

THE POWER STRUCTURE OF THE THREE AFFILIATED TRIBES

REBECCA ANNE BIRDSBILL FORD

This paper originated from my discussions with a tribal elder of the Three Affiliated Tribes (TAT) during the summer of 2000. Concerned about the balance of powers in the Three Affiliated Tribes' Indian Reorganization Act Constitution, the elder asked me whether I would review the TAT Constitution. I chose to use this subject for my writing requirement at the University of New Mexico School of Law. In March of 2001, I was privileged to meet with the Mandan Hidatsa and Arikara Elders Organization, and this organization formally agreed to sponsor my paper.¹

This group, known as the MHA Elders, was chartered under the Three Affiliated Tribes' government. The group named itself the "MHA Elders" or the Mandan, Hidatsa, and Arikara Elders. On principle, the group avoided naming itself the Three Affiliated Tribes Elders because the name "Three Affiliated Tribes" was given to the Three Tribes by the federal government. This organization is comprised of segment representatives and a chairman.

The purpose of the MHA Elders is to represent the voice of the tribal elders and to manage a budget for health care and other old age issues. During this meeting, I listened to the elders discuss health care issues and their concern for the elders from their respective communities.

The subject of the meeting turned to another issue of the MHA Elders, the Three Affiliated Tribes' Indian Reorganization Act Constitution. I listened to two competing groups

¹ B.S., University of Oklahoma 1998, Candidate for J.D., University of New Mexico School of Law 2001. Member of the Three Affiliated Tribes of Fort Berthold, North Dakota.

¹ The following summary is taken from a Discussion with the MHA Elders, at Fort Berthold, ND (March 13, 2001). I wish to express my gratitude to the MHA Elders and other tribal members many of whom met with me individually or in small groups to provide suggestions for this paper.

School of Law Library
University of New Mexico
1117 Stanford NE
Albuquerque, NM 87131

tell their stories. First, I listened to some members express heartfelt disappointment in their current structure of government because in their view the government leaders didn't listen to other voices and were too powerful. In addition, they objected to the form of government which placed almost all of the power in one Tribal Business Council and didn't provide for meaningful ways to participation in government. They felt that if the government were divided into three branches: legislative, executive, and judicial, there would be less tyranny in the government. They also expressed dissatisfaction with the current form of government arguing that it was imposed by the Bureau of Indian Affairs (BIA) with little input from the Three Affiliated Tribes' People, particularly the elders. They also expressed concern over the Tribal Council's current system of hiring and firing tribal employees.

This group feels it is traditional for the elders to influence politics and the government of the Tribe. These members intend to use the MHA Elders organization as a vehicle for a grass roots movement to rethink and redesign the IRA Constitution. In particular, they want the new government to balance the traditional values of the People with the contemporary values. For example, this group supports the traditional value of active participation by the People and a relatively new value of the People, capitalism.

I also listened to other elders, many of whom had previously served on the Tribal Business Council for the TAT. They expressed great pride in the TAT government and in one another. They stated that the TAT government had always been a role model for other tribal governments. They also heard their elders tell them that the government was modeled after the Tribe's traditional government. This group has full trust in the Council to update the Constitution as needed and feels a grass roots movement would detract from the MHA Elders specific charter: to help the government with old age issues.

This battle of views over the Tribal Constitution originates from the Indian Reorganization Act (IRA) passed in 1934. The IRA authorized tribes to organize under a constitution for their "common welfare" and authorized tribes to incorporate under a federal charter.² Although Congress, through the IRA, encouraged tribes to draft their own constitutions and laws, "most tribal constitutions were drafted by the Bureau of Indian Affairs without tribal input and consequently reflected little, if any, direct local concern."³ Because of the participation of the BIA, today there are several distinctive provisions in the typical IRA constitution. First, the IRA constitutions often lack cultural values and tribal input. Second, most IRA constitutions placed all power in an elected tribal council and "did not provide for any separation of powers."⁴ Third, the constitutions "did not specifically create any court system."⁵ Fourth, most IRA constitutions lack a bill of rights. Finally, tribal members note that the IRA constitutions, written in the 1930's, are not compatible with "self governance in the 21st century" and with the current federal policy of tribal Self-Determination.⁶ However, since the BIA, and not Congress suggested this format, tribes are free to amend their constitutions to include their own provisions and to institutionalize their own traditional systems of government.⁷

This paper explores the effect of the Indian Reorganization Act on the Three Affiliated Tribes: The Mandan, Hidatsa, and Arikara Nations of Fort Berthold, North Dakota. As in most IRA constitutions, the current structure of the Three Affiliated Tribes' system of government places most of the power in the Tribal Council. The main purpose of this paper is to invite tribal discussion within the MHA Elders and among the Three Tribes as to whether the TAT should

² See 25 U.S.C. §§476-477 (1934). It also stopped the allotment of Indian lands and extended any existing trust and alienation restrictions on Indian allotments. See 25 U.S.C. §461 (1934).

³ FRANK POMMERSHEIM, BRAID OF FEATHERS 65 (1997) (footnote omitted).

⁴ *Id.* (citation omitted).

⁵ *Id.*

⁶ MHA Elders Organization, Position Paper on Constitution Revision 1 (2000).

⁷ For further discussion, see generally, Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 Gonz. L. Rev. 393, 396-397 (1992).

adopt a constitutional form of separation of powers. In the course of the discussion, various divisions of governmental powers will be discussed. This will include the internal structure of governmental powers but also other considerations such as the historical structure of governmental power and other external governmental powers over which the Tribe has little control, such as federal policy.

This paper also makes comparisons to the federal model of separation of powers for several reasons. The first reason is to formulate a basic understanding of the meaning of separation of powers. Second, this paper attempts to explain the values behind the federal model of separation of powers so that a determination can be made as to whether the federal model of separation of powers is appropriate for the Three Affiliated Tribes. Finally, this paper attempts to see what values were behind the historical structure of separation of powers of the Three Affiliated Tribes and to see whether these values are appropriate in today's government. Also, the current views of the People supporting separation of powers will be discussed.

