, the video services consumers would be best served by the removal of the ban.

It is clear that technology and marketplace demand have obviated the need for the Section 613 ban on cable-telco cross-ownership. Without competition, the cable industry grew into a monopoly, and the rapid expansion of the cable industry effectively eliminated the reasons supporting the prohibition against telephone company entry into the video distribution market. The current policy forces consumers to suffer the consequences of higher rates and lower quality of service. The resultant myopic reregulation of the industry only half-heartedly attacks one portion of the problem.

Furthermore, the ban, for all of the same reasons, no longer enjoys legal support. In fact, the evolution of the marketplace has forced a law, already on dubious legal grounds, to become unconstitutional.

II. THE SECTION 613 BAN AS A PRIOR RESTRAINT

From the moment Congress enacted the Section 613 ban on cross-ownership, the telcos' First Amendment rights have been relegated to a tertiary level of concern. Telcos have been regarded as entities deserving unique and more onerous attention due to their historical monopoly over the local telephone loop. However,

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27. Brief for Plaintiff at 16, Chesapeake and Potomac Tel. Co. of Va. v. United States, 830 F. Supp. 909 (E.D. Va. 1993) (No. 92-1751-A).

28. *Id.* (quoting Reply Comments of the U.S. DOJ, Telephone Co.-Cable TV Cross-Ownership Rules, CC Dkt. No. 87-266, at 44 (Mar. 13, 1992) (Doc. App., Tbl. 6)).

this status should not deprive them of their First Amendment rights, especially in light of the fact that the industry that was to be protected from the telcos' omnipotence has built an equally strong financial foundation, and now enjoys a similar monopoly in the local cable loop. Therefore, the ban should no longer be viewed as a mere *protection*, but instead as a restraint on *expression*.

The telcos desire to engage in the distribution of video programming to homes. However, as established, the government prohibits such distribution due to an unjustified fear that the telcos would use their market power to force the cable operators out of the market. The goal of Congress in the codification of the prohibition was to circumscribe telco business activities that could injure and delay the growth of a nascent industry and the subsequent deployment of a broadband information highway. However, in the process of reaching this goal, Congress shackled the telcos' ability to express themselves to their customers. In reality, Congress placed a prior restraint on the telcos' speech.

Sir William Blackstone laid the cornerstone for the jurisprudence of prior restraint when he stated:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press . . . .[29]

Nearly two centuries later, the Supreme Court introduced the theory of prior restraint into American jurisprudence in *Near v. Minnesota*.[30] This case involved a statute that authorized judicial abatement of any newspaper or periodical deemed "malicious, scandalous and defamatory."[31] A Minneapolis periodical sought to expose the corruption of gangsters and the city officials who cooperated with them.[32] The state court found that the publication

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29. 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52 (emphasis in original) (referring to the English Licensing Act of 1662).

30. *Near*, 283 U.S. 697 (1931).

31. *Id.* at 701.

32. *Id.* at 704.

violated the statute,[33] but the Supreme Court held the statute unconstitutional as an invalid prior restraint on the freedom of expression.[34]

The theory of prior restraint has been used most commonly in cases involving injunctions and protective orders. *New York Times Co. v. United States*,[35] the "Pentagon Papers" case, is the most famous example of government attempting to suppress the media through injunction. However, the case involved a national security matter and was decided with undue haste, yielding numerous concurring opinions with varying rationales. *Nebraska Press Ass'n v. Stuart*[36] presents a more coherent and refined holding for cases involving this sort of prior restraint.

In *Nebraska Press Ass'n*, a Nebraska state trial judge, in anticipation of a murder trial, issued an order that forbade the confessions or statements of the accused from being published by the press.[37] The Supreme Court granted certiorari in order to determine whether the order violated the constitutional guarantees of freedom of the press, and found that pretrial publicity does not necessarily lead to an unfair trial.[38] It also found that the trial court's conclusion that pretrial publicity would alter the outcome of the case was "speculative," and that the record indicated that the judge explored no other means to prevent this result.[39] The Supreme Court reversed the decision of the Nebraska Supreme Court, holding that "the heavy burden imposed as a condition to securing a prior restraint was not met."[40]

The Court reiterated that the First Amendment guarantees that Congress shall make no law abridging the freedom of speech. It also stated that this guarantee affords "special protection against orders that prohibit the publication or broadcast of particular

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33. *Id.* at 706.
34. *Id.* at 722.
35. *New York Times Co.*, 403 U.S. 713 (1971).
36. *Nebraska Press Ass'n*, 427 U.S. 539 (1976).
37. *Id.* at 542.
38. *Id.* at 554.
39. *Id.* at 563.
40. *Id.* at 570.

information or commentary—orders that impose a 'previous' or 'prior' restraint on speech."[41] The Court admonished, "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[42] This restraint is particularly loathsome due to the fact that it has an immediate and irreversible effect, especially when it falls upon the communication of news and commentary of current events.[43] In other words, "the gravity of the evil, discounted by its improbability," did not justify the invasion of free speech that was necessary to avoid the danger.[44] Injunctions, as one form of prior restraint, are subject to the independent presumption of unconstitutionality.[45]

Along with injunctions, a second form of prior restraint is administrative preclearance.[46] Prior restraint arises within this arena when a license is needed from an executive body in order to execute an action. The Supreme Court, in *Shuttlesworth v. City of Birmingham*,[47] set the parameters by which an administrative prior restraint must be judged. In *Shuttlesworth*, the leader of a civil rights march in Birmingham, Alabama, was arrested for violating a city statute that prohibited parades or processions in the city streets without first obtaining a permit from the City Commission.[48] The statute permitted the Commission to refuse the permit if its members believed that the proposed parade endangered the health, safety, or welfare of the city's residents.[49]

The Court, in overturning the city code, held that this ordinance contradicted the doctrine that had evolved in the previous three decades: a law subjecting the exercise of First Amendment freedoms to prior restraint, without a narrow,

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41. *Id.* at 556.
42. *Id.* at 559.
43. *Id.*
44. *Id.* at 564 (paraphrasing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand, J.), *aff'd*, 341 U.S. 494 (1958)).
45. John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 426 (1983).
46. *See generally id.* at 422-26.
47. *Shuttlesworth*, 394 U.S. 147 (1969).
48. *Id.* at 148.
49. *Id.* at 149-50.

