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Tribal Advisory Committees:

Tools for Fulfilling the Federal Trust Obligation to American Indian/Alaska Native People

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Abstract

Tribal advisory committees have the potential to be an effective mechanism to facilitate Tribal consultation and urban confer as part of the government-to-government relationship between Tribes and the federal government. This paper analyzes the Unfunded Mandated Reform Act (UMRA) intergovernmental exemption to the Federal Advisory Committee Act (FACA) as applied to Tribal advisory committees formed to advise federal agencies on policy that affects American Indian and Alaska Native (AI/AN) people. As such, this paper suggests that both Congress and federal agencies should implement Tribal advisory committees more broadly as an important communication tool in the fulfillment of

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the federal trust obligation to AI/AN people.
The federal duty to engage in Tribal consultation and urban confer stems from its trust obligation generally to AI/AN people both on and off the reservation. Tribal consultation is also mandated by statute, regulations, executive order, and case law. This paper illustrates the role Tribal advisory committees can play in facilitating effective Tribal consultation and urban confer.
This paper asserts that Washington representative organizations, both for Tribes and for urban Indian organizations, should be included on Tribal advisory committees handling relevant issues. Further, this paper argues that the membership of a Washington representative organization on a Tribal advisory committee does not violate the UMRA intergovernmental exemption to FACA when it shares or is designated to represent the interests of Tribes.

I. Introduction

Treaty-making and the principles of federal Indian law that have evolved in U.S. case law have established a unique relationship between Tribes and the federal government. Tribes are viewed as both sovereign governments and as domestic dependent nations. Communications between federal agencies and Tribes are government-to-government communications, with the federal government bound by a trust obligation to provide for the wellbeing of Tribes and AI/AN people. As will be discussed in this paper, the trust obligation can be conceptualized as a sort of fiduciary duty on the part of the federal government to protect the sovereignty, wellbeing, and resources of AI/AN people. It follows then, that as part of its duty, the federal government must understand the needs of Tribes and AI/AN people in order to competently fulfill its duty to meet those needs. The requirements for Tribal consultation and urban confer stem directly from the federal trust obligation and the communication that is required for the federal government to appropriately fulfill its duty.

Consider, for example, something as simple as the flow of funding from the federal government to Tribal governments and Urban Indian Organizations (UIOs) that serve the healthcare needs of urban AI/AN communities. Healthcare funding of this sort is often in the form of grants or line-items in a budget for very specific purposes: diabetes prevention and care, addiction prevention and rehabilitation, elder care, and general wellness, to name a few. What if a UIO is overwhelmed with treating meth addiction but receives only funding specifically earmarked for opioid rehabilitation care? Without Tribal consultation and urban confer to identify the unique needs of each community, there is a great risk of healthcare funding being misappropriated and the government failing its duty to provide for those needs.

Similarly, if federal government action affecting the environment has the potential to threaten the resources of a Tribe or AI/AN community, consultation and urban confer is necessary for the government to understand and meet its duty. Permitting a project such as a pipeline or highway in the absence of Tribal consultation carries incredible risk that natural or cultural resources will be destroyed, demonstrating a failure of the federal trust obligation to Tribes and AI/AN people.

Given the federal trust obligation to provide health services and to protect resources for AI/AN people, this paper analyzes the use of Tribal advisory committees in both health and environmental agencies. The U.S. Department of Health and Human Services (HHS) exemplifies how Tribal advisory committees, implemented under the UMRA intergovernmental exemption, have been used beneficially. These are contrasted with the lack of Tribal advisory committees within environmental agencies and the poor consultation that results. All agencies should use Tribal advisory committees to improve communication, consultation, and accountability in fulfillment of the federal government's trust obligation to Tribes and the 78% of AI/AN people living in urban areas.

II. Background

Tribes have inherent sovereignty, and Tribal governments strive for a government-to-government relationship with the U.S. federal government that recognizes their sovereignty. The U.S. Constitution recognizes Tribal sovereignty that arises from treaty-making and all branches of the federal government have affirmed the right of Tribes to self-governance. Many Tribal governments have been crippled from the effects of colonization and harmful U.S. government policies, however. Because of this, Tribes are struggling to build the governmental capacity necessary to provide for the needs of their people.

A. The Federal Trust Obligation Generally

Treaties signed by the federal government in exchange for Indian land established a trust obligation for the wellbeing of AI/AN people. The Supreme Court has recognized the "distinctive obligation of trust incumbent upon the Government . . . ."[2] The Court has stated that in carrying out its obligation, "the Government is something more than a mere contracting party," and that under "a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court," it has "charged itself with moral obligations of the highest responsibility and trust."[3]

Further, this trust obligation has been formed and defined in the U.S. Constitution and case law that recognizes Tribes as political entities and holds AI/AN people outside of racial classification.[4] The Court in *Morton v. Mancari* articulated this principle:

> "On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment . . . . This unique legal status is long standing [citations omitted] and its sources are diverse. [This] preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ."[5]

The federal trust obligation can be conceived as including three duties: (1) to provide federal services to AI/AN people; (2) to protect tribal sovereignty; and (3) to protect Tribal resources.[6] The federal duty to provide services points to the

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[2] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) (citing Cherokee Nation v. State of Georgia, 5 Pet. 1 (1831); United States v. Kagama, 118 U.S. 375 (1886); Choctaw Nation v. United States, 119 U.S. 1 (1886); United States v. Pelican, 232 U.S. 442 (1914); United States v. Creek Nation, 295 U.S. 103 (1935); Tulee v. State of Washington, 315 U.S. 681 (1942)).

[3] *Id*. at 296–97.

[4] *See* Morton v. Mancari, 417 U.S. 535 (1974).

[5] *Id*. at 554–55.

[6] Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U.

wellbeing of AI/AN people generally and includes the provision of healthcare, education, housing, and food.[7] Congress has passed several statutes that require the provision of services to Tribes and in many cases has transferred the administration of those services to Tribes with the capacity to do so.[8]

Scholars of federal Indian law postulate that the duty to protect Tribal sovereignty has been articulated from the very first Supreme Court decisions that attempted to define the status of Tribes and their relationship with the U.S. government.[9] Further, to protect the Tribe as a sovereign, it follows that the federal government must protect the Tribe's sovereignty.[10] As such, the trust obligation has "necessarily expanded to include the duty to protect tribal sovereignty from inadvertent divestment by Congress."[11] Thirdly, the federal duty to protect Tribal resources captures the fiduciary duty to Tribes in those cases where the federal government is in control of Tribal resources.[12]

1. The federal trust obligation extends to urban AI/AN people

The federal trust obligation extends to all AI/AN people.[13] This includes

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MICH. J. L. REFORM 417, 430 (2013).

[7] *Id*. at 430–31 (citing Richard M. Nixon, *Special Message on Indian Affairs (July 8, 1970), in Documents of United States Indian Policy* 256, 257 (Francis Paul Prucha ed., 2000) ("[T]he Indians have often surrendered claims to vast tracts of land . . . . In exchange, the government has agreed to provide community services such as health, education and public safety . . . .").

[8] *Id*. at 431. *See also,* Snyder Act of 1921, Pub. L. No. 67-85, 42 Stat. 208 (codified as 25 U.S.C § 13) (authorizing the expenditure of money "for the benefit, care, and assistance of the Indians" including for education, health, and farming); Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400, 1400 (codified at 25 U.S.C. §§ 1601-1683) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.").

[9] Routel & Holth, *supra* note 6, at 431–32 (citing Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1219 & n.34, 1220 (1975); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1498, n. 124 (characterizing the federal-tribal relationship articulated by Marshall as a "sovereign trusteeship")).

[10] Routel & Holth, *supra* note 6, at 432.

[11] *Id*. at 433.

[12] *Id*. at 434–35 (citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (concluding that the federal government "has charged itself with moral obligations of the highest responsibility and trust" and its conduct "should therefore be judged by the most exacting fiduciary standards.")); United States v. White Mountain Apache Tribe, 537 U.S. 465, 469 (2003) (concluding that the United States could be liable for damages for not maintaining tribal trust property).