Part I of this paper begins with the history of the Three Affiliated Tribes. Part II explores the values of separation of powers in the federal constitution. Part III addresses the historical government separation of powers. Part IV demonstrates how federal policy impacts the amount of power that the Tribal government can dispense. Parts V and VI, the heart of the paper, delineate the current separation of powers in the internal government structure and ways in which the values underlying separation of powers could be institutionalized in the Three Affiliated Tribes' Constitution. Part VII addresses the division of power between the IRA government and the civil rights of its People. Part VIII compares the traditional government with the current governmental structure of power. In conclusion, Part IX briefly discusses what

changes could be implemented to balance the powers of government and how these changes could be implemented.

I. HISTORY OF THE THREE AFFILIATED TRIBES

The Fort Berthold Reservation is home to the Hidatsa, Mandan, and Arikara Nations, which are collectively known as the Three Affiliated Tribes. The Three Affiliated Tribes are a people of the Great Plains of the North Central states. Unlike other Plains Tribes which relied solely on the buffalo for sustenance, the Three Tribes also relied on agriculture and lived in permanent earth villages during the summer.⁸ Although the Three Tribes frequently visited one another, traded, and sometimes warred, there was no official union until 1862.⁹

Historically, the Hidatsa were once the same Tribe as the Crow.¹⁰ The Hidatsa and Mandan claim to have always lived along the upper Missouri River.¹¹ Both the Mandans and Hidatsas moved into the area of the present Reservation in 1845.¹² These two Nations have a similar Siouan language and culture. In fact, early traders frequently grouped the Tribes and villages together because they were unable to distinguish them.¹³

The Arikara have different origins than the Hidatsa and Mandan, as they originated from the Pawnee Tribe, of the Caddoan language family.¹⁴ The Arikara separated from the Pawnee and came north along the Missouri. Eventually, The Arikara joined the Mandan and Hidatsa for mutual protection against the Sioux.

⁸ Ralph M. Shane, *Short History of Fort Berthold*, published by the Fort Berthold Indian Agency New Town, ND 1, 7 (1956).

⁹ *Id.* at 17-18.

¹⁰ ROBERT H. LOWIE, NOTES ON SOCIAL ORGANIZATION AND CUSTOMS OF THE MANDAN, HIDATSA, & CROW INDIANS 3 (1976).

¹¹ See ALFRED W. BOWERS, HIDATSA SOCIAL & CEREMONIAL ORGANIZATION 21 (1992) (cited as 1 BOWERS).

¹² Shane, *supra* note 8, at 1.

¹³ See 1 Bowers, *supra* note 11, at 10.

¹⁴ GEORGE E. HYDE, THE PAWNEE INDIANS 83-85 (1974).

In 1782 the first smallpox epidemic decimated the Three Tribes and it has been estimated that the population was cut in half.¹⁵ In 1794, the first fur-trading post was established by the North West Company among the Three Tribes.¹⁶ More non-Indians explored this territory in the late 1790's and early 1800's. Lewis and Clark traveled up the Missouri River on their voyage through the Louisiana Territory and met with the Arikaras in October 1804.¹⁷ During the winter of 1804-1805, Lewis and Clark also stayed with the Mandan and Hidatsa Tribes. During this visit, they hired Charbonneau, and his wife, Sakakawea, a Hidatsa, as interpreters.¹⁸

In June of 1837, the second smallpox epidemic hit the Three Tribes. This time, the Mandan were hit the hardest because they remained in the village with their dead.¹⁹ The Hidatsa moved away to escape the diseases. "Many committed suicide because they felt they had no chance to survive."²⁰

In 1851, Chief Four Bears went to the meeting with the federal government at Fort Laramie. He went to secure a Treaty for the Hidatsa and the Mandan Tribes that would protect and preserve the Tribes' sacred sites.²¹ One of the MHA Elders, John Fredericks, has described this meeting:

My thoughts sort of drifted to the past and as far back as I could remember, then it drifted far back to the time that our Chiefs had to get on their horses and go to Laramie, Wyoming for the big gathering of our chiefs and the white mans chiefs (leadership) for the purpose of negotiating out an agreement on how they might live together in this country. Its [sic] hard to imagine what must have been on their minds, and what they talked about around the camp fires as they journeyed toward that historical gathering. They knew that their people were used to journeying many miles for warmer better climates during cold winters and to

¹⁵ See e.g., 1 BOWERS, *supra* note 11, at 10 (discussing the effect of the first epidemic on the Mandans); Shane 16.

¹⁶ Shane, *supra* note 8, at 12.

¹⁷ *Id.* at 8.

¹⁸ DAN MURPHY, LEWIS AND CLARK: VOYAGE OF DISCOVERY 14-20 (1984). I have used the term Hidatsa term, "Sakakawea," to refer to Charbonneau's wife, but this book refers to her as "Sacagawea."

¹⁹ Shane, *supra* note 8, at 15.

²⁰ *Id.* at 8.

²¹ *Id.* at 17 (stating that "Four Bears signed for the Hidatsa, Iron Bear signed for the Arikara, and White Wolf signed for the Mandans").

better hunting grounds and also to pray and worship at various places that our early people utilized for that purpose. The burden on our chiefs had to be very heavy and of deep concern to them. You know as I know, that they did a pretty good job in their negotiations with the Federal Government that provided an area that our tribes could still move around good in carrying out their traditional livelihood. An area, from the black Hills in South Dakota nearly to the Canadian border to the north, and from the Missouri River west to the Powder River in Montana (to make it short). Thus the Fort Laramie Treaty of 1851 was signed and ratified.²²

However, as a result of several Executive Orders that changed its boundaries, today the Reservation, consisting of 930,000 acres, is located in western North Dakota.²³ In 1887, the Dawes Act provided for individual allotments to tribal members and many non-Indians purchased allotments within the Fort Berthold Reservation.²⁴

In 1936, the Three Affiliated Tribes ratified a Constitution and Bylaws by a close vote of 366 for and 220 against.²⁵ On June 29, 1936 Harold Ickes, Secretary of the Interior, approved the Three Affiliated Tribes Indian Reorganization Act Constitution and Bylaws.