objective, and definite standard to guide its administration, is unconstitutional.[50] "It is settled . . . that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship . . . ."[51] The Court affirmed that a government may not empower an administrative official to "roam essentially at will, dispensing or withholding permission to speak" in accordance with the official's own "opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community."[52]

The Section 613 ban can be viewed as nothing less than an administrative prior restraint imposed by Congress. The ban seeks to prohibit a group of speakers, telephone companies, from entering the mass media.[53] The statute seeks to suppress the speech of a class of speakers based simply upon the nature of the business in which they engage.[54]

This situation is analogous to a licensing statute. In *City of Lakewood v. Plain Dealer Publishing*,[55] the Court stated that a licensing statute concerning the freedom of expression, which places unbridled discretion in the hands of the government, constitutes a prior restraint and may result in censorship.[56] The unfettered discretion to censor, held in the hands of an administrative agent, coupled with the power of a prior restraint, can intimidate a party into censoring its own speech, even if the discretion is never abused.[57] Control of expression through this

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50. *Id.* at 150-51.

51. *Id.* at 151 (quoting Staub v. City of Baxley, 355 U.S. 313, 322 (1958)).

52. *Id.* at 153.

53. Laurence H. Winer, *Telephone Companies Have First Amendment Rights Too: The Constitutional Case for Entry Into Cable*, 8 CARDOZO ARTS & ENT. L.J. 257, 290 (1990).

54. *Id.*

55. *Lakewood*, 486 U.S. 750 (1988).

56. *Id.* at 757. See also Niemotko v. Maryland, 340 U.S. 268 (1951), in which the Court stated, "[T]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has firmer foundation than the whims of personal opinions of a local governing body." *Id.* at 272.

57. *Lakewood*, 486 U.S. at 757.

scheme of administrative fiat results in a total exclusion of speech, a result that is more insidious and loathsome than one that selects only specific victims. "Proof of an abuse of power . . . has never been deemed a requisite for attack on the constitutionality of a statute . . . ."[58]

The Supreme Court has consistently condemned licensing schemes that vest an administrative official with discretion to approve or disapprove of a person's attempt at self-expression.[59] The Commission defends the constitutionality of the ban by claiming that although the "restrictions implicate First Amendment rights, as content neutral regulations that affect speech incidentally they can be sustained as narrowly tailored to achieve a substantial government interest."[60] The Commission relies on *United States v. O'Brien*[61] for the proposition that the ban can be sustained as narrowly tailored to achieve a substantial government interest.[62] The FCC concluded that the current ban, in light of the contemporary technological, competitive, and regulatory conditions, was an effective method to curb anticompetitive behavior that would otherwise work to the public's detriment and impede the development of competition in the provision of broadband services.[63]

It is unlikely that a court would accept the Commission's interpretation of the law, since this approach is similar to the strategy that the Commission employed unsuccessfully in defense of must-carry regulations.[64] In *Quincy Cable*, the Commission used the more lenient First Amendment scrutiny of the *O'Brien*

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58. Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

59. *See, e.g.*, Kunz v. New York, 340 U.S. 290, 294 (1951).

60. Telco-Cable Cross-Ownership Rules, *supra* note 1, para. 76.

61. *O'Brien*, 391 U.S. 367 (1968).

62. Telco-Cable Cross-Ownership Rules, *supra* note 1, para. 76. "As the Supreme Court has interpreted and applied the 'narrowly tailored' standard of *O'Brien v. FCC*, content-neutral government regulation will be upheld if it in fact, '. . . promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

63. *Id.* para. 77.

64. Winer, *supra* note 53, at 291. These regulations required cable television operators, upon request and without compensation, to transmit every over-the-air broadcast signal that was significantly viewed in the local area. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1437 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

standard to attempt to defend the constitutionality of the must-carry rules,[65] casting the rules as having only an incidental burden on speech. The FCC maintained that these regulations evinced a content-neutral standard in which the government interest was unrelated to the suppression or protection of a particular set of ideas.[66] However, the court had "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech" to the must-carry rules,[67] thus damning them to certain failure under the more critical examination required by strict scrutiny.

The court found that these regulations favored one class of speakers over another, thereby negating the Commission's claim that it incidentally intruded upon speech.[68] The must-carry rules were created so as to bolster the fortunes of one business over another.[69] The court further held that the "mere abstract assertion of a substantial government interest" is insufficient to maintain a law that subordinates First Amendment freedoms.[70]

This case is analogous to the telco-cable cross-ownership ban, in that Congress and the FCC have claimed that a situation exists that demands the protection of a restrictive regulation. They have not put forth any credible substantiation as to why the ban must continue. They have undermined the constitutional rights of the telcos in order to bolster the fortunes of a potential competitor, a competitor that has cornered its market and has been accused of monopolistic abuses. The prohibition is not a mere incidental burden on the telcos' ability to express themselves. By administrative fiat, telcos are completely excluded from a medium of expression. This ban cannot withstand the lenient threshold of the *O'Brien* standard proffered by the Commission. Accordingly, the

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65. *Quincy Cable*, 768 F.2d at 1448.

66. *Id.* at 1450. This regulation would only be "sustained if 'it furthers an important or substantial government interest * * * and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Id.* at 1451 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

67. *Id.* at 1453.

68. *Id.*

69. *Id.*

70. *Id.* at 1454.

ban should be struck down as an obsolete and burdensome prior restraint.

III. SECTION 613 AS AN INFRINGEMENT ON COMMERCIAL EXPRESSION

The prohibition on telco entry into the cable market circumscribes the telcos' desire to communicate with potential subscribers. Inevitably, this communication would involve commercial speech, such as self-promotional advertisements and those of program sponsors. This commercial speech could be understood as video programming much like that which would be seen on broadcast stations and, therefore, a direct violation of the ban. Further, this step into the information age would be part of a larger scheme to interconnect the nation. Therefore, cable would be a stepping-stone to a greater design, which would, by plan and necessity, be built partially upon commercial speech. Thus, the prohibition collides with the First Amendment doctrine that protects commercial speech.[71]

"[T]he Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."[72] Commercial speech is thus constitutionally protected

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71. The Court, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), succinctly sums up the history of constitutional protection for commercial speech:

> We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is "sold" for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money.
>
> If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet speech whose content deprives it of protection cannot simply be speech on a commercial subject.