[13] *See e.g.,* No Child Left Behind Act, 20 U.S.C. § 7401 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children."); Indian Child Welfare Act, 25 U.S.C. §§ 1901(2)-(3) ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds . . . ."); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5302(a) ("The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services

the 78% of AI/AN people now living outside of reservations. [14] AI/AN people have migrated off reservations for several reasons. Most prominently, the assimilationist policies of the Relocation Era (1945-1968) promised a better life for AI/AN people in cities.[15] Bureau of Indian Affairs (BIA) policies and the Indian Relocation Act of 1956 coerced more than 30% of the reservation population at that time to move into urban areas in an attempt at forced assimilation.[16]

In addition to the children and grandchildren of those relocated peoples who still live in cities, other AI/AN people have continued to migrate to urban areas seeking better access to necessary services and economic opportunity. Urban AI/AN people, however, continue to face a "host of social and economic problems, including intense racial prejudice, sporadic or underemployment, low pay, inadequate housing, insufficient health care, crime, and high student drop-out rates."[17]

Congress has repeatedly recognized that the federal government's trust obligation extends to AI/AN people living outside of reservations.[18] In recognizing its obligation to urban AI/AN people, Congress funded 58 urban Indian centers between 1970 and 1975 to provide urban AI/AN people with "housing and employment assistance, legal aid, social gathering places, and a 'safe place for the observance and preservation of Indian values.'"[19] As stated in a 1977 report to the Senate:

> "The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes *and people*. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the *Indian*

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more responsive to the needs and desires of those communities."); Indian Alcohol & Substance Abuse Prevention & Treatment Act, 25 U.S.C. §§ 2401(1)-(2) ("The Congress finds and declares that … (1) the Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members, (2) included in this responsibility is the treaty, statutory, and historical obligation to assist the Indian tribes in meeting the health and social needs of their members."); Restatement of the Law of American Indians § 3 DD No 1 (2013).

[14] U.S. Census Bureau (2012).

[15] *See* Thomas A. Britten, *Urban American Indian Centers in the Late 1960s- 1970s: An Examination of Their Function and Purpose*, 27 INDIGENOUS POL'Y 1, 2 (2017).

[16] *See generally* Max Nesterak, *Uprooted: The 1950's Plan to Erase Indian Country*, APM REP., https://www.apmreports.org/story/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country (last visited Jan. 28, 2020).

[17] Britten, *supra* note 15, at 3.

[18] *See generally* 25 U.S.C § 13; 25 U.S.C. §§ 1651–1160h (providing for healthcare to urban Indians); 29 U.S.C. § 764(b)(13) ("Research grants may be used to conduct studies of . . . effective mechanisms for the delivery of rehabilitation services to Indians residing on and off reservations.").

[19] Britten, *supra* note 15, at 5; *see also* Native Americans Programs Act of 1974, Pub. L. No. 93-644, 88 Stat. 2324 (specifically including Indian organizations located in urban and non-reservation areas for funding).

people to a level comparable to the non-Indian society."[20]

Further, as articulated in Senate Report 100-508 eleven years later:

> "The [trust] responsibility . . . arising from treaties and laws that recognize this responsibility as an exchange for the cession of millions of acres of Indian land does not end at the borders of an Indian reservation. Rather, government relocation policies which designated certain urban areas as relocation centers for Indians, have in many instances forced Indian people who did not [want] to leave their reservations to relocate in urban areas, and the responsibility for the provision of health care services follows them there."[21]

Clearly, Congress recognizes its role in enacting policies that have forced AI/AN people to migrate off reservation and that the federal trust obligation extends to AI/AN people now in urban areas as a result.

2. The procedural duty to consult as part of the trust obligation

The federal government cannot fulfill its fiduciary duty without full and open communication with Tribes and AI/AN people. Underlying and implicit in the three substantive requirements of the federal trust obligation is the procedural obligation of the federal government to meaningfully consult with those it has a duty to protect.[22] Many of the statutes requiring consultation have language expressing this, but one of the better examples can be found in the Indian Self Determination and Education Assistance Act (ISDEA).[23] ISDEA's Declaration of Commitment states:

> "The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole . . . which will permit . . . effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."[24]

Without effective consultation and communication, the federal government impermissibly undermines Tribal sovereignty and important information about what is actually needed very often get missed. Where funding or grants are being approved and allocated, for example, the risk of misidentification of priorities and misapplication of funds is very high without effective Tribal consultation and urban

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[20] AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT SUBMITTED TO CONGRESS (May 17, 1977), https://files.eric.ed.gov/fulltext/ED190335.pdf (emphasis added).

[21] S. REP. NO. 100-508, at 25 (1988).

[22] Routel & Holth, *supra* note 6, at 435.

[23] 25 U.S.C. § 5302(b).

[24] *Id*.

confer.[25] For example, how can Congress or agencies know if a Tribal community has greater need for suicide prevention funding or for diabetes care?

The federal government also fails in its obligation and its fiduciary duty to protect Tribal resources when its failure to consult results in the destruction of those resources. For example, it is well known that permits issued without effective Tribal consultation often end up allowing projects that destroy sacred sites, objects, and resources.[26] The destruction and loss of burial grounds, sacred religious sites, and other cultural and natural resources clearly affects all AI/AN people with ties to those sites and to their Tribe—whether they are living on or off reservation. The federal government fails in its trust obligation to AI/AN people where its failure to meaningfully engage in Tribal consultation and urban confer results in the destruction of resources, the undermining of Tribal sovereignty, or its failure to provide necessary services.[27]

B. Tribal Consultation and Urban Confer

As recognition of the necessity and duty of Tribal consultation has grown, so has the proliferation of statutes, executive orders,[28] agency policies,[29] and case law that mandates it.

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[25] *See* Section I(B), *infra*, for an explanation of and statutory authority for urban confer.

[26] *See e.g.*, Carol Berry, *Pipeline Creates Tribal Dissent*, INDIAN COUNTRY TODAY (Sept. 27, 2010), http://www.klamathbasincrisis.org/pipelinecreates092710.htm (citing examples of inadequate consultation before federal government's approval of the Ruby Pipeline Project, which destroyed sacred sites, cultural and natural resources); Rob Capriccioso, *House Passes Keystone XL Pipeline Provision*, INDIAN COUNTRY TODAY (Dec. 14, 2011), http://sacandfoxnation-nsn.gov/sites/sfnation/uploads/documents/News_13/april/april_Final_Web.pdf (discussing inadequate consultation before approval of the pipeline where there is Tribal concern over "considerable risk and impact upon First Nation, tribal and indigenous community cultural resources along the route.").

[27] In addition to the procedural duty to consult stemming from the federal trust obligation, *see* Section I(B), *infra*, for a discussion of statutory, regulatory and common law mandates for Tribal consultation and urban confer.

[28] *See e.g.,* Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000); Memorandum on Government-to-Government Relationship with Tribal Governments (Sept. 23, 2004), https://www.govinfo.gov/content/pkg/WCPD-2004-09-27/pdf/WCPD-2004-09-27-Pg2106.pdf; Presidential Memorandum on Tribal Consultation (Nov. 5, 2009), https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president.

[29] *See e.g.,* U.S. DEP'T OF HEALTH & HUMAN SERVS., HHS TRIBAL CONSULTATION POLICY (updated Dec. 12, 2010), https://www.hhs.gov/sites/default/files/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf; U.S. ENVTL. PROT. AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES (May 4, 2011), https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.