In 1954, the federal government built the Garrison Dam and flooded the Missouri River, which runs through the Fort Berthold Reservation.²⁶ The flooding of the Missouri River destroyed the original communities and engulfed the Tribe's sacred low lands, creating Lake Sakakawea.²⁷ Few bridges exist over the lake and the effect has been the creation of six new isolated segments on the Reservation. Today, these six segments form the basis for tribal government. Each segment elects a Councilman and the people elect a Chairman at large.²⁸

²² John Fredericks, Statement to the Tribal Council for Elders Organization (May 4, 2000) in Mandan, Hidatsa and Arikara Newsletter, vol. 2000 No. 1.

²³ See Fort Berthold History and Information, www.mhianation.com.

²⁴ 25 U.S.C. §331 *et seq.*

²⁵ See T.A.T CONST. CERTIFICATION OF ADOPTION.

²⁶ See Fort Berthold History and Information, www.mhianation.com.

²⁷ *Id.*

²⁸ T.A.T. CONST. art. IV.

Today both Indians and non-Indians live within the Fort Berthold Reservation in a checkerboard arrangement. There are approximately 4,000 Indians residing on the Reservation, of approximately 8,000 enrolled members.²⁹

II. VALUES IN SEPARATION OF POWERS IN THE FEDERAL MODEL

This section briefly examines federal separation of powers. First, this section explains the views of government that influenced the framers in crafting the federal constitution. Second, and most importantly, this section uncovers the values behind federal separation of powers. The values discussion is critical because the TAT must decide whether it too holds the same values and therefore whether it would be *appropriate* to incorporate the federal model of separation of powers into its IRA Constitution. Finally, this section briefly explores the technical aspects of the federal model of separation of powers.

Separation of powers protects one core value: the protection of individual liberty from governmental tyranny.³⁰ The framers wanted to create a government free of tyranny. To do this, the framers studied two periods in history: the period in classical Roman and Greek history from 509 B.C. to 27 B.C. and the period in the late 17th and early 18th centuries known as the "Age of Enlightenment."³¹

The first theory studied by the framers was taken from the Greeks and Romans and is sometimes labeled "classical republicanism."³² Under the classical republicanism model, men were perceived as generally good civic-minded people. Together these men could institute a

²⁹ Discussion with John Danks, MHA Elder, at Fort Berthold, ND (March 12, 2001).

³⁰ DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRUCKEY, CONSTITUTIONAL LAW THEMES FOR THE CONSTITUTION'S THIRD CENTURY 907 (2nd ed. 1998).

³¹ See CENTER FOR CIVIC EDUCATION, U.S. DEPARTMENT OF EDUCATION, WE THE PEOPLE THE CITIZEN AND THE CONSTITUTION 13, 24 (1998).

³² *Id.* at 13.

government, whereby public servants would put the good of the community before that of any one man.³³

The framers also studied a second theory supported by the natural rights philosopher, Locke.³⁴ Under this theory, men by nature were reasonable but "self-interested."³⁵ In the absence of a government, the stronger men would rule the weaker men in the society.³⁶ Government, therefore, was a social contract whereby individuals gave up some control to the government which served to protect man's rights to his own property and liberty.³⁷

When the framers of the constitution considered what type of government they wanted, they considered the above theories of government. They also sought to avoid the tyranny of England that reigned during the colonial period.³⁸ They also sought to avoid a life where property and governmental rights were determined by birth into a particular class of people as it was in England.³⁹ The framers looked instead to a model where each person could participate in government no matter what his station or class in society and where each person could pursue life, liberty, and property.⁴⁰

³³ *Id.* at 13-14.

³⁴ *Id.* at 2 (stating "The natural rights philosophy is based on imagining what life would be like if there were no government.")

³⁵ *Id.* at 4.

³⁶ *Id.*

³⁷ *Id.* at 6.

³⁸ *Id.* at 42-43.

³⁹ *Id.* at 5.

⁴⁰ It has been argued by Jack Weatherford that the early Europeans and Americans were influenced by their perceptions that the Indians possessed true liberty:

The most consistent theme in the descriptions penned about the New World was amazement at the Indians' personal liberty, in particular their freedom from rulers and from social classes based on ownership of property. For the first time the French and the British became aware of the possibility of living in social harmony and property without the rule of a King.

During this era the thinkers of Europe forged the ideas that became known as the European Enlightenment, and much of its light came from the torch of Indian liberty....

JACK WEATHERFORD, INDIAN GIVERS HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD 121-122, 124 (1988). However, it may also be true that the Europeans and early Americans' perceptions

The federal model generally favored Locke's view over classical republicanism and the framers strove to protect the value of individual liberty by creating several restraints on government. The framers created their own principle of separation of powers by combining two technical structures for government: separation of powers and checks and balances.⁴¹ These two "organizing principles," separation of powers and checks and balances, are actually quite different.⁴² The first organizational concept is that the government is divided into separate branches and that each has its own powers.⁴³ Separation of powers is most usually attributed to Montesquieu. He wrote of the separation between the legislative and executive functions: "When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."⁴⁴ Montesquieu also wrote of the necessity for a separate judiciary:

Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.⁴⁵

The second concept is that the branches share powers and must cooperate in some respects and check the power of the other two branches in other respects.⁴⁶ James Madison, one

were not fully accurate because the clan relationships that exist in most tribes were probably not visible to casual observers.

⁴¹ Although I have used the term "technical structures," to refer to the implementation of separation of powers and checks and balances, the Supreme Court has rejected construing the federal constitution's division of powers in a technical manner. In fact, separation of powers is more of a "political doctrine" rather than a technical rule of law. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 129-130 (5th ed. 1995) (footnote omitted).

⁴² FARBER, ESKRIDGE & FRICKEY, *supra* note 30, at 905.

⁴³ *Id.*

⁴⁴ Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 212-22 (1989) reprinted in DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CONSTITUTIONAL LAW THEMES FOR THE CONSTITUTION'S THIRD CENTURY 910 (2nd ed. 1998).