Id. at 761 (citations omitted).

72. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); *see also* Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969).

because it furthers the societal interest in the free flow of commercial information.[73]

Speech in which telcos would engage is analogous to that of current cable operators. The Supreme Court has held that the cable television industry's operations plainly implicate First Amendment interests,[74] including the protection of commercial speech.

> "The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content."[75]

This view was recently reaffirmed by the Supreme Court in *Leathers v. Medlock*.[76]

Traditional First Amendment doctrine does not lose its validity simply because it involves an analysis of the protection afforded to a unique and new mode of communication.[77] In fact,

> the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed. Rather, the objective is to recognize that those values are best served by paying close attention to the distinctive features that differentiate the increasingly diverse mechanisms through which a speaker may express his view.[78]

It is unlikely that a viewer would be able to differentiate between cable service brought to the home through a cable-owned coaxial

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73. *Bellotti*, 435 U.S. at 783.

74. City of Los Angeles v. Preferred Comm., Inc., 476 U.S. 488, 494-95 (1986).

75. *Id.* at 494 (quoting Joint Appendix at 3a, *Preferred Comm.*, 476 U.S. 488 (1986)(No. 85-390)).

76. *Leathers*, 499 U.S. 439 (1991). The *Leathers* case concerned the taxation of media. Arkansas had imposed a tax on receipts from the sale of all tangible personal property and specified resources. This was later amended to include cable television, while still excluding newspapers. Cable operators filed a class action claiming that their expressive rights under the First Amendment and their rights under the Equal Protection Clause of the Fourteenth Amendment were violated. The Supreme Court ruled on appeal that cable television is engaged in "speech" under the First Amendment, and is, to a substantial degree, part of the press. It also stated, however, that the mere fact that cable television is taxed differently from other media does not by itself raise First Amendment concerns.

77. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

78. *Id.*

cable and that of the telco-owned fiber optic cable. Therefore, the application of the appropriate jurisprudence should not turn on this distinction.

The Supreme Court outlined its criteria for upholding the rights of commercial speakers in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[79] The Court developed a four-part analysis to determine if commercial speech rights have been abridged by a government regulation. Initially, a court must determine whether the expression is protected by the First Amendment. For commercial speech to be protected, it must neither concern an unlawful activity nor be misleading.[80] Next, the court must ascertain whether the asserted government interest is substantial.[81] If both inquiries yield positive responses, the third and fourth parts of the test consist of determining whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest.[82] The fourth part of the analysis was modified in *Board of Trustees of State University of New York v. Fox*,[83] where the Court "conclude[d] that the reason of the matter require[d] something short of a least-restrictive-means standard."[84]

The Supreme Court reaffirmed the *Central Hudson* test as modified by *Fox* in *City of Cincinnati v. Discovery Network, Inc.*[85] This case involved a city zoning ordinance that prohibited Discovery Network from placing newsracks for distribution of commercial handbills on city streets, but permitted newspapers to use newsracks. The City claimed that it wanted to improve the safety and aesthetics of the area. The Supreme Court, after analyzing the facts of the case against the backdrop of the standard, held that the city ordinance was a violation of Dis-

79. *Central Hudson*, 447 U.S. 557 (1980).
80. *Id.* at 566.
81. *Id.*
82. *Id.*
83. *Fox*, 492 U.S. 469 (1989).
84. *Id.* at 477.
85. *Discovery*, 113 S. Ct. 1505 (1993).

covery's First Amendment rights, because it infringed on its ability to engage in commercial expression.[86]

The Court noted that ample evidence existed that the City did not establish the necessary reasonable fit between the purpose of the statute and the factual result.[87] "The ordinance on which it relied was an outdated prohibition against the distribution of any commercial handbills on public property. It was enacted long before any concern about newsracks developed."[88] The Court also stated that the obsolescence of the statute was apparent by the fact that the City did not carefully calculate the burden that it imposed on free speech, as exemplified by the removal of sixty-two Discovery newsracks, while allowing about two thousand other newsracks to remain.[89]

If the Section 613 ban were tested against the *Central Hudson* and *Fox* standard, it would be found an unconstitutional intrusion on commercial speech. The ban prohibits lawful commercial speech. As stated by the Court in *Virginia State Board of Pharmacy*, speech does not lose its First Amendment protection simply because money is spent to project it.[90]

The speech that is transmitted would pass the first prong of the *Central Hudson* test, in that it would concern a legal activity and would not be misleading to the viewer. No evidence exists that suggests that the telcos would engage in the transmission of speech banned by other statutes or precedent. In fact, it is likely that they would deliver programming similar to that of the current cable operators, as well as develop interactive programming that could take advantage of the capacity of broadband technology.

It must be determined then if the cross-ownership prohibition advances a substantial government interest. As stated earlier, the purpose of the ban was to prevent the telcos from using their superior market and financial position to the disadvantage of the

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86. *Id.* at 1517.
87. *Id.* at 1510.
88. *Id.*
89. *Id.*
90. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

nascent cable companies. This threat became moot almost as soon as the provision became law. The cable companies grew at an exponential rate and soon gained a financial status tantamount to that of the telephone companies. Therefore, the ban, when viewed in a contemporary light, must fail the second test.

Ordinarily, since the second question yielded a negative response, the ban would fail the modified *Central Hudson* test and be found unconstitutional as an infringement upon the First Amendment rights of the telephone companies. However, assuming arguendo that the second question yielded a positive response, it is improbable that the ban could withstand the scrutiny of the final tests. It must next be determined whether the regulation directly advances the governmental interests asserted.

The government's interest, as established earlier, was to protect the cable companies. The prohibition does protect the cable industry from substantial competition. However, the government asserted that the original need for the protection was to create a base upon which a broadband information highway could be built.[91] This, in effect, would be giving a monopoly to the cable industry on the technology of the future, a policy argument but not a legal assertion. A close examination of the facts reveals that telcos, due to the nature of their business, are in an equally sound position to build this highway, either by themselves or in conjunction with the cable industry.