1. Statutes mandate Tribal consultation and urban confer.

Many federal statutes and their implementing regulations mandate the effective involvement of Tribal governments, leaders, and Indian organizations in the making of laws, rules, policies, and procedures that impact them.[30] In general, these statutes and their implementing regulations mandate consultation on the specific issue they were enacted to address, such as repatriation, religion, and environmental reporting.[31]

The Unfunded Mandates Reform Act (UMRA) stands out as a broad mandate, however, requiring consultation for *every* agency on *all* rulemaking that impacts Tribes. [32] The UMRA states that "each agency *shall* . . . develop an effective process to permit elected officers of . . . tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals."[33] In mandating the effective involvement of Tribal governments and their designees, the UMRA also provides the authority for Tribal advisory committees, which will be discussed in detail in section II(B).[34]

The Indian Health Care Improvement Act (IHCIA) explicitly recognizes the "trust, respect, and shared responsibility" between the federal government and Urban Indian Organizations (UIOs) that serve and represent urban AI/AN people. [35] IHCIA mandates urban confer by the Indian Health Service (IHS) "to the maximum extent practicable" and provides the authority for urban Indian

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[30] *See* American Indian Religious Freedom Act, 42 U.S.C. § 1996 ("The President shall direct the various Federal departments, agencies . . . to evaluate their policies and procedures in consultation with native traditional religious leaders . . . ."); Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-mm (requiring federal agencies to consult with tribal authorities before permitting archeological excavations on tribal lands); National Historic Preservation Act (NHPA), 16 U.S.C. § 470 ("In carrying out its responsibilities . . . a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties . . . ."); Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 (requiring consultation with Indian tribes, traditional religious leaders and *lineal descendants of Native Americans* regarding the treatment and disposition of specific kinds of human remains, funerary objects, sacred objects and other items (emphasis added)); Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA II), Pub. L. No. 109-162 (2005). *See also* NAGPRA Implementing Regulations, 43 C.F.R. § 10 (specifying consultation requirements); National Environmental Policy Act (NEPA) Implementing Regulations, 40 C.F.R. § 1500 (requiring federal agencies to consult with Indian tribes early in the NEPA process); NHPA Regulations Implementing Section 106, 36 C.F.R. § 800.2 ("The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. . . . Consultation with an Indian tribe must recognize the government-to-government relationship . . . . The agency official shall consult with representatives designated or identified by the tribal government . . . .").

[31] *See supra* note 31.

[32] 2 U.S.C. § 1534(a).

[33] *Id.* (emphasis added).

[34] *Id.*

[35] 25 U.S.C. § 1660d(b).

organizations on IHS advisory committees.[36] A UIO is defined as a nonprofit corporate body governed by a majority AI/AN board of directors and established in an urban center to administer urban Indian health programs.[37] UIOs "provid[e] for the maximum participation of all interested Indian groups and individuals . . . ."[38] IHCIA mandates Urban Confer repeatedly throughout the Act, declaring that "all actions under this [Act] shall be carried out with . . . conference with urban Indian organizations . . . ."[39]

2. Executive actions mandate Tribal consultation.

Presidents and agency heads[40] have expanded the statutory Tribal consultation and urban confer mandates with executive orders and agency guidance. On November 6, 2000, President Clinton issued Executive Order 13175 titled Consultation and Coordination with Indian Tribal Governments.[41] Executive Order 13175 has also been cited across federal agencies as the authority for their consultation policies and was affirmed by President Obama in 2009.[42] President Clinton included "authorized intertribal organizations" in the definition of Tribal officials with which agencies were to establish and maintain "regular and meaningful consultation and collaboration."[43] The consultation mandated by Executive Order 13175 is clearly aimed at fostering the government-to-government relationship with Tribes and honoring Tribal sovereignty.

Notably, the expansion of the Tribal consultation mandate to include "authorized intertribal organizations" reveals the understanding that a broad application of the consultation requirement may be necessary to capture the input of the hundreds of Tribal governments in the U.S. as well as the needs of the 78% of AI/AN people that live off-reservation. Moreover, the OMB guidance issued to implement Executive Order 13175 articulates that consultation is mandated for any

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[36] *Id.*

[37] *Id.* § 1603(4)(29); *see also* INDIAN HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERVS., INDIAN HEALTH MANUAL, at pt. III, ch. 19, § 3-19.1G (1994).

[38] 25 U.S.C. § 1603(29).

[39] § 1602(5). *See also* § 1660d(b) ("ensure that the Service confers, to the maximum extent practicable"); § 1602(5) ("all actions … shall be carried out with . . . conference with urban Indian organizations"); § 1631(f) ("confer with urban Indian organizations, in developing innovative approaches"); § 1665k(a)(2)(A)(vii) ("funding . . . shall be used . . . in conference with urban Indian organizations . . . ."); § 1660d(a)(2).

[40] *See, e.g.*, U.S. Dep't of the Interior, Order No. 3317, *Department of the Interior Policy on Consultation with Indian Tribes* (Dec. 1, 2011), https://www.onrr.gov/IndianServices/pdfdocs/SO-3317-Tribal-Consultation-Policy.pdf.

[41] Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

[42] *See* Exec. Off. of Pres. Obama, Memorandum on Tribal Consultation, 74 Fed. Reg. 57879 (Nov. 5, 2009) (affirming the mandates and definitions in E.O. 13175 and imposing deadlines for reporting on compliance with the consultation mandates it laid out).

[43] Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

policy issues that "impact Indian communities."[44]

Arguably, these expanded definitions should be construed to include UIOs and their national representative organizations—especially in those instances where they share interests with Tribal governments. Any input from UIOs and their representative organizations must supplement that of Tribal governments, however, and should not be construed as replacing it. Where UIOs are serving Tribal members, it is obvious that they share interests with the Tribal government in providing for the needs of those members. Thus, UIOs and their representative organizations have a potentially vital role to play in representing those needs.

3. Agency policies mandate Tribal consultation.

Many agency policies mandate Tribal consultation.[45] Here, the focus is on HHS and EPA consultation policies specifically.

HHS has a thorough and substantive consultation policy.[46] It, like most consultation policies, recognizes that the need for consultation stems from the "special relationship" between Tribes and the federal government.[47] It acknowledges the importance of Tribal sovereignty and expresses its commitment to work "in partnership" with AI/AN people.[48] It states that "open, continuous, and meaningful consultation" is "essential" and that "to the extent practicable and permitted by law, consultation with Indian Tribes *will* occur" prior to any action that significantly affects Indian Tribes.[49] HHS's policy further incorporates the mandates of Executive Order 13175 by requiring each division to make "all practicable attempts" to use "consensual mechanisms" for developing regulations, including "negotiated rulemaking."[50]

Notably, HHS's consultation policy includes "Indian organizations," stating that "these organizations represent the interest of Indian Tribes when authorized by those Tribes. These organizations by the sheer nature of their business serve and advocate for Indian Tribes' issues and concerns that might be negatively affected if these organizations were excluded from the process."[51]

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[44] Memorandum from the Off. of Mgmt. & Budget, Memorandum for Heads of Exec. Dep'ts & Agencies, and Indep. Reg. Agencies on Guidance for Implementing E.O. 13175 (Jan. 11, 2011) (on file with Off. of Mgmt. & Budget).

[45] *See, e.g.*, U.S. Dep't of the Interior, Order No. 3317, *Department of the Interior Policy on Consultation with Indian Tribes* (Dec. 1, 2011), https://www.onrr.gov/IndianServices/pdfdocs/SO-3317-Tribal-Consultation-Policy.pdf; BUREAU OF INDIAN AFFAIRS, GOVERNMENT-TO-GOVERNMENT CONSULTATION POLICY (Dec. 13, 2000), https://www.tribalconsultation.arizona.edu/docs/BIA/BIA%20Consultation%20Policy%202000.pdf.

[46] *See* U.S. DEP'T OF HEALTH AND HUM. SERV., TRIBAL CONSULTATION POLICY (Dec. 14, 2010), https://www.hhs.gov/sites/default/files/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf [*hereinafter* HHS Tribal Consultation].

[47] *Id*.

[48] *Id*.

[49] *Id*. (emphasis added).

[50] *Id*.

[51] *Id*.

EPA's policy states that it takes "an expansive view of the need for consultation."[52] However, its consultation policy is somewhat lacking in both scope and substance, especially when compared with HHS's policy. EPA acknowledges Tribes as "sovereign entities" and dryly recognizes the "historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law."[53] While EPA's policy cites Executive Order 13175 as the authority requiring Tribal consultation, it appears to attempt to reserve discretion to itself on whether to actually consult.[54] The policy reiterates throughout the document that activities "*may be* appropriate for consultation" rather than articulating specific triggers and mechanisms for identifying issues that mandate Tribal consultation as HHS's policy does.[55] While this reservation of discretion is concerning, EPA does generally acknowledge the importance of Tribal consultation in its policy guidelines. In the section on identifying matters that "may" be appropriate for consultation, EPA includes "National and Regional Tribal Partnership Groups," explaining that "these groups assist in the identification of matters that may be appropriate for consultation."[56] EPA's policy also allows for Tribes to request consultation "in addition to EPA's ability to determine what requires consultation."[57]

Even with the differences in tone between the HHS and EPA Tribal consultation policies, both incorporate Executive Order 13175 and mandate Tribal consultation. Likewise, both policies acknowledge the important role Tribal advisory committees play in facilitating effective consultation.