⁴⁵ *Id.*

⁴⁶ FARBER, ESKRIDGE, & FRICKEY, *supra* note 30, at 905 (stating checks and balances is "the notion that each of the three branches shall have some influence on how the other two branches perform their specialized roles.")

of the framers of the federal constitution, defended the integration of the two concepts because he felt the combination would better protect individual liberty.⁴⁷ In fact, the combination allows both positive and negative protections from tyranny. First, checks and balances provides for a positive protection because it requires the action of more than one branch, thus making it "more likely that the action will be reasonable and just."⁴⁸ Second, separation of powers provides for a negative protection from tyranny. For example, "legislators will be more reluctant to pass unfair statutes, out of fear that tyrannical laws could be used against them and their supporters. On the other hand, if unfair laws were passed, they might be implemented in ways that avoid their most tyrannical features."⁴⁹

The framers used the constitution as a tool to implement these two concepts. Interestingly, the framers never used the words "separation of powers" or "checks and balances" in the federal constitution. First, the framers divided the government into three branches: the Legislative, Executive, and the Judiciary.⁵⁰ Second, the framers provided that in some instances, the branches must share power. There are times when the legislative and executive branches must work with one another. For example, the President must sign the bills of Congress before they become law.⁵¹ In addition, the President can veto the bill but a 2/3 majority vote of both houses can override the President's veto.⁵² There are also times when the legislative branch controls the judicial power. For example, although the judicial power is vested

⁴⁷ *Id.* at 906.

⁴⁸ *Id.* at 907.

⁴⁹ *Id.*

⁵⁰ Article I vests the legislative power in a Congress which consists of both the Senate and the House of Representatives. U.S. CONST. art. I, § 1. Most of the legislative powers are outlined in Article I, § 8. U.S. CONST. art. I, § 8. Article II vests the executive power in the President. U.S. CONST. art. II, § 1. Art II states most of the powers of the President. U.S. CONST. art. II. Article III vests all power in one Supreme Court. U.S. CONST. art. III, § 1. Art. III, § 2 outlines the extent of the judicial power. U.S. CONST. art. III, § 2.

⁵¹ U.S. CONST. art. I, § 7 cl. 2, 3.

⁵² *Id.*

in one Supreme Court, Congress must create the lower courts.⁵³ Only the Supreme Court is "constitutionally guaranteed."⁵⁴

In some circumstances, all three branches must work together to accomplish a result. The core example is that the legislature makes the laws, the executive enforces the laws, and the judiciary interprets the laws.⁵⁵ Another example is the President's ability to appoint the Justices of the Supreme Court with the advice of the Senate.⁵⁶ Through these provisions, the branches check one another and no branch becomes tyrannical over the others. Therefore, the government cannot oppress the people.

However, the downside to the protection of individual liberty is a less efficient government. For example, not only does it take two branches of government, the legislature and the executive branches, to enact a law, but the framers also required bicameralism.⁵⁷ If the framers had better faith in public servants, then the framers might also have created a more efficient government. For example, a government where the executive and legislative are unified can enact and implement laws more efficiently.

Two other restraints were included in the federal constitution. First, the framers decided that the federal government would be a government of limited powers.⁵⁸ The balance of powers between the governments of the states and the federal government is known as federalism.⁵⁹

⁵³ U.S. CONST. art. III, § 1.

⁵⁴ JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 11 (4th ed. 1999).

⁵⁵ U.S. CONST. art I, § 7 cl. 2, 3; art. II, § 3; art. III, § 2.

⁵⁶ U.S. CONST. art. II, § 2, cl. 2.

⁵⁷ U.S. CONST. art I, § 7 cl. 2, 3; art. II, § 3; art. III, § 2.

⁵⁸ BARRON & DIENES, *supra* note 54 at 64 (stating "[u]nder our Constitution, all powers not delegated to the national government under the Tenth Amendment are retained by the states and the people. This is a basic premise of the division of powers, 'Our Federalism.'").

⁵⁹ *Id.*; *c.f.* WEATHERFORD, *supra* note 40 at 135. Weatherford states:

Reportedly, the first person to propose a union of all the colonies and to propose a federal model for it was the Iroquois chief Canassatego, speaking at an Indian-British assembly in Pennsylvania in July 1744. He complained that the Indians found it difficult to deal with so many different colonial administrations, each with its own policy.

Second, the framers added a bill of rights which delineated the rights of citizens and the limits of government action.⁶⁰

Imposing the federal model of separation of powers on the Three Affiliated Tribes might also impose all of the values that go along with the principle. Therefore, it is imperative that the Three Affiliated Tribes debate and discover which values it holds dear prior to adopting any model of separation of powers.

In summary, the federal model is based on several values: the protection of individual liberty, and the idea that every person has the right to pursue life, liberty, and property. This also evidences that the framers had a general distrust of government and preferred a slow, reflective government with divided and shared powers over a faster, more efficient government.

Accordingly, the TAT must determine whether it holds the same respect for the values of individual liberty and individual rights as did the framers. This is particularly true for tribes, such as the TAT, that are organized into clan relationships.⁶¹ The TAT must also determine whether the benefits of separation of powers would outweigh the tradeoffs, such as inefficiency.

It is also important to consider what values are evident from the traditional model of separation of powers discussed in the next section. It will also be important to discover whether these traditional values have changed in light of the Self-Determination era and in light of increasing influence by the federal and state governments.

III. BALANCE OF POWERS IN HISTORICAL GOVERNMENT

This section focuses on the historic government structure of the Three Tribes. In determining how any government should function within a society, it is important to understand

(citation omitted). Canassatego suggested the colonies model their union after the League of the Iroquois. *Id.*

⁶⁰ U.S. CONST. amend. I-X.

⁶¹ See POMMERSHEIM, *supra* note 3, at 116-119 (discussing the problems of individual rights within tribal communities particularly when the community "holds 'relatedness' to be a central value....") (footnote omitted).

how the society's governmental structure began. History is particularly important as background for the IRA which was often accepted without great concern for traditional tribal organization. Furthermore, it has been stated that, "Indian culture is a resource that strengthens tribal government...[and] a match between institutions of government and culture also matters to [economic] success."⁶² It is important to understand which values the Tribes held before they were introduced to a federal styled government. A short comparison of the traditional government with the IRA government is discussed in Part VIII.