Section 613 also fails to advance Congress's purpose of promoting competition in cable communications. In the findings of the Cable Act of 1992, Congress asserted that a goal of the legislation was to create fair competition in the delivery of television programming and thus foster the greatest possible choice of programming and lower prices for consumers.[92] In the exclusion by statute of a formidable competitor in the marketplace,

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91. Telco-Cable Cross-Ownership Rules, *supra* note 1, para. 3 (quoting *In re* Applications of Tel. Cos. for § 214 Certificates for Channel Facils. Furnished to Affiliated Community Antenna TV Sys., *Final Report and Order*, 21 F.C.C.2d 307, para. 48 (1970)).

92. H.R. REP. NO. 628, *supra* note 12, at 2.

Congress has expressly circumvented one of the preeminent goals of the reregulatory legislation.

The ban fails the final prong because it is more extensive than is necessary to achieve the stated interest. This analysis focuses on Congress's goal to protect the cable companies from undue competition. Other means exist by which to protect the cable companies from such a threat by the telcos. If telcos do have a history of cross-subsidization, whereby they assign costs from their unregulated ventures to their regulated phone business, this practice would then force the rate payer, and not the shareholder, to bear the burden of the telcos' forays into new lines of business. However, a ban on entry into the provision of cable television is not narrow enough to achieve the goal of preventing cross-subsidization. A more appropriate measure would be to forbid this practice with legislation aimed at addressing this issue specifically.

For the purpose of argument, the Supreme Court, in *City of Cincinnati v. Discovery Network, Inc.*, assumed that the City could prohibit the use of all newsracks for the reasons claimed.[93] It declared, however, that "as long as this avenue of communication remains open, these devices continue to play a significant role in the dissemination of protected speech."[94]

This is analogous to the scenario involving the Section 613 ban. Congress could opt to ban cable operators, satellite dish operators, and telephone companies from disseminating information to subscribers because it would impinge upon the broadcasters' fiduciary and public interest responsibilities and the goal of localism. This would, of course, stunt the evolution of the information age in the United States and place the nation's telecommunications companies at a severe disadvantage. Therefore, as long as the avenue for communication remains open, Congress must open it to everyone. Otherwise, it is unconstitutionally foreclosing a means of commercial communication to a potential speaker.

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93. *Discovery*, 113 S. Ct. 1505, 1516 (1993).
94. *Id.*

The ban's underinclusiveness highlights its inherent unconstitutionality and its fatal burden on a particular speaker's desire to engage in commercial speech. The ban targets telcos. It does not attempt to thwart the entry of municipalities, electric companies, or film studios into the cable business, all of which maintain interests in this industry.[95] These enterprises are capable of posing a financial and competitive danger to the cable operators. Cities could use their franchise powers to monopolize a market; electric companies could be accused of building a system on the backs of their rate payers; and film studios could limit the distribution of their product.

The prohibition also precludes telcos from delivering one form of speech, video programming, that is comparable to broadcast television.[96] Yet, the telcos can provide video transmissions, such as graphics, video conferencing, and videotext services to customers in their service area.[97] Even the Commission has come to the realization that the technological metamorphosis has caused the lines between voice, data, graphics, and video transmissions to blur.[98] Therefore, the ban on video programming is actually a ban on the provision of commercial speech to subscribers.

One court has found these arguments persuasive. On August 24, 1993, the U.S. District Court for the Eastern District of Virginia, Judge T.S. Ellis presiding, held in *Chesapeake and Potomac Telephone Co. of Virginia v. United States*[99] that the Section 533 ban was an unconstitutional burden on the telco's freedom of speech. Specifically, the court held that the ban failed the *O'Brien* intermediate scrutiny test. In a footnote, the court also

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95. Brief for Plaintiff at 39, Chesapeake and Potomac Tel. Co. of Va. v. United States, 830 F. Supp. 909 (E.D. Va. 1993) (No. 92-1751-A).

96. *Id.* at 40.

97. *In re* Telephone Co.-Cable TV Cross-Ownership Rules, *Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry*, 7 FCC Rcd. 300, para. 11 (1991).

98. *In re* Telephone Co.-Cable TV Cross-Ownership Rules, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 5781, para. 90 n.232 (1992).

99. *Chesapeake*, 830 F. Supp. 909 (E.D. Va. 1993).

stated that if the "analysis regarding the appropriate standard of review is flawed, and § 533(b) is properly subject to strict scrutiny, then the provision would fail the 'narrowly drawn' element of that test as well."[100]

The court, in accepting the fact that telecommunications is a rapidly evolving industry, opted not to rely on precedent from previous First Amendment broadcasting cases. "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[101] Furthermore, it limited the possible standards of review to either strict scrutiny or intermediate level scrutiny, since the ban directly abridged the telephone company's "right to express ideas by means of a particular, and significant, mode of communication—video programming."[102] In support of this rationale, the court noted that the Supreme Court has recognized that video programming, as offered by cable companies, is a form of speech protected by the First Amendment.

Although the court recognized that the statute must be viewed within the parameters of heightened scrutiny, it did not feel that the statute's wording and intention merited review under strict scrutiny. Therefore, the ban was analyzed against the backdrop of intermediate level scrutiny. In making this decision, the court held that the statute was not a content-based restriction. In fact, it was content-neutral, since it was "'justified' on grounds unrelated to the suppression of speech . . . ."[103]

In addition to being content-neutral, to overcome intermediate level scrutiny, the statute must be narrowly tailored to serve a significant government interest and allow alternative channels for communication.[104] The ban does not foreclose all channels of communication through video programming for the telcos. The telcos can provide programming to subscribers outside their

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100. *Id.* at 932 n.35.

101. *Id.* at 919 (citing Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 557 (1975)).

102. *Id.* at 918.

103. *Id.* at 926.