4. Case law mandates Tribal consultation.

Courts have enforced Tribal consultation requirements and have held agencies accountable for Tribal consultation pursuant to statute, regulations, and their own policies.[58] Additionally, the United States Court of Appeals for the Eight Circuit has enforced the right to Tribal consultation outside of statute or regulation.[59] In doing so, the court stated that where an agency "has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful

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[52] *See* U.S. ENVTL. PROT. AGENCY, EPA POLICY ON CONSULTATION & COORDINATION WITH INDIAN TRIBES (May 4, 2011), https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.

[53] *Id*.

[54] *Id*.

[55] *Id*. (emphasis in original).

[56] *Id*.

[57] *Id*.

[58] *See, e.g.*, Yankton Sioux Tribe v. Kempthorne, 442 F. Supp. 2d 774, 785 (D.S.D. 2006) (finding an agency's "failure to comply with its own consultation policy violates general principles that govern administrative decision-making.").

[59] Routel & Holth, *supra* note 6, at 452.

opportunity to express their views before Bureau [of Indian Affairs] policy is made, that opportunity must be afforded."[60]

Despite broad mandates and the trust obligation to consult, pervasive problems persist in the actual implementation (or lack thereof) of Tribal consultation.[61] Tribes are frequently not consulted when they should be. Tribal consultation or urban confer often lacks substance or any sense of collaboration. Some agencies don't fully understand what Tribal consultation is, mistaking it for a "listening session" or merely a form of disseminating information.[62] And in some cases, notice requirements for Tribal consultation are circular or confusing.[63] Section III will discuss the role that Tribal advisory committees could and should play in facilitating more effective Tribal consultation and urban confer.

III. Tribal Advisory Committees

Tribal advisory committees are formed by agencies to advise them on policy that affects AI/AN people. Tribal advisory committees are formed under the UMRA intergovernmental exemption to FACA in recognition and furtherance of the government-to-government relationship between Tribes and the federal government. Tribal advisory committees are composed of Tribal representatives from different regions, depending on how each particular agency has divided its regulatory area. There may also be seats for national-at-large members or Washington representative organization members, as will be discussed in section II(C).

As mentioned previously, Tribal advisory committees can play an important role in filling the gaps and shortcomings of Tribal consultation as it is currently implemented. It is important to note that Tribal advisory committee functions and meetings do not replace the direct government-to-government dialogue required by Tribal consultation.[64] However, Tribal advisory committees can and should be used as a useful mechanism to assist agencies in fulfilling their trust obligation to consult and confer. Because of our "burgeoning administrative state," the "duty to protect Tribal sovereignty is more relevant than ever."[65] Agencies are continually contemplating and promulgating policies and regulations that have the potential to affect AI/AN people, and the federal trust obligation requires consultation and confer for all of them.

There are many reasons agencies may not be engaging in Tribal

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[60] Oglala Sioux Tribe v. Andrus, 603 F.2d 707, 721 (8th Cir. 1979).

[61] Routel & Holth, *supra* note 6, at 444.

[62] *See id.* at 444-46.

[63] *See generally Tribal Consultation Policies Still Lacking Amid Challenges of Trump Era*, HAALAND.HOUSE.GOV (April 23, 2019), https://haaland.house.gov/media/in-the-news/tribal-consultation-policies-still-lacking-amid-challenges-trump-era.

[64] Routel & Holth, *supra* note 6, at 458 (". . . a meeting with pan-Indian organizations, although useful, cannot substitute for government-to-government consultation without the express consent of the tribe in question. Consultation must occur between federal officials and tribal officials.").

[65] *Id*. at 465.

consultation in a way that fulfills their federal trust obligation.[66] Where an agency fails to identify issues that could potentially affect AI/AN people, Tribal advisory committees can alert them to the need for consultation and urban confer. Where an agency conflates the right to public notice and comment with the right to Tribal consultation,[67] a Tribal advisory committee—while not replacing Tribal consultation—may provide substantive input that might otherwise have been overlooked. Tribal capacity can be an issue, also. Where some Tribes lack the resources to engage in the many consultations they might need or want to,[68] Tribal advisory committees may serve to fill that gap by representing Tribal interests either specifically or generally. Likewise, Tribal advisory committees may alert an agency to the need to engage in Tribal consultation on an issue where Tribes lack the resources or ability to monitor agency actions and request it themselves.

HHS is a model for the effective use of Tribal advisory committees.[69] Across its agencies, HHS utilizes Tribal advisory committees to track need, report concerns, and collaborate on possible solutions. Many of these Tribal advisory committees meet at least quarterly. This allows ample opportunity for members to voice questions, concerns, or suggestions and for the agency to give notice of possible shifts in funding, policy, and upcoming consultations, confers, or rulemaking.

Importantly for our discussion here, Tribal advisory committees are in a prime position to alert agencies to the need for Tribal consultation or urban confer on a specific issue or problem that they have identified, rather than waiting for agency notice that may never come. Employing Tribal advisory committees as another communication mechanism may help remedy some of the Tribal consultation shortcomings discussed previously.

A. The Federal Advisory Committee Act (FACA)

The requirements of FACA burden the right of Tribes and AI/AN people to the free and open communication necessary for the federal government to fulfill its trust obligation. As previously discussed, without free and open communication, the federal government will be hampered in fulfilling its fiduciary duty to Tribes and AI/AN people. Tribal advisory committees are needed to help facilitate effective Tribal consultation and urban confer.

FACA defines a federal advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" established by statute or "established or utilized" by the President or agencies "in the interest of obtaining advice or

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[66] HHS Tribal Consultation, *supra* note 46.

[67] Routel & Holth, *supra* note 6, at 454.

[68] *Id*. at 463.

[69] See Appendix 1 for chart of the active HHS Tribal advisory committees, including membership and charters, where available.

recommendations . . . ."[70] Where various experts, private interests, technical advisors, special interests, and the like are gathered by the agency to advise agency actions, that committee would be subject to the FACA requirements laid out below. Thus, a committee formed to advise an agency on Tribal issues comprised of members that were not Tribal government representatives or their designees would be subject to FACA.

The FACA imposes the following requirements for federal advisory committees: they must be advisory only; they must be "fairly balanced;" there must be no "inappropriate influence;" their charters and filing of meeting notice must adhere to specific requirements; and all meetings and records must be open and available to the public (with exceptions specified).[71] Clearly, these requirements are not appropriate for advisory committees aimed at facilitating the type of Tribal consultation and urban confer that is required as part of the federal trust obligation and in furtherance of the government-to-government relationship.[72]

Of greatest concern is the requirement that all meetings and records of them be open and available to the public. For obvious reasons, there is no other context where government-to-government meetings are open and available to the public. In fact, in the interest of furthering those relationships, maintaining security, and facilitating frank and open communication between governments, the privacy of meetings between governmental officials and representatives is strictly enforced. Likewise, because Tribes are sovereign and their relationship with the federal government is *as another sovereign government*, the privacy of meetings as such should similarly be protected.

Congress passed the intergovernmental exemption to FACA precisely to encourage the effective implementation of the mandate to involve Tribal governments and their representatives in agency decision-making that affects Tribal communities.[73] Understanding that FACA rules created barriers to the communication necessary for a government-to-government relationship, President Clinton wrote a memo to departments and agencies explaining that legislation would be drafted to create the intergovernmental exemption to FACA.[74] He added, "I now direct you to expand substantially your efforts to promote consensual rulemaking."[75]

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[70] 5 U.S.C. App.2 § 3(2).

[71] 5 U.S.C. App.2.

[72] *See* Memorandum from the Off. of Mgmt. & Budget to Heads of Dep'ts. & Agencies, Guidelines & Instructions for Implementing Section 204 "State, Local, and Tribal Government Input" of Title II of P.L. 104-4 (Sep. 21, 1995) ("the process required by the Federal Advisory Committee Act is not to act as a hindrance to full and effective intergovernmental consultation.").

[73] *See* Memorandum from the Exec. Off. of Pres. Clinton, Memorandum for Heads of Dep'ts. & Agencies: Reg. Reinvention Initiative (Mar. 4, 1995) ("We will . . . begin drafting legislation that will carve out exemptions to the Federal Advisory Committee Act to promote a better understanding of the issues, such as exemptions for meetings with . . . tribal governments . . . .").