Village Council

During the period between 1500-1851, each of the Three Tribes functioned separately. All Three Tribes had relatively similar governments. Indeed, each Tribe had several villages, each of which was self-governing, with its own Village Council. "The council's duties were broad and involved matters concerning the people at large: moving the village; the time of leaving for the summer buffalo hunt and the various camping places along the way; the prohibition on leaving the village for warfare; peace treaties with neighboring tribes...[and] policies with respect to the White traders and Government officials."⁶³

The Village Council "was of indefinite size" because the membership depended upon "personal achievement and public acclaim."⁶⁴ The members of the Council usually came into power with the consent of public opinion, usually after a progression through the age societies, or by courage in battle, or participation in religious ceremonies.⁶⁵ There was an age and maturity prerequisite; the council members had to be older than the Black Mouths, or the police force. The Black Mouths were mature members between 28-45 years of age.

⁶² See Overview, Harvard Project on American Indian Economic Development, www.harvard.edu/hpaied/overview.

⁶³ 1 BOWERS, *supra* note 11, at 186.

⁶⁴ *Id.* at 33.

⁶⁵ *Id.* at 32-33.

Indeed, age requirements fostered development in the entire organization of the Tribes. It was thought that the elders always held a special place in leadership and education of the community. For example, John Fredericks, a MHA Elder, noted that,

During one of our meetings, one of the elders from Mandaree was expounding on how important the Elders of the Tribes were in the past. He went on to say that the main chiefs sat in the middle of the gathering then sub-chiefs, then the clan representatives and Medicine Men, etc. They spoke to their people about life and how they were taught to live it by their Elders, etc.⁶⁶

Peace and War Chiefs

There was a degree of separation of powers in the village government. Along with the Council, two council members emerged to lead the village: a peace chief and a war chief. The peace chief was one that had "important ceremonial bundles" and held the esteem of the people. The war chief was one who had a good war record.⁶⁷ These two leaders were usually selected by merit; however, at times hereditary chiefs came into power, particularly because ceremonial bundle rights were passed from father to son.⁶⁸ Younger men eventually replaced these two chiefs; they were never demoted.⁶⁹

Although charged with different duties, these two leaders were expected to work together for the good of the people. The Mandans chose two leaders whose skills were "complementary."⁷⁰ The war chief was in charge of the defense of the village; while the peace chief was in charge of day to day activities, trade with other nations, and supervising visits with

⁶⁶ John Fredericks, Statement to the Tribal Council for Elders Organization 1 (May 4, 2000) in Mandan, Hidatsa and Arikara Elders Newsletter, vol. 2000, no. 1.

⁶⁷ ALFRED W. BOWERS, MANDAN SOCIAL AND CEREMONIAL ORGANIZATION 33 (1950) (cited as 2 BOWERS); Interview with Lawrence Birdsbill, TAT Member, in Albuquerque, NM (January 2001) (stating Tribal chieftains were chosen based on leadership and distinguished service during battles. Young men often wanted to gain recognition for themselves so they assembled a war party and battled the enemy so they could distinguish themselves).

⁶⁸ *Id.* at 34.

⁶⁹ *Id.* at 35.

⁷⁰ *Id.* at 34.

other tribes.⁷¹ In Mandan way, the two chiefs were sometimes chosen one from each of two organizations of clans called moieties.⁷²

The two chiefs used the power of persuasion to convince the Village Council or Council of Older Men, to adopt their views. The chief "was, first of all, an orator who in council, after enumerating his various accomplishments to demonstrate the extent to which he had worked for the welfare of the entire village, then offered an opinion as to the wisdom of a certain act or policy."⁷³ A chief's power was measured by how well he united the village and by the fortune during his tenure. If a chief could not maintain unity, bands often split from the group and returned if they respected the new successor.⁷⁴

Representation

Every household had a voice in Council meetings. A household could send one elder to the meeting to give input to the Village Council.⁷⁵ The Village Council attempted to use persuasion to reach unanimous decisions. Sometimes one household would fail to agree to the proposed action. Usually, this veto power ended the Village Council's discussion.⁷⁶ Accordingly, individual households had a powerful voice. However, in other situations, the Village Council proceeded without unanimous consent. After a time, disgruntled families sometimes decided to part ways and formed their own band.⁷⁷

Appointed Leaders

The Council appointed special leaders for a defined duration. Every man aspired to be a leader for a special task and even the chiefs were expected to follow the mandates of appointed

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 34-35.

⁷⁴ *Id.* at 36.

⁷⁵ 1 BOWERS, *supra* note 11 at 33.

⁷⁶ *Id.* at 34.

⁷⁷ *Id.*

leaders.⁷⁸ For example, the Village Council appointed a leader in charge of the summer buffalo hunt. The Council selected this leader based upon a man's ability to find buffalo herds as well as his good judgment. It was expected that he had obtained his ability in degrees.⁷⁹ The Council selected the leader of the summer hunt "a month before the village was to leave for the summer hunt."⁸⁰ This person had full authority for the duration of the planning of the hunt which continued through the end of the hunt. However, this individual sought the advice of the Council regularly.⁸¹ His lodge became the meeting place of the Council during preparation for the hunt. The Village Council also appointed separate winter leaders when the village parted into several smaller winter camps.

The Police Force

The Black Mouths, a Mandan age society, served as the village police force by enforcing the regulations of the Village Council, the two chiefs, and special leaders.⁸² This was the most highly developed age society and it met every two or three days. Membership in the Black Mouths was purchased from current Black Mouths. Purchasers had progressed through younger age societies and when it was felt they were mature enough, the current Black Mouths sold the society to the next generation.⁸³

"Unlike some Plains tribes where the responsibilities of group management were passed around from society to society, the Hidatsa and Mandan village groups entrusted police duties to one society, the Black Mouths."⁸⁴ In addition to regulation enforcement, the Black Mouths

⁷⁸ 2 BOWERS, *supra* note 67 at 35-36.

⁷⁹ *Id.* at 86.

⁸⁰ *Id.* at 87.

⁸¹ *Id.*

⁸² *Id.* at 35; 1 BOWERS, *supra* note 11 at 184-186.

⁸³ 1 BOWERS, *supra* note 11 at 184.

⁸⁴ *Id.* (citation omitted).