104. *Id.* at 917 (citations omitted).

specific service areas. Furthermore, they can produce programming and market it within their service areas to broadcasters or cable operators.[105]

Therefore, the crux of constitutionality is whether the ban is narrowly tailored to serve a significant government interest. The court examined the government's justifications for the statute, which were twofold: (1) the promotion of competition in the video programming market, and (2) the preservation of diversity in the ownership of communication media.[106] However, it discerned quickly and correctly that only one of these reasons was valid, since the ban "simply does not, in a direct fashion, promote competition in the video programming market."[107] In fact, the provision serves as a bar to entry into the market "by the one class of potential competitors that has exhibited an inclination to compete with the entrenched monopolists."[108]

Therefore, the court concentrated on the government's second justification—preservation of diversity of ownership. The government has a justifiable concern with the implications of having a single entity in control of all telecommunications conduits to the home. Thus, the court focused on whether the regulation was narrowly tailored as required by the *O'Brien* test.

The court concluded that less restrictive means could have been chosen by Congress or the FCC that would have allowed the telephone companies to enter the video programming market while limiting their ability to force cable operators out of the market.

> In short, if there exists a range of regulatory strategies that would effectively eliminate the threat of anticompetitive conduct by the telephone companies in the cable television industry, then § 533(b) would "burden substantially more speech than is necessary to

105. *Id.* at 926.

106. *Id.* at 927.

107. *Id.* The court, in support of this contention, noted that the United States cable television industry is a monopoly service. "Of the approximately 10,000 communities served by cable, as of 1991, 53 communities had more than one competing cable system in the same locality." The ban clearly operates to stifle competition by limiting the number of potential providers. "Thus on the most elemental level, section 533(b) actually reduces competition, both in the market for video transport services and the market for video programming." *Id.*

108. *Id.*

further the government's legitimate interests," and would therefore violate the First Amendment.[109]

The government, to substantiate its "diversity of ownership" argument, claimed that the elimination of Section 533(b) would allow the telephone companies to engage in pole access discrimination and cross-subsidization in order to monopolize the market. The court determined that the statute does not address the telephone companies' ability to undertake these practices. It made clear that "it is the concern the telephone companies will act anti-competitively in the *video programming* market, not the *video transport* market, that ultimately must provide the justification for § 533(b)."[110]

The court further noted that the telephone companies do not have any inherent advantage that would allow them to evade the regulation of anticompetitive behavior in the video programming market. It also noted that there were other regulatory options available to achieve the government's interests, but it opted not to explore these since Section 533(b) did not even address the behavior the government was seeking to prevent.[111]

The court concluded that Section 533(b) is not narrowly tailored to serve a significant government interest. Rather, the law substantially burdens more speech than is necessary to further the government's legitimate interest. Therefore, it fails the *O'Brien* test and is facially unconstitutional as a violation of the telephone company's First Amendment rights.[112]

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109. *Id.* at 928 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). In fact, as the court notes, Congress, according to the legislative history, did not even reach a conclusion regarding the effectiveness of less restrictive regulations. It only examined and expressed opinions with regards to the effectiveness of § 533(b). *Id.* at 929.

110. *Id.* at 930 (emphasis added).

111. *Id.* at 931 n.34.

112. *Id.* at 931-32.

IV. A MORE RATIONAL AND CONTEMPORARY APPROACH TO THE REGULATION AND DEVELOPMENT OF THE BROADBAND INFRASTRUCTURE

Congress and the Commission wish to regulate telco entry into cable service. However, as discussed above, the current method has become unconstitutional through obsolescence. Therefore, a new method must be proposed. In the last three Congresses, several of my colleagues and I have introduced legislation that would fulfill the desires of those who wish to regulate, while simultaneously giving telcos the freedom to diversify into cable programming.[113] The current House version of the bill is House Bill 1504, the Communications Competitiveness and Infrastructure Modernization Act of 1993.[114] The purpose of the bill is to encourage the modernization of the nation's telecommunications infrastructure. It would also promote competition in the cable television industry by permitting telephone companies to provide video programming.[115]

The bill, if enacted, would amend Section 613(b) of the Communications Act of 1934 to allow any common carrier subject to Title II of the Act to provide video programming directly to subscribers in its telephone service area, either through its own facilities or through those of an affiliate under the control of that common carrier.[116] Second, any common carrier subject in whole or in part to Title II would be allowed to provide channels of communication, pole line conduit space, or other rental arrangements to any entity controlled or connected to the carrier, so long as these arrangements are used for the provision of video programming to subscribers in the telephone service area.[117]

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113. *See* H.R. 1504, 103d Cong., 1st Sess. (1993); H.R. 3701, 102d Cong., 2d Sess. (1992); H.R. 2546, 102d Cong., 1st Sess. (1991); H.R. 1523, 102d Cong., 1st Sess. (1991); H.R. 2140, 101st Cong., 2d Sess. (1989).

114. H.R. 1504.

115. *Id.* § 2.

116. *Id.*

117. *Id.*

The telco would be required to establish a separate affiliate to manage the cable distribution portion of the business. The affiliate would also be required to maintain all necessary books and accounts, and to carry out the bulk of its own marketing, but would be allowed to engage in institutional advertising by the parent telephone company. The affiliate would be prohibited from owning real or personal property in conjunction with the common carrier. The bill would subject all business transactions between the telco and the video programming affiliate to regulation by the Commission.[118]

In order to ensure equal access and competition within the industry, the telco would be required to establish a basic video dialtone platform, to be regulated by the Commission.[119] The telephone company would have to make available such capacity as is requested by an unaffiliated video program provider. However, the telco would not be required to provide more than 75 percent of the equipped capacity of its basic video dialtone platform to the unaffiliated video program providers.[120]

To prevent uncompetitive behavior on the part of the telcos, the bill prohibits cross-subsidization. The common carriers would be forbidden to include costs or expenses associated with provision of video service in their rates for telephone exchange service. Furthermore, the telephone company would be prohibited from purchasing or retaining control over any cable system that is in its telephone service area and owned by an unaffiliated person. However, it could obtain a noncontrolling interest in a cable system through a joint venture. The bill also provides that the

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118. *Id.*

119. Under the video dialtone concept, a common carrier could construct and operate a facility within its local service area that would be capable of transporting video images, audio messages, and graphics. The space would be leased to an unaffiliated programmer. The rates would be regulated to ensure reasonable and nondiscriminatory prices and practices.