[74] *Id.*

[75] *Id.*

B. Unfunded Mandated Reform Act (UMRA)

The UMRA intergovernmental exemption to FACA is precisely aimed at promoting the "free communication" between the federal government and Tribal governments.[76] UMRA was enacted in 1995 and lays out a two-part test for committees that must be satisfied for the exemption to apply.[77] First, meetings must be held "exclusively" between federal officials and "elected officers of State, local and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities . . . ."[78] Second, meetings must be solely for the purpose of "exchanging views, information, or advice" relating to federal programs that implicate Tribes.[79]

The first statutory purpose stated in UMRA is "to strengthen the partnership between the Federal Government and State, local, and tribal governments."[80] Among the statutory mandates aimed at achieving this purpose is the requirement that federal agencies develop a process that enables "elected and other officials of . . . tribal governments to provide input" when agencies are developing regulations.[81] This requirement is distinct and separate from the broad mandate to consult with Tribes demonstrating that Congress understood the need for both consultation and Tribal advisory committees to facilitate the communication necessary for the government-to-government relationship.

Congress recognized that the UMRA intergovernmental exemption to FACA is necessary because other mechanisms for participation in rulemaking are insufficient.[82] During Senate hearings on UMRA, Senator Lankford asked about Advanced Notice of Proposed Rulemaking as a mechanism for participation in rulemaking.[83] When confronted with the reality that draft rules are already basically in their "final" language before Notice of Proposed Rulemaking occurs, Senator Lankford conceded that this process does not satisfy the requirement that Tribal governments have substantive input early on in the rulemaking process.[84]

> "[A]s a practical matter, the first notice has to be the final, because if you make any change, you have to justify it to the satisfaction of

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[76] U.S. Gen. Servs. Admin., The Unfunded Mandates Reform Act of 1995: The Intergovernmental Committees Exemption of FACA ("… UMRA was intended to strengthen the partnership and communications between the federal government and its…tribal counterparts.").

[77] 2 U.S.C. § 1534(b); *see also* Federal Advisory Committee Management Final Rule, 41 C.F.R. § 102-3.40 (2001).

[78] 2 U.S.C. § 1534(b).

[79] *Id*.

[80] 2 U.S.C. § 1501(1).

[81] *Id.* § 1501(7)(A).

[81] *Unfunded Mandates Reform Act of 1995: One Year Later: Hearing Before the Subcomm. On Human Res. and Intergovernmental Relations of the H. Comm. On Gov't Reform and Oversight*, 104th Cong. 762 (1996).

[83] *Id*. at 29.

[84] *Id*.

> the court. So the easy way to minimize the burden and risk of judicial review is by making all of the decisions before you ever put anything in writing, and most agencies-EPA is a good example. They have hundreds of meetings through which they come up with the initial draft . . . . The easy way around that is do not make changes, which means as a bottom line make all your decisions before you ever issue the notice.") *See also* p.2 ("Studies of the notice and comment rulemaking process have consistently found that private parties and their representatives dominate that process both with respect to the comments they submit and the influence of those comments. By contrast, beneficiaries of rules, state governments, local governments and tribal governments file very few meaningful comments and the comments they file have little effect on the final rule the agency adopts."[85]

Beyond merely rulemaking discussed above, a House Report on UMRA hearings reveals a similar recognition of the need for the intergovernmental exemption to FACA to provide a more effective mechanism for "soliciting and integrating the input of such interests into the Federal decision-making process."[86] The report goes on to state that the Congressional intent behind the UMRA exemption to FACA is to encourage the use of Tribal advisory committees as a more effective mechanism for discussion between Tribal governments (and their designees) "to discuss regulatory *and other issues involving areas of shared responsibility*."[87]

Conceivably then, Tribal advisory committees could capture the communication needs of decision making that may not rise to the level of triggering formal consultation or confer but is still necessary to ensure fulfillment of the trust obligation. For example, where permitting, licensing, or other regulatory interpretations or policies are in the preliminary stages of consideration or are deemed not likely to have a substantial impact on Tribes, the input of a Tribal advisory committee may be necessary to prevent the agency from overlooking or neglecting issues relevant to AI/AN people.

Congress recognized the useful role Tribal advisory committees could play in fulfilling its trust obligation to consult and confer. The UMRA is "built on three foundations: information, accountability and consultation . . . [and] [c]odifying parts of President Clinton's Executive Orders, as this bill does . . . requiring consultation . . . brings [Tribes] to the table when the agencies are trying to develop the means of administering any program."[88] Clearly, Tribal advisory committees

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[85] *Id*.

[86] H.R. Rep. No. 104-76, at 40 (1995).

[87] *Id*. (emphasis added) ("Accordingly, this legislation will require Federal agencies to establish effective mechanisms for soliciting and integrating the input of such interests into the Federal decision-making process. Where possible, these efforts should complement existing tools, such as negotiated rulemaking and/or the use of Federal advisory committees broadly rep-resenting all affected interests.").

[88] *Unfunded Mandates: Hearing Before the Comm. On Gov. Aff. & Comm, on the Budget*, 104th Cong. 75-76 (1995) (prepared statement of Rep. Jane Campbell on behalf of the National

can and should serve as a mechanism for government-to-government communication and consultation where other mechanisms fall short.

C. Washington representative organizations

In the context of the mandates for Tribal consultation, where UIOs are serving Tribal members, it is obvious that they share interest with the Tribal government in providing for the needs of those members. They therefore have a potentially vital role to play in representing those needs. As such, UIOs and their representative organizations are important in facilitating the communication necessary for the federal government to fulfill its trust responsibility to AI/AN people.

Further, as will be discussed at length below, UIOs arguably may be included as Tribal advisory committee members under the UMRA exemption. First, UIOs are defined by statute as being governed by and serving AI/ANs.[89] Secondly, UIOs are charged by statute with the duty of representing the shared interests of the AI/AN communities they serve through contract and cooperation agreements with government agencies.[90] A Washington representative organization of UIOs then, is capable of efficiently and effectively representing the shared interests of UIOs.

OMB guidelines mandate that to comport with legislative intent, the UMRA intergovernmental exemption must be construed broadly to include Washington representative organizations.[91] In the statute, Congress directed the president to issue "guidelines and instructions to federal agencies for appropriate implementation of subsections (a) and (b) . . . ."[92] While OMB guidelines are generally viewed as non-binding, here, the OMB guidelines and directions to agencies have the weight of direct statutory authority behind them.[93] In addition to instructing that the intergovernmental exemption be construed broadly, the

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Conference of State Legislatures).

[89] *See* 25 U.S.C. § 1603(29); *see also* INDIAN HEALTH SERV., *supra* note 37, at pt. III, ch. 19, § 3-19.1G.

[90] *Id.*

[91] OFF. OF MGMT. & BUDGET, EXEC. OFFIC OF THE PRESIDENT, GUIDELINES & INSTRUCTIONS FOR IMPLEMENTING § 204: ST., LOC., & TRIBAL GOV. INPUT OF TIT. II OF P.L. 104-4 (1995) ("In accordance with the legislative intent, the exemption should be read broadly to facilitate intergovernmental communications . . . .").

[92] 2 U.S.C. § 1534(c), Pub. L. 104-4, 109 Stat. 48, at §204 (Mar. 22, 1995); *see also* EXEC. OFFICE OF THE PRESIDENT, 60 FED. REG. 45,039, DELEGATION OF AUTHORITY TO ISSUE GUIDELINES AND INSTRUCTIONS TO FEDERAL AGENCIES ON CONSULTING WITH STATE, LOCAL, AND TRIBAL GOVERNMENTS (1995) ("By the authority vested in me as President by . . . section 204(c) of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) [2 U.S.C. 1534(c)] . . . I hereby delegate to the Director of the Office of Management and Budget the authority vested in the President to issue the guidelines and instructions to Federal agencies required by section 204(c) of that Act.").