"remove[d] any misunderstandings among fellow-villagers."⁸⁵ They also attended all matters of public importance to ensure the safety of the village.⁸⁶ The Black Mouth Society also announced the decisions of the Council to the People.⁸⁷ When a particular leader was in charge, the Black Mouths served him and enforced his mandates.⁸⁸ For example, if the leader of the summer hunt called for a no-hunt ban, the Black Mouths enforced this decree.⁸⁹

The Black Mouths also helped to resolve community matters. If for example, members of the community plotted revenge for the death of one of their own family members, "the Black Mouths would gather together property and offer it to the aggrieved people, fill a pipe for them to smoke, and by gentle words would conciliate them and cause them to give up projects of revenge."⁹⁰

The Black Mouths also regulated visits with other villages and with other tribes.⁹¹ They regulated the number of young men that could leave on war expeditions so that the village would not be left defenseless. They recalled war parties when word was sent that an "alien group was approaching."⁹²

They could also deliver quick and stern punishment to offenders.⁹³ Each member "carried a club" and was authorized to use it if someone broke one of the chiefs' regulations. Interestingly, both the age society and clan system served to guard against excesses by the Black Mouths. Due to the great amount of trust placed in the Black Mouth Society, as well as their ability to deliver swift punishment, care was taken to ensure that the men were of mature age

⁸⁵ LOWIE, *supra* note 10, at 19.

⁸⁶ 1 BOWERS, *supra* note 11 at 185.

⁸⁷ *Id.* at 186.

⁸⁸ *Id.* at 186-187.

⁸⁹ *Id.* at 188.

⁹⁰ LOWIE, *supra* note 10, at 19.

⁹¹ 1 BOWERS, *supra* note 11 at 47, 190.

⁹² *Id.* at 47.

⁹³ *Id.* at 188.

before they were allowed to purchase the membership rights of the group.⁹⁴ This became the principal means to curb improper use of power by the Black Mouths.⁹⁵ Another form of control over the Black Mouths was through clan regulation. If a Black Mouth's punishment was too harsh, for example, his clan might tease him.⁹⁶

Clans and Women

Each Tribe functioned under a highly developed matrilineal clan system.⁹⁷ The clan system regulated social interaction and in some ways checked the power of the government, particularly the Black Mouths. In addition, although the Village Council and the Black Mouths regulated hunting and trade, the women regulated farming and gardening.⁹⁸ The women were also responsible for constructing the earth lodges.⁹⁹ See Figure 1.

⁹⁴ *Id.* at 188-189.

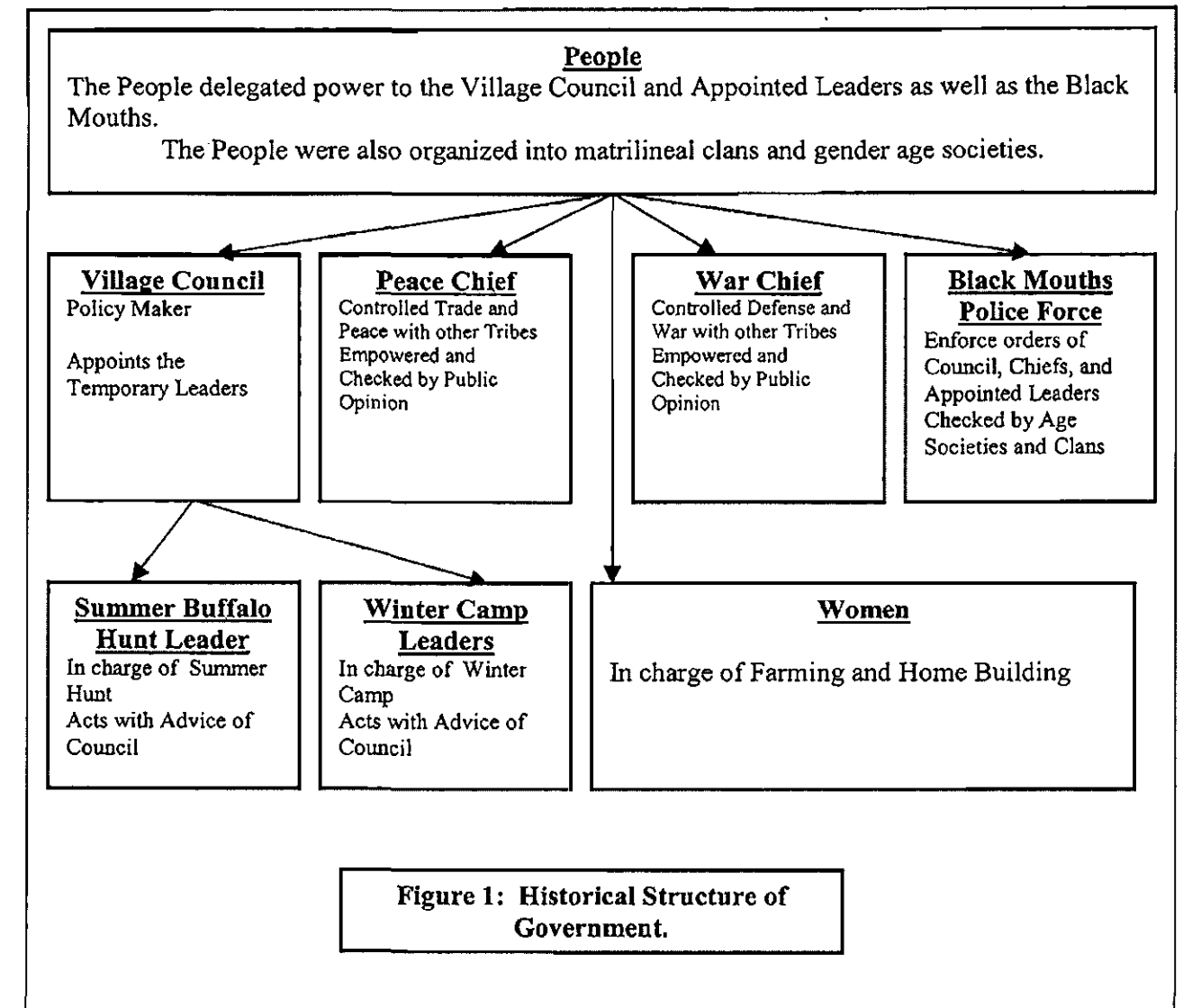
⁹⁵ *Id.*

⁹⁶ *Id.* 189-190.