120. H.R. 1504. This may seem like an unreasonable infringement upon the telco. However, broadband technology promises to deliver an extremely high level of channel capacity. In the current market, it would be almost impossible to meet this capacity. Therefore, the telcos would still be able to provide as much programming as they want, without restriction.

Commission could waive the prohibition if the buyout would result in a substantial upgrade through the deployment of modern technology, if it would expand the capacity and services of the cable system, if the purchase would be in the public interest, and if the local franchising authority approves the waiver.[121]

This provision does not attempt to regulate the speech of the common carriers. Instead, by focusing specifically on business practices, it attempts to quell the concerns of those who believe that a telephone company might use its financial strength to overpower a competing cable company. This is a narrowly tailored approach to achieve the government's interests in allowing competition to flourish and providing advanced telecommunications services to those areas that are most often underserved.

Furthermore, the bill empowers the Commission to assess fines and penalties as it deems appropriate in the event a common carrier knowingly and willfully violates any provision. Penalties could range from fines to a mandated complete divestiture of the video programming affiliate.[122] These penalties could be categorized as a subsequent punishment, as opposed to a prior restraint. Even so, the penalty strikes not at punishing the expression, but at punishing the business practices that resulted in the exclusion of or the limitation upon a competing speaker in the marketplace.[123]

V. THE BENEFITS OF AN OPEN AND COMPETITIVE TELECOMMUNICATIONS MARKETPLACE

The Section 613 prohibition has a direct and immediate effect on the lives and futures of the citizens of the United States that extends beyond home entertainment. The prohibition is not designed to cope with the technological convergence and evolution of two traditionally separate wings of the United States' telecommunications industry. Together, these two wings provide the two

121. *Id.*
122. *Id.*
123. *Id.*

essential items in the American home: the television and the telephone.

Currently, cable operators are deploying advanced technology in order to offer an expanded array of video programming, and to experiment with two-way and point-to-point communications. Simultaneously, the telcos are deploying fiber optic cable within their public switched networks. This technology holds out the promise of providing video, audio, and high speed data transmission. The removal of the ban would create a competitive atmosphere in which to expedite the development of public networks with switched broadband capabilities.

The repeal of the cable-telephone company cross-ownership ban would promote and expedite the continued development of the United States' telecommunications infrastructure. It would provide an incentive to the telcos to replace copper wires with broadband fiber optic cable more quickly than the current rate of depreciation.

The argument that the telephone companies can already facilitate the provision of video programming ignores the risk that competitors to the current cable operators would not want to invest in a market in which the latter already has a stake. Furthermore, cable operators would not deploy programming over a telco distribution facility because they have already made an infrastructure investment and can sustain market power in their current service areas.

If the telcos are not allowed to provide their own programming, they may not be able to secure programming to be carried over their video dialtone. By 1990, large multiple system operators (MSOs) held ownership interests in six of the eight national pay cable networks, and thirteen of the top twenty national basic cable networks.[124] It is reasonable to expect the competing MSOs to prohibit distribution of their property to a new competitor. In fact, Congress found that this practice had become so egregious that in

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124. Policies Relating to the Provision of Cable TV Serv., *supra* note 9, para. 78.

the Cable Act of 1992 it passed an access to programming provision.[125]

The NTIA also cited arguments that if Local Exchange Carriers (LECs) could provide programming, they "could realize revenues in the programming market . . . which revenues could then be used to fund 'investment in a broadband public network.'"[126] Although the NTIA recognized that LECs might conceivably realize efficiencies as program providers and stimulate a competitive video market, the NTIA, based on the sparse record before it, concluded "there will not be any long-term excess profits available to subsidize" network development activities.[127]

The most tangible result from the elimination of the cross-ownership ban would be lower rates and increased efficiency of service. Currently, cable companies have little incentive to improve either program choices or services. However, the advent of a potential competitor in the marketplace would provide the impetus for progress. Furthermore, a recent study concluded that the elimination of Section 613 would result in $74.9 billion in consumer surplus from price reductions by the year 2003.[128]

The revolution in communications extends beyond the mere provision of programming. Health care, education, business communications, and residential communications will undergo a significant change in the wake of the deployment of a broadband network, whether provided by cable operators or telephone companies.

Broadband networks threaten to break down the four walls of the traditional classroom. Experiments in distance learning occurring nationwide highlight the advantages of interconnecting students and teachers from different areas and backgrounds. College professors can reach an exponentially larger field of high school students in order to teach advanced level classes. The new

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125. 47 U.S.C.A. § 548 (West Supp. 1993).

126. NTIA, AGE OF INFO., *supra* note 25, at 240 (citations omitted).

127. *Id.* at 241.

128. THE WEFA GROUP, ECONOMIC IMPACT OF ELIMINATING THE LINE OF BUSINESS RESTRICTIONS ON THE BELL COMPANIES 85 tbl. 10, July 1993 (on file with the *Federal Communications Law Journal*).

technology allows these professors not only the ability to teach, but also the ability to interact with the students as though they were in the same classroom. Fiber optics also brings new opportunities to rural area students, who have traditionally been deprived of the benefits of being in a large city. The students now have access to college libraries and computers through the use of the telephone lines.

Mississippi 2000, an experiment implemented by BellSouth, IBM, Apple, and Northern Telecom, has improved educational facilities available to students in the Mississippi Delta region of the state. Fiber optics connects three colleges, four high schools, and the Mississippi Educational Television Network studio. It allows the institutions to interact in simultaneous, two-way, full-motion instructional programming.[129] Michigan Bell has linked six school facilities through fiber optics in the Lansing-Jackson area. Besides other benefits, it allows high school students from Pottersville High School to receive classes from Lansing Community College.[130] Finally, students in the Findlay, Ohio, School District have been interconnected to the facilities of two area colleges by a fiber optic system deployed by Ameritech.[131]

Health care providers are using broadband telecommunications facilities to improve health care. Of course, this benefits hospitals and patients in major urban centers. However, the most beneficial impact is felt by patients in traditionally underserved areas. Since 1980, more than two hundred rural hospitals have closed and one-fifth of the remaining rural institutions are at risk of closing.[132] From a technological standpoint, the average rural hospital is a generation or more behind its urban counterpart.[133] Employment of a broadband network would allow these hospitals

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129. John L. Clendenin, *Bringing Technology to the Classroom*, PUB. UTIL. FORT., Dec. 20, 1990, at 18, 19.