[93] 2 U.S.C. § 1534(c).

guidelines specify that the UMRA requirements for consultation apply to all federal agencies.[94]

The OMB guidelines articulate that consultation with Washington representative organizations is necessary for the effective intergovernmental consultation and communication mandated by the UMRA.[95]

> "It is also important that federal agencies consult with Washington representatives, where available, of associations representing elected officials. These Washington representatives often know which local elected officials are the most knowledgeable about, interested in, or responsible for, implementing specific issues, regulations or programs, and can ensure that a broad range of government officials learn of and provide valuable insight concerning a proposed intergovernmental mandate."[96]

Admittedly, Washington representatives targeted here are elected Tribal officials and their designated representatives. Considering the policy aims of Tribal consultation and urban confer, the practical implications of the majority of AI/AN people living off reservation, and the mandates to construe the UMRA broadly, Washington representatives of UIOs should arguably be included as well. Importantly, they should only be included as members of Tribal advisory committees to the extent that they are representative of Tribal interests and are designated by Tribal officials to do so. The importance of Tribal sovereignty cannot be overstated.

In addition to mandates that the UMRA intergovernmental exemption be construed broadly regarding the parties included, agencies are instructed to construe the exemption broadly as to the scope and content of intergovernmental advisory committee meetings as well.[97]

> "The scope of meetings covered by the exemption should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus; exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration."[98]

Recall the purpose and intent of the UMRA intergovernmental exemption

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[94] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-95-20, GUIDELINES AND INSTRUCTIONS FOR IMPLEMENTING SECTION 204 "STATE, LOCAL, AND TRIBAL GOVERNMENT INPUT," OF TITLE II OF P.L. 104-4 (1995).
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*.

to FACA is to provide a mechanism for the effective consultation mandated by statute. In the following sections, examples of a statute and a court's interpretation are provided to support the assertion that federal agencies should utilize Tribal advisory committees that include Washington representative organizations. The statute example is aimed at Tribal advisory committees within HHS and thus points to the federal trust obligation to provide services. The court interpretation is aimed at Tribal advisory committees with the U.S. Forest Service and points to the federal trust obligations to protect Tribal sovereignty and resources in the environmental context.

1. Statutes may authorize Tribal advisory committee membership

Statutes that authorize or directly establish a Tribal advisory committee may also explicitly authorize the membership of a specific type of Washington representative organization on that committee under the UMRA intergovernmental exemption. Because agencies often establish Tribal advisory committees and are tasked with discerning who may lawfully hold membership roles on them, examples of statutes that have expanded the UMRA intergovernmental exemption should be persuasive in those membership eligibility decisions.

For example, the UMRA intergovernmental exemption applies to a national representative of UIOs within the Centers for Medicaid & Medicare Services (CMS) because the American Recovery and Reinvestment Act of 2009 (ARRA) authorized it.[99] While this statute is aimed only at HHS, it is worth analyzing as an example of how statutes can be used to further the aims of the UMRA intergovernmental exemption across agencies.

The ARRA mandates that the Secretary of HHS maintain a Tribal Technical Advisory Group (TTAG) within CMS and that the TTAG include a "representative" of a national urban Indian health organization.[100] ARRA then provides that "the inclusion of a representative of a national urban Indian health organization . . . shall not affect the nonapplication of [FACA]" under the UMRA.[101] In its report to the joint Senate and House conference committee deliberating on ARRA, the Congressional Research Service (CRS) found the inclusion of a UIO representative within the UMRA exemption important enough to explain.[102]

"The provision would require the Secretary to maintain within CMS

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[99] American Recovery and Reinvestment Act of 2009, Pub. L. No 111-5, § 5006(e), 123 Stat 115, 505 (2009). (codified at 42 U.S.C. § 1320b-24).

[100] *Id.* at § 5006(e)(1), 123 Stat. at 505.

[101] *Id.*

[102] CLIFF BINDER ET AL., CONG. RESEARCH SERV., MEDICAID PROVISIONS IN THE HOUSE AND SENATE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 14 (2009), https://www.everycrsreport.com/files/20090213_R40158_7b2fe7fcc1933d1bf756b9be2435315bb57c3af0.pdf

> a Tribal Technical Advisory Group (TTAG), previously established in accordance with requirements of a charter dated September 30, 2003. The provision also would require that the TTAG include a representative of the UIOs and IHS. *The UIO representative would be deemed an elected official of a tribal government for the purposes of applying Section 204(b) of the Unfunded Mandates Reform Act of 1995*, which exempts elected tribal officials from the Federal Advisory Committee Act for certain meetings with federal officials."[103]

Finally, HHS states that "[ARRA] statutorily created [an] expansion of the UMRA FACA exemption,"[104] and the CMS TTAG charter confirms that it complies with the UMRA intergovernmental exemption.[105] Here, Congress saw clearly that including a Washington representative organization for UIOs within the UMRA intergovernmental exemption is necessary to facilitate the communication necessary to fulfill its trust obligation to provide services to AI/AN people.

Given the IHCIA mandate for urban confer, the OMB guidance to construe the intergovernmental exemption broadly, and ARRA's provision that the inclusion of national representatives of UIOs does not violate the intergovernmental exemption to FACA, it is fair to extrapolate that Washington representatives of UIOs inclusion on other HHS tribal advisory committees would not violate the intergovernmental exemption either.

Recall that a UIO is defined as being governed by a majority AI/AN board of directors and "providing for the maximum participation of all interested Indian groups and individuals."[106] Also recall the OMB guidance language instructing the use of Washington representative organizations, which states: "These Washington representatives often know which local elected officials are the most knowledgeable about, interested in, or responsible for, implementing specific issues, regulations or programs, and can ensure that a broad range of government officials learn of and provide valuable insight concerning a proposed intergovernmental mandate."[107]

While the HHS asserts that the ARRA expansion of the UMRA intergovernmental exemption is limited only to CMS TTAG,[108] ARRA exemplifies the best way to implement the UMRA intergovernmental exemption in accordance with policy and legislative intent, and other agencies should follow suit.[109] It is

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[103] *Id*. (emphasis added).

[104] DEP'T OF HEALTH & HUMAN SERVS., FEDERAL ADVISORY COMMITTEE ACT FREQUENTLY ASKED QUESTIONS 5 (2013), https://www.cdc.gov/tribal/documents/HHS_FACA_FAQs.pdf.

[105] *See* Binder et al., *supra* note 102, at 14.

[106] Indian Health Care Improvement Act, 25 U.S.C. § 1603(29); *see also* INDIAN HEALTH MANUAL, *supra* note 37, a § 3-19.1G.

[107] OFFICE OF MGMT. & BUDGET, *supra* note 94.

[108] DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 104.

[109] *See* Steven P. Croley, *Practical Guidance on the Applicability of the Federal Revisory Comm. Act*, 10 ADMIN. L. J. AM. U. 111, 120 (1996) ("[C]ourts have at times taken seemingly different approaches [to applying FACA], and . . . agencies themselves take different positions with respect

important to note, however, that inclusion of a Washington representative organization may not be appropriate on every Tribal advisory committee. Where a Washington representative organization does not share or is not designated to represent the interests of a Tribal government, it would risk violating the UMRA intergovernmental exemption. Washington representative organizations of Tribes and of UIOs are distinguishable from each other, but where they meet the requirements above, their membership on Tribal advisory committees will contribute substantially to the intergovernmental communication required by the federal trust obligation to AI/AN people.

As discussed earlier, Congress recognized that exempt intergovernmental advisory committees are an important mechanism to facilitate the types of Tribal consultation mandated by statute.[110] Given that urban confer is mandated by statute, it follows that on authority of the UMRA, Washington representative of UIOs should be included as members on UMRA exempt advisory committees that handle "issues, regulations or programs" affecting UIOs and the majority of AI/AN people they serve.

Clearly, the ARRA statute example here is aimed at Tribal advisory committees within HHS that may serve to facilitate the communication necessary for the trust obligation to provide health services. The following court's interpretation, however, addresses Tribal advisory committees with the U.S. Forest Service and recognizes the necessity of construing the UMRA intergovernmental exemption broadly to further the government's trust obligation to protect Tribal sovereignty and resources.