⁹⁷ LOWIE, *supra* note 10 at 8, 19 (discussing the matrilineal clans of the Mandan and Hidatsa Tribes); HYDE, *supra* note 14 at 19 (discussing the clans of the Arikaras and Caddos).

⁹⁸ JOSEPH H. CASH AND GERALD W. WOLFF, *THE THREE AFFILIATED TRIBES* 22 (1974); GILBERT L. WILSON, *BUFFALO BIRD WOMAN'S GARDEN* 1 (1987).

⁹⁹ LOWIE, *supra* note 10 at 9.



Alliances

Sometime between 1797 and 1798, three Hidatsa Village Councils formed one large Tribal Council.¹⁰⁰ The membership of the Tribal Council was between 10 and 12 members.¹⁰¹ The duties of the Tribal Council included war powers, peace powers, and other duties as

¹⁰⁰ I BOWERS, *supra* note 11 at 27.

¹⁰¹ *Id.*

necessary for mutual assistance of the three villages.¹⁰² The Chiefs also used the power of persuasion to obtain consensus from the Council members and the people.¹⁰³ The Hidatsa Tribal Council had its flaws but it was quite effective for the common good.¹⁰⁴ It is unclear when the Tribal Council officially ended but the Village Councils remained in effect throughout the alliance and afterward.

The historical village governments remained separate until 1845, when the three Hidatsa villages joined with one Mandan group at Like a Fish Hook Village.¹⁰⁵ They lived there for about 40 years, from 1845 until 1885, when the federal government moved the people onto individual allotments.¹⁰⁶ In 1862, the Three Tribes officially joined one another in a formal union.¹⁰⁷ There were also varying degrees of unions among the Three Tribes prior to this date. The most common reason the Three Tribes allied themselves was for protection against the Sioux.¹⁰⁸ On the other hand, the Tribes often fiercely guarded their territory along the Missouri River and would prevent other tribes (including one another) from moving up or downstream.¹⁰⁹

Analysis of Historical Government

The Three Tribes had sophisticated local village governments with a form of separation of powers. Interestingly, there were up to four separate branches of government: the Village Council, the two chiefs, the appointed leaders, and the People. These in turn were regulated by and drawn from the clans and age societies. The two chiefs had separate functions: the war

¹⁰² *Id.*

¹⁰³ *Id.* at 29.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 27.

¹⁰⁶ WILSON, *supra* note 98, at 8.

¹⁰⁷ Shane, *supra* note 8, at 17-18.

¹⁰⁸ *Id.* at 4.

¹⁰⁹ *Id.* at 3-4 (stating the Hidatsas, more powerful than the Mandan, refused to let the Mandan move above the Knife River).

chief was in charge of defense while the peace chief was in charge of day to day activities. The Council acted as the policymaker. The Black Mouths acted as the executive branch.

In addition, there were also checks and balances. First and foremost, public opinion seemed to grant power to the chiefs, the Council, and to curb the Black Mouths. The Council also checked the activities of the special leaders by holding the appointment power. The appointed leaders usually acted with the advice of the Village Council. The Village Council and chiefs collaborated to use persuasion to obtain the consent of the People. The Age Societies shared power with the government, by controlling the purchase of the Black Mouth Society.

From this system, the following values can be inferred. First, the Three Tribes valued religion and ceremony. Second, they valued group rights through clans and age societies. Third, they valued participation in government either through appointment to particular positions, service on the Council, or participation in the age societies. They also valued the right of the People, particularly elders, to speak before the Council and to voice both support and opposition to the Council. Although the Tribes generally valued consensus, they also valued the right of bands to separate. This could be a value of a different kind of liberty; the TAT People only followed the leaders in which they had faith.

IV. BALANCE OF POWERS BETWEEN THE THREE AFFILIATED TRIBES AND THE FEDERAL GOVERNMENT

This section outlines the balance of power between the Three Tribes and the federal government. This balance of power has continually changed since the first time that the federal government involved itself with the Three Tribes. In general, these shifts in federal power and their effect on the Tribes are known as the "policy periods."

Four great occurrences dominate Indian law, history and policy and they are better understood in terms of time periods than doctrines. They are the existence

of aboriginal culture and sovereignty during pre-Columbian times; the location of separate Indian societies on reservations; the imposition of assimilationist policies, including the opening of most reservations to settlement by non-Indians; and the efforts of Indians during the last quarter century to reverse the press of assimilation by reestablishing viable, separate sovereignties in Indian country.¹¹⁰

Interestingly, the Tribes had the least control over the balance of power with the federal government. Accordingly, the traditional governments were heavily influenced by changes in the federal Indian policy periods: the Indian Wars, Allotment, World War II, the Missouri River Basin Dam Project, the Indian Reorganization Act, and the current federal policy of tribal Self-Determination.

Indian Wars and Indian Agents (1851-1880)

One of the first upsets to the Three Affiliated Tribes' government was its decision to ally with the federal government. The stress of the Indian wars and the use of Indian Agents had strained the traditional governments. In 1851, after the Treaty of Fort Laramie, the federal government officially established the boundaries of the Three Tribes.¹¹¹ In 1864, the federal government assigned a federal agent to the Three Tribes, the Assiniboine, and the Crow. After 1870, the federal government assigned the Three Tribes its own agent.¹¹²

Throughout the 1860's and beyond, the Three Tribes were allies with the federal government because they needed protection from the Sioux.¹¹³ The Tribes were frequently attacked by the Sioux yet also asked by the Sioux to join them in fighting the federal government.¹¹⁴ This period has been described as "the period of greatest danger for the three

¹¹⁰ CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW ix (1987).

¹¹¹ CASH & WOLFF, *supra* note 98, at 38-39.

¹¹² *Id.* at 39.

¹¹³ *Id.* at 45-46.