130. *Students, Teachers Interact with Fiber Optics*, PR Newswire, Nov. 14, 1990, *available in* LEXIS, Nexis Library, Wires File.

131. Scott Bargelt, *Video Teaching System to be Installed Locally*, FINDLAY COURIER, Nov. 12, 1991, at A1.

132. *Better Health Care for Rural America: Hearing Before the Joint Economic Comm.*, 101st Cong., 1st Sess. 1 (1989).

133. *Id.* at 65.

to engage in rapid transfer and information sharing, such as the transmission, storage, and retrieval of x-rays and other medical images. Experiments in this field are still in the early stages, but the initial results are encouraging.

By turning the home into an office, telecommuting promises to improve the quality of life for millions of Americans. President Bush declared, "Millions have already found their productivity actually increases when they work nearer the people they're really working for: their families at home."[134] Telecommuting can reduce stress and lost time, while increasing job satisfaction. Furthermore, it can help businesses reduce office overhead and allow them to reap the benefits of increased productivity. These benefits have been enjoyed by only a handful. The infrastructure for this sort of experiment is not yet in place. As a broadband fiber optics network is deployed, telecommuting may become more commonplace.

Elimination of the cross-ownership ban will allow the United States to remain competitive in the international marketplace. The first country to have nationwide implementation of a fiber optic network will lead the world in the telecommunications race in the twenty-first century. The United States has begun developing this infrastructure. However, Japan and other nations are surpassing us. The Japanese government plans to have 100 percent fiber penetration by the year 2015.[135] In comparison, at the current rate, the United States will reach this mark by the year 2030 or 2045.[136]

The United States is the standard-bearer of telecommunications technology. However, its position is beginning to erode in the wake of the farsighted policy decisions of other countries. U.S. companies have the knowledge and technology that will allow them to retain the lead, but current policies prevent them from

134. Remarks at the National Transportation Policy Meeting, 1 PUB. PAPERS 336, 337 (Mar. 8, 1990).

135. H.R. 2546, 102d Cong., 1st Sess. 4 (1991).

136. *Id.*

utilizing this potential and may eventually cost us the advantage in the international marketplace.

CONCLUSION

Telecommunications regulatory policies are necessary to ensure that the benefits of the evolving technology reach all sectors of the United States. However, the policymakers must avoid stifling the expression of speakers in the marketplace. An infringement on their First Amendment rights injures speakers and has serious repercussions on all those who benefit from the advances that they may make. In an era of technological upheaval in telecommunications, policymakers must not act on the basis of a particular industry's past. Instead, they should look to the benefits that this industry and its competitors can bring the future generations, not only in terms of technology, but in the ability of the citizens to express themselves.

PREPARED STATEMENT OF GERALD L. DANFORTH, CHAIRMAN, ONEIDA TRIBE OF INDIANS OF WISCONSIN

Good morning Chairman Dorgan, Vice Chairman Thomas and honorable committee members.

My name is Gerald Danforth and I am chairman of the Oneida Tribe of Indians of Wisconsin. I am extremely honored to be here with you today. As you will recall, when Carl Artman first came before this committee in the last Congress, other pressing issues precluded my attendance. Today I am privileged to bring you greetings from our nearly 16,000 members who share their pride today as I come forward to express our support and confidence in one of our enrolled members, Carl Artman.

Mr. Artman is a bright and extremely hard-working individual who has a broad and distinguished academic background. For such a young man, he has a wide arrange of skills and broad diversity of experience upon which to draw from in the exercise of his duties as Assistant Secretary of the Interior. It brings me great pride to know that voices of support for Mr. Artman have come from all comers of Indian country. I am encouraged, as are many other tribal leaders throughout Indian country as demonstrated at the listening session in Minneapolis this past Saturday, that this committee has moved so expeditiously to fill this critical position—one that has remained vacant for 2 years. I believe that you will be considering an exceptional candidate.

Carl Artman has earned a Juris Doctorate, an L.L.M. [Master of Laws] and a Master of Business Administration Degree. He is familiar with the legal and economic forces that demand consideration by this office. His experience serving Congressman Oxley and representing our nation in Washington provides him with unique preparation and familiarity with Capital Hill and Indian country. He comes before you with the array of attributes necessary to engage this administration, understand the relationship with Congress, and appreciate the unique and common issues affecting the Indian nations. I believe Mr. Artman's experience thoroughly qualifies him for this position.

Mr. Chairman, in 1976 and again in 1989 this very committee heard testimony regarding the role of our nation in the founding of the United States, the incorporation of many of our governmental concepts into the American constitution, and our commitment to the Colonies in the Revolutionary War . . . commitments that helped found and secure America. Our people's long and proud tradition in support of this country . . . tradition of government of and by the people . . . tradition of leaders as true public servants guides us and certainly guides Carl. It is therefore fitting and proper that an Oneida now comes forward to hold this high post. We believe that Carl Artman will do so with honor and distinction.

PREPARED STATEMENT OF JACQUELINE JOHNSON, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS

Chairman Dorgan, Vice Chairman Thomas and distinguished members of the Senate Committee on Indian Affairs, on behalf of the National Congress of American Indians I want to thank you for the opportunity to provide our views on the nomination of Carl Artman to be the next Assistant Secretary for Indian Affairs. This is the first time that we have testified before the committee in the 110th Congress, and I want to reinforce with you how much we appreciate the bipartisan manner in which this committee conducts its business. NCAI has always operated as a nonpartisan organization, and we strongly support this committee's tradition of bipartisan cooperation in developing Federal policy for American Indian and Alaska Native communities.

On behalf of the National Congress of American Indians, we urge the Senate to move forward on confirmation of Carl Artman to be the Assistant Secretary of Indian Affairs. Mr. Artman has the necessary experience for this important job, having served as the Associate Solicitor for Indian Affairs for the Department of the Interior for the past 1 year, and having worked as an attorney in the field of Indian affairs for many years. We attach a copy of NCAI Resolution TUL–05–17 urging confirmation of a nominee with this level of experience and expertise.

We also urge a swift confirmation of the President's appointment because this is an extremely important position for Indian tribes and Indian people, and the position has been vacant for 2 years. The Assistant Secretary leads the Bureau of Indian Affairs [BIA], an agency with 10,000 employees and an annual budget of $2.2 billion. The BIA provides critical services and infrastructure in law enforcement, education, social services, transportation and land, and natural resources management; and the Assistant Secretary is the primary advocate for these programs and services within the Administration. James Cason, the Associate Deputy Secretary

has been fulfilling these responsibilities on a temporary basis since February 2005. We greatly appreciate the work that Mr. Cason has done, but the BIA requires an appointee who has the approval of the Senate to provide the leadership and direction that it needs.

The BIA is also at a critical time on policy direction and reorganization, and needs the Assistant Secretary to lead these efforts in consultation with tribal leadership. For example, law enforcement and tribal courts are a top priority of tribal leadership, particularly with the growing methamphetamine epidemic that is affecting so many reservations. We expect that these areas will see increases in the President's budget for fiscal year 2008, and we will need strong leadership at the BIA to make sure that these increases are implemented effectively. As you know, trust reform and land management have been critical issues for many years, a settlement is under discussion, reorganization is underway and there is a major effort to revise the trust regulations. We need a leader at the BIA to facilitate those efforts. I could go on and on with the list of important responsibilities—like education and No Child Left Behind—but I don't want to alarm Mr. Artman with too long of a list. He will have to tackle them one at a time.

The Assistant Secretary also has an important decisionmaking role that affects individual tribes—and many of these decisions have been on hold for too long. Construction of schools and roads, allocation of police, water rights settlements, approval of leases, et cetera. Sometimes these decisions can be controversial, such as some land-to-trust applications. The Assistant Secretary has to balance competing interests and make decisions. Of course we always want the decisions to favor Indian tribes, but whether the decision is yes or no, it is important to have decisions made so the tribes can move forward with their planning and efforts.

If I have one piece of advice for Mr. Artman, it is to focus on government-to-government consultation. The key is to communicate with tribes early before decisions are made, have an open mind and talk about problems and solutions. You will be amazed at how much tribal leaders want to be a part of the solution as long as their concerns are respected and included in making the decision. One of the strongest powers of the Assistant Secretary is to bring parties together and urge them to negotiate solutions. Tribal leaders will listen to you and respect you because you are the Assistant Secretary for Indian Affairs.

That brings me to my final point. It is important to fill the position of Assistant Secretary for Indian Affairs because the position plays such an important role in the relationship between the Federal Government and Indian tribes. Prior to 1977, the Commissioner of Indian Affairs was most often a non-Indian administrator and a symbol of paternalism. The position of Assistant Secretary was created as part of the implementation of the Federal policy of tribal self-determination, and ever since that time the position has been held by a talented Indian person who was accorded significant respect by tribal leaders. The Assistant Secretary elevated the status of the job and put an Indian into the position. The importance of this is not lost on tribal leaders. Forrest Gerard, Ada Deer, Kevin Gover, Neal McCaleb—these are accomplished Indian people that we have looked up to as symbols of our ability to take control of our own futures.

Carl Artman now has the opportunity to join this distinguished company and help lead the Federal-tribal relationship into the future. Tribal leaders are working to fulfill a vision of transitioning the BIA to a system where there is active participation and management by tribal governments, while the BIA fulfills its trust responsibility to protect Indian lands, oversee regulations and enforcement, and provide technical assistance and funding for critical services. We have a vision of a partnership where tribes and the BIA manage reservation lands for their intended purpose—providing a homeland and economy for Indian people. NCAI urges the Senate to consider Mr. Artman's nomination as soon as possible so that he can move forward with this important work.

NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #TUL-05-017

TITLE: Support for the President to Nominate and Confirm the Assistant Secretary for the Bureau of Indian Affairs

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, more than 550 American Indian tribes in the United States are recognized by the Secretary of the Department of the Interior as having a special legal relationship with the United States, including the federal government's trust responsibility to Indian tribes characterized as a government-to-government relationship; and

WHEREAS, the Department of Interior has a duty to consult with tribal governments prior to, during, and after any federal action within this trust relationship; and

WHEREAS, the Department of Interior, primarily through the Bureau of Indian Affairs is the lead federal agency charged with carrying out the United States' relationship with Indian tribal governments and the Assistant Secretary for the Bureau of Indian Affairs is that agency's chief spokesperson and ambassador to tribal governments; and

WHEREAS, the most recent Assistant Secretary of the Bureau of Indian Affairs, Dave Anderson, resigned on January 31, 2005 and his position remains vacant; and

WHEREAS, there has been no subsequent nomination to the position of Assistant Secretary made by the President of the United States to fill the vacancy.

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NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby call upon President George W. Bush to nominate and confirm, with the advice and consent of the United States Senate, an American Indian/Alaska Native experienced in matters of concern to Indian Country to the position of Assistant Secretary for the Bureau of Indians Affairs, as expeditiously as possible; and

BE IT FURTHER RESOLVED, that the NCAI requests the President and his advisors to consult with tribal governments regarding the selection of a nominee; and

BE IT FURTHER RESOLVED, that the NCAI is supportive of nominees who have demonstrated and proven credentials relevant to the position of Assistant Secretary of the Bureau of Indian Affairs, who possess a superior record of achievement relevant to the position of Assistant Secretary of the Bureau of Indian Affairs, and who have knowledge and expertise relevant to the position of Assistant Secretary of the Bureau of Indian Affairs; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted at the 2005 Annual Session of the National Congress of American Indians, held at the 62nd Annual Convention in Tulsa, Oklahoma on November 4, 2005 with a quorum present.

President

ATTEST:

Recording Secretary

Adopted by the General Assembly during the 2005 Annual Session of the National Congress of American Indians held from October 30, 2005 to November 4, 2005 at the Convention Center in Tulsa, Oklahoma.