2. Case law clarifies where Washington representative organizations may be appropriate on Tribal advisory committees.

As the case below illustrates, courts recognize the importance of construing the UMRA intergovernmental exemption broadly to facilitate the kinds of communications necessary to fulfill the federal trust obligation. Courts recognize the intent for the UMRA intergovernmental exemption to be "sweeping in scope."[111]

Courts are willing to find that a Washington representative organization meets the UMRA intergovernmental exemption requirements when it shares

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to the FACA's application . . . ."); *see also* CTIA-Wireless Ass'n v. Fed. Commc'ns. Comm'n, 466 F.3d 105, 116 (D.C. Cir. 2006) ("Although it is generally true that deference may not apply to an agency's interpretation of a statute if Congress has entrusted more than one agency with administering the statute, *see*, *e.g.*, Ass'n of Am. Phys. and Surgeons, Inc. v. Clinton, 997 F.2d 898, 913 (D.C. Cir.1993) ("we do not defer to an agency's construction of a statute interpreted by more than one agency") that is not the case here.").

[110] *Unfunded Mandates Reform Act of 1995: One Year Later: Hearing Before the Subcomm. On Human Res. and Intergovernmental Relations of the H. Comm. On Gov't Reform and Oversight*, 104th Cong. 762 (1996).

[111] *See* Wyo. Sawmills, Inc. v. U.S. Forest Serv., 179 F. Supp.2d 1279, 1305 (D. Wyo. 2001).

concerns with tribal members and is designated to represent them. Courts construe "designated" broadly.[112] As such, AI/AN organizations representing any shared interest or management issue between the federal government and AI/AN people may be included as members on UMRA exempt advisory committees handling that subject matter.[113] These Washington representative organizations may be designated as representing shared interests with a letter of designation from Tribal officials, for example.[114] The Wyoming district court also allowed it when the overseeing agency recognized the representational role of the organization.[115]

The Wyoming district court in this case ruled in favor of Tribal interests, but it is easy to see how these same principles could be applied against them. In fact, the federal government has often employed cherry-picking of Tribal "representatives" or members that support adverse governmental or corporate interests as a tactic to create the appearance of Tribal "consultation" or "consent" while pursuing or allowing actions that actually harm Tribes and AI/AN people. To be clear, the broad UMRA intergovernmental exemption should only be applied in favor of Tribal sovereignty and interests. To do otherwise violates the federal trust obligation to Tribes and AI/AN people and substantially undermines Tribal sovereignty.

Here, the *Wyoming Sawmills* court construed the UMRA intergovernmental exemption to FACA very broadly in favor of Tribal interests, citing underlying policy, OMB guidance, and the Supreme Court to do so.[116] The U.S. Forest Service established meetings with several "consulting parties" to develop and implement a Historic Preservation Plan (HPP) for Medicine Wheel.[117] In addition to other consulting parties that were clearly federal and state entities, the Forest Service included the Medicine Wheel Coalition for Sacred Sites (Coalition) and the Medicine Wheel Alliance as consulting parties to the Medicine Wheel HPP.[118] In holding that the inclusion of the Coalition and the Medicine Wheel Alliance on the federal advisory committee did not violate the UMRA intergovernmental exemption, the court noted the "shared interest" in the traditional and cultural value of Medicine Wheel to "Native Americans" in general and to "numerous Native American Tribes."[119]

Neither the Coalition nor the Medicine Wheel Alliance were expressly

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[112] *Id.*

[113] *Id*.

[114] *Id.*

[115] *Id*.; *but cf*. Idaho Wool Growers Ass'n v. Schafer, 637 F. Supp.2d 868, 877 (D. Idaho 2009) (finding in part that the presence of state Department of Fish and Wildlife employees on a federal advisory committee invalidated that committee's status as exempt from FACA rules under the UMRA intergovernmental exemption where the Governor issued statements that they did not authorize any state employee to act on their behalf).

[116] *Wyo. Sawmills*, 179 F. Supp.2d at 1304-1305 (citing Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 453 (1989) (rejecting a literal application of FACA because it would "cover every formal and informal consultation between … an Executive agency and a group rendering advice.")).

[117] *Wyo. Sawmills*, 179 F. Supp.2d at 1287.

[118] *Id*.

[119] *Id*. at 1286.

designated tribal employees with authority to act on behalf of a Tribal government under a strict reading of the UMRA exemption. However, the *Wyoming Sawmills* court construed the intergovernmental exemption broadly to include them.[120] Court filings describe the Medicine Wheel Coalition as a "political advocacy organization of traditional cultural leaders designated by several Plains tribes."[121] Letters of support from two Tribes satisfied the court that the Medicine Wheel Coalition was "designated."[122] We do not know, and the court did not seem to care, if those letters were written by elected Tribal government officials acting in their official capacity as a strict reading of the UMRA intergovernmental exemption would require. [123]

The inclusion of the Medicine Wheel Alliance as exempt under the UMRA demonstrates the court's very broad application of the UMRA intergovernmental exemption when shared interests with Tribes are represented.[124] In its opinion, the court described the Medicine Wheel Alliance as an "activist " including both members of federally recognized Tribes and "environmentalists."[125] Despite the fact that the Medicine Wheel Alliance's membership was not comprised of Tribal government officials or even exclusively of AI/AN people, the *Wyoming Sawmills* court found the Medicine Wheel Alliance was appropriately included in the UMRA intergovernmental exemption based on its representation of the "shared interests" of several Tribes in the area.[126]

Broadly applying the statutory requirement for designation by an elected Tribal official,[127] the *Wyoming Sawmills* court accepted the following documents as valid forms of designation: a request for consulting party status signed by "elders" from "various tribes," a letter indicating that the Medicine Wheel Alliance represents Fort Peck Tribes through their tribal representatives, and a Forest Service press release "affirming" that the Medicine Wheel Alliance and Coalition represent tribal governments."[128]

This thorough examination of the UMRA intergovernmental exemption by

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[120] *Id*. at 1305.

[121] Brief in Opposition of Writ of Certiorari at 191-95, Wyo. Sawmills v. U.S. Forest Serv., 546 U.S. 811 (2005) (mem.).

[122] *Wyo. Sawmills,* 179 F. Supp.2d at 1305, n.25 (citing to the Administrative Record for the case which was not made public. It does describe letters that "indicate" that Northern Arapaho elders in the Coalition represent and are authorized to act on behalf of the Tribe and letter indicating that the Coalition represents the Northern Cheyenne through tribal representatives to the Coalition.)

[123] *See* 2 U.S.C. § 1534(b).

[124] *Wyo. Sawmills*, 179 F. Supp.2d at 1304-05.

[125] *Id.*

[126] *Id.* at 1306.

[127] *See* 2 U.S.C. § 1534(b)(1).

[128] *Wyo. Sawmills*, 179 F. Supp. 2d at 1305, n.25; *see also* Idaho Wool Growers Assoc. v. Schafer, 637 F. Supp.2d 868, 876 (D. Idaho 2009) (suggesting that a letter would be sufficient to satisfy the "designation" requirement.); *but see id.* at 875 (stating that Forest Service statements that state employee members had authority to act on behalf of elected state officials lacked legal authority where the Governor issued statements to the contrary).

the court is persuasive in its broad interpretation of "designation" and the importance of the representation of shared interests. A Washington representative organization would also be likely found to fit within the UMRA intergovernmental exemption when governed by an AI/AN executive board composed of Tribally designated representatives of urban Indian organizations that serve AI/AN communities across the country.[129]

The valid designation of the Medicine Wheel Alliance as an intergovernmental representative organization that fit within the UMRA intergovernmental exemption was not based on its membership, but rather on the following: (1) its representation of shared interests of area Tribes; (2) documents only loosely connecting some of the Medicine Wheel Alliance membership to Tribes; and (3) recognition by the Forest Service that it represented Tribal governments.[130]

In addition to the stated policy purposes of the UMRA, the OMB guidelines, and other federal statutes that explicitly expand the UMRA intergovernmental exemption, the *Wyoming Sawmills* opinion strongly supports the argument that a Washington representative organization should fit within the UMRA intergovernmental exemption if it meets the following criteria: (1) it represents the shared interests of Tribes; (2) it is designated[131] to represent Tribes; and (3) it is recognized by the federal agency as representing Tribal and AI/AN community members.

A Washington representative organization representing UIOs would be even better situated than the Medicine Wheel Alliance was to qualify as a designated representative organization. Recall that UIOs are defined by statute as being governed by and serving AI/AN people. UIOs are also charged by statute with the duty of representing the shared interests of the AI/AN communities they serve through contract and cooperation agreements with government agencies. [132] Washington representative organizations of UIO's are capable of efficiently and effectively representing their shared interests with Tribes to the extent that they are serving Tribal members.