¹¹⁴ *Id.*

tribes and a time when their very existence hung in the balance."¹¹⁵ They were also at the mercy of corrupt fur traders and Indian agents.¹¹⁶ Matters grew worse during the United States Civil War in 1861, because the federal government focused its efforts on the war and did not aid the Three Tribes.¹¹⁷ In 1876, Sitting Bull tried to influence the Tribes into fighting the Whites with him. The Arikara, instead choose to join the federal government in fighting against the Sioux in the Battle of the Little Big Horn.¹¹⁸

In 1874, the Three Affiliated Tribes escaped relocation. The Commissioner of Indian Affairs, Edward P. Smith, considered moving the Three Tribes to Indian Territory in Oklahoma. He "felt that the lands of Ft. Berthold were unproductive, the climate [was] unfriendly, fuel supplies [were] scarce and with 'the flood, drought, frost, and the marauding Sioux, he suggested they would be better off in Oklahoma.'"¹¹⁹ The Three Affiliated Tribes sent a delegation to investigate the Indian Territory. The delegation returned and decided not to move because they loved their homeland, stating they would prefer to "work a little harder and have less" to keep their location.¹²⁰

The Allotment Era (1881-1933)

In the 1870's and 1880's the federal government, through its Indian agents, began a campaign to make the Three Tribes into "civilized" white farmers.¹²¹ The federal government used several techniques: mandatory schooling, Christianity, rations, and allotment. Any parents that refused to send their children to school were denied rations.¹²² School children were not

¹¹⁵ *Id.* at 49.

¹¹⁶ Shane, *supra* note 8, at 20.

¹¹⁷ CASH & WOLFF, *supra* note 98, at 46.

¹¹⁸ Shane, *supra* note 8, at 22.

¹¹⁹ *Id.* at 21-22.

¹²⁰ *Id.* at 22.

¹²¹ CASH & WOLFF, *supra* note 98, at 61.

¹²² *Id.* at 61-62.

allowed to look like Indians and had to wear frontier clothing. Young men had to cut their hair. The children were punished for engaging in tribal customs.¹²³

During this time, the government also attempted to stop the ceremonies of the Three Tribes and to introduce them to Christianity. The Fort Berthold Indian Agent William Courtenay stated that the federal government should end “tribal organization, dances, ceremonies, and tomfoolery” and if the Indians failed to work, they should starve.¹²⁴ Fortunately, this proposal was never fully implemented but its basic idea was consistent with federal policy. In spite of the federal government’s campaign for education and Christian religion, the Three Tribes continued to practice traditional values.¹²⁵

The next upset was the introduction of forced individual land ownership. The federal government passed the Dawes Act in 1887, which allotted individual farm plots to individual Indians.¹²⁶ The allotment process at Fort Berthold, however, began as an earlier experiment. In 1882, twenty families moved from their village to the other side of the Missouri to farm as individuals.¹²⁷ Although there was probably some support among the Three Tribes, the Indian Agent Abram J. Gifford told them that if they did not farm individual plots in 1885, that he would deny all government assistance.¹²⁸ The federal government finished the allotment of the Three Tribes between 1895 and 1929 and all “surplus lands” were ceded to the federal government for eventual sale to non-Indians.¹²⁹

¹²³ *Id.* at 62.

¹²⁴ *Id.* at 61.

¹²⁵ *Id.* at 62-64.

¹²⁶ 25 U.S.C. §331.

¹²⁷ CASH & WOLFF, *supra* note 98, at 64.

¹²⁸ Shane, *supra* note 8, at 23.

¹²⁹ CASH & WOLFF, *supra* note 98, at 66-68.

Not all members of the Three Affiliated Tribes embraced allotment. In 1869, Chief Crow Flies High separated from the Three Tribes with 185 Mandans and Hidatsas.¹³⁰ He separated because of a disagreement with the other chiefs. His band, the Xxoshgaas, went to live at Fort Buford, Montana. In 1884, the federal government ordered them to return to Fort Berthold. They did, but they did not agree with the policy of farming individual allotments.¹³¹

One of the purposes of allotment was to end the social organization of the Tribes. The Three Tribes, however, established allotment communities such as “Lucky Mound, Elbowoods, Independence, Armstrong, and Shell Creek.”¹³² The federal government unwittingly aided the Indians by establishing schools within these districts. The tribal communities strengthened.¹³³

Both the War Department and later the Department of the Interior used Army Officers as Indian Agents. The Indian Agents used Indian people to help them. In 1895, Agent William H. Clapp appointed Goodbird as a government farmer.¹³⁴ Goodbird was torn between loyalties to his family, clan, tribe, and the federal government.¹³⁵ The Agent ordered him to assign ten acres to each man and to make sure each tilled it. “Goodbird’s orders showed how the agent’s role had changed since the 1870s. Instead of being an ambassador to the tribe, the agent was now more like a benign feudal lord trying to guide the Indians to civilization and citizenship.”¹³⁶

Additionally, the Indian Agent needed police to help run the federal agenda on the Reservation.¹³⁷ However, “the U.S. government did not acknowledge the power of the Black

¹³⁰ Shane, *supra* note 8, at 24.

¹³¹ *Id.* at 24.

¹³² CASH & WOLFF, *supra* note 98, at 71.

¹³³ *Id.*

¹³⁴ CAROLYN GILMAN & MARY JANE SCHNEIDER, *THE WAY TO INDEPENDENCE MEMORIES OF A HIDATSA INDIAN FAMILY, 1840-1920* 209 (1987).

¹³⁵ *Id.*

¹³⁶ *Id.* at 209. A 1904 handbook stated that “The chief duty of an agent is to induce his Indians to labor in civilized pursuits.” *Id.* (citation omitted).

¹³⁷ See e.g., Francis Paul Prucha, *Documents of United States Indian Policy* 151 citing Indian Commissioner Ezra A. Hayt in his Annual Report of the Commissioner of Indian Affairs (1877) (where he recommended that Indian police

Mouths, and the Black Mouths' ancient customs did not include enforcing laws made by white legislatures."¹³⁸ Accordingly, the "Office of Indian Affairs made the laws, the agent was chief of police, and Indian officers made up the police force."¹³⁹ The Fort Berthold Indian Police were organized like a military with military ranks and uniforms.¹⁴⁰ In 1918, the Indian Agent assigned a private for each district in the Reservation.¹⁴¹ Even the buttons on the police uniforms worn by the Indian police, were adorned with civilization phrases such as, "God Helps Those Who Help Themselves."¹⁴² The Hidatsa Indian, Wolf Chief, reflected on the dual police systems stating he knew that the Indian police would compete with the "traditional systems of authority."¹⁴³

During the 1920's the communities stabilized and the crops were good. But by the late 1920's and 1930's the Tribes suffered from "low prices and