Washington representative organizations also maintain memorandums of understanding (MOUs) with each other and with government agencies that recognize their role as representative of UIOs and of their shared interests with Tribes. Federal agencies contribute funding for Washington representative organizations of UIOs precisely because they recognize their role as a representative for urban AI/AN communities. And most importantly, federal

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[129] Recall that a UIO is defined as a nonprofit corporate body governed by a majority AI/AN board of directors and established in an urban center to administer an urban Indian health program and "providing for the maximum participation of all interested Indian groups and individuals." Indian Health Care Improvement Act, 25 U.S.C. § 1603(29); s*ee also* INDIAN HEALTH SERV., *supra* note 37, at pt. III, ch. 19 § 3-19.1G.

[130] *See Wyo. Sawmills,* 179 F. Supp.2d at 1305.

[131] Recall the requirement for "designation" is very broad and may include a letter from an elected Tribal official, a letter from a Tribal member, or representation in its membership of Tribal members.

[132] *See* 25 U.S.C. § 1603(29); *see also* INDIAN HEALTH SERV., *supra* note 37, at pt. III, ch. 19 § 3-19.1G.

agencies are mandated to facilitate effective consultation with UIOs and their Washington representative organizations as part of their trust obligation to AI/AN people.

D. Current Tribal advisory committee examples

Language from the charters, bylaws, and statements of purpose for the following sample of Tribal advisory committees reveals a spectrum of approaches: express support for the assertions made here; reluctance to expressly employ Tribal advisory committees as a mechanism to improve Tribal consultation and urban confer; and hesitancy to include Washington representative organizations as members. This sample of Tribal advisory committees are all structured to function within the UMRA intergovernmental exemption.

Centers for Medicare & Medicaid Services (CMS)

The Tribal Technical Advisory Group (TTAG) is the gold standard for Tribal advisory committees being implemented in a substantive and broad way that facilitates the kind of communication necessary to fulfill the federal trust obligation to consult and confer. TTAG was established on statutory authority, as previously discussed.[133] TTAG has 17 members, including Washington representative organizations.[134] Recall the statutory language stating, "the Secretary of Health and Human Services shall include . . . a representative of a national urban Indian health organization . . . ."[135] TTAG meets monthly via conference calls and also holds three face-to-face meetings each year.[136] Additionally, TTAG has subcommittees that meet regularly "in order to be more effective and perform in-depth analysis of . . . policies that have Tribal implications."[137] TTAG exemplifies the ideal role that Tribal advisory committees should play in facilitating the kinds of free and open communication required by the federal trust obligation to AI/AN people.

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[133] 42 U.S.C. § 1320b-24.

[134] *See Tribal Technical Advisory Group,* CTRS. FOR MEDICARE AND MEDICAID SERVS., https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/Tribal-Technical-Advisory-Group (last modified Mar. 25, 2021).

[135] 42 U.S.C. § 1320b-24.

[136] *Tribal Technical Advisory Group*, *supra* note 134.

[137] *Id.* ("The TTAG is comprised of 17 representatives: an elected Tribal leader, or an appointed representative from each of the twelve geographic Areas of the Indian Health Service (IHS) delivery system and a representative from each of the national Indian organizations headquartered in Washington DC - the National Indian Health Board (NIHB), the National Congress of American Indians (NCAI), and the Tribal Self-Governance Advisory Group (TSGAC).")

Environmental Protection Agency

The National Tribal Operations Committee (NTOC) doesn't look as impressive on its face as TTAG. It is the most substantive Tribal advisory committee at the EPA, however, and approaches facilitating proper, substantial Tribal consultation.[138] NTOC was established in February 1994 to "improve communication and build stronger partnerships between the Agency and federally recognized tribes."[139] NTOC has 19 tribal members from nine EPA regions and EPA's "senior leadership team" who work together on "policy and resource matters related to tribal capacity building, and environmental programs in Indian country."[140] However, there is no mention in any NTOC policy documents of Washington representative organizations for Tribal members in urban areas.

Clearly, EPA actions affect AI/AN people both on and off reservation. Recall that the federal trust obligation extends to AI/AN off the reservation. It is hard to conceive of any issues that implicate the federal trust obligation more than healthcare and the environment. EPA should follow HHS's example and implement more Tribal advisory committees and include Washington representative organizations of both Tribes and UIOs on those committees.

Indian Health Service

Here, IHS recognized the important role Tribal advisory committees should play in facilitating Tribal consultation and wrote it right into the charter for the Tribal Leaders Diabetes Committee (TLDC) in 1998.[141] In addition to outlining the specific policy issues that TLDC makes recommendations to the IHS Director on, its charter states, "The TLDC also plays a key role in *ensuring that the IHS consults with Tribes* before making decisions."[142]

U.S. Forest Service

It is unclear that the Forest Service has any permanent Tribal advisory committees. The Forest Service promotes its Office of Tribal Relations as purportedly fulfilling a communications role with Tribes.[143] It falls severely short, however. The Office of Tribal Relations is staffed with agency personnel and was formed to "facilitate consistency and effectiveness in Forest Service *program*

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[138] Interview with .

[139] *Tribal Partnership Groups.,* EPA, https://www.epa.gov/tribal/tribal-partnership-groups#ntoc (last visited Mar. 29, 2021).

[140] *Id.*

[141] INDIAN HEALTH SERVS., U.S. DEP'T. OF HEALTH & HUMAN SERVS., CIRCULAR NO. 2007-03, TRIBAL LEADERS DIABETES COMMITTEE–CHARTER, https://www.ihs.gov/IHM/circulars/2007/tribal-leaders-diabetes-committee-charter/#3.

[142] *Id.* (emphasis added).

[143] *About the Office of Tribal Relations*, U.S. FOREST SERV., https://www.fs.fed.us/spf/tribalrelations/aboutOTR.shtml (last visited Far. 29, 2021).

delivery to Tribes . . . ."[144] Delivering programs to Tribes without the involvement of Tribes undermines Tribal sovereignty.

Additionally, the Forest Service publishes a "Tribal Relations Consultation Schedule,"[145] with five topics that have been or will be consulted on in the last two years.[146] Presumably, these (very few) topics were chosen by the Forest Service for consultation because there is no evidence of the existence of any Tribal advisory committees that could have provided input.[147] The Forest Service uses generalized, dry language to describe its Tribal relations in somewhat paternalistic terms.[148]

IV. Conclusion and Recommendations

Tribal advisory committees can be an effective mechanism to facilitate Tribal consultation and urban confer as part of the federal government-to-government relationship with Tribes. As such, federal agencies should implement Tribal advisory committees more broadly as an important communication tool in the fulfillment of the federal trust obligation to AI/AN people.

Statutes can be used beneficially in several ways. They can establish Tribal advisory committees within agencies; explicitly authorize Washington representative organizations as members on those Tribal advisory committees; explicitly mandate Tribal consultation on a broad scope of issues; and mandate urban confer for other agencies as IHCIA has done for HHS. Given the federal trust obligation to protect resources and the environment for AI/AN people, Congress should establish more Tribal advisory committees within EPA and other relevant agencies. Additionally, Congress should statutorily expand the UMRA intergovernmental exemption to include Washington representative organizations as it did with ARRA.

Agencies can also establish Tribal advisory committees, and they should. Agencies would be wise to follow IHS's example and recognize the role Tribal advisory committees can and should play in facilitating effective Tribal consultation. Where Tribal consultation is being overlooked, policies for notice requirements are circular or unclear, consultation lacks substance or relevance, or agencies are unclear on what Tribal consultation even is, Tribal advisory committees can help fill the communication and intergovernmental relations gap.

Congress intended for Tribal advisory committees to be used in this way under the UMRA. Additionally, the presence of Washington representative organizations on Tribal advisory committees will help to ensure that the federal

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[144] *Id.* (emphasis added).

[145] *Tribal Relations Consultation Schedule*, U.S. FOREST SERV., https://www.fs.fed.us/spf/tribalrelations/documents/consultation/USFSTribalRelationsConsultationSchedule20210310.pdf (last modified Mar. 10, 2021).

[146] *Id.*

[147] *See About the Office of Tribal Relations, supra* note 143.

[148] *Id.*

government has the free and open communication necessary to fulfill its substantive and procedural trust obligations to Tribes and AI/AN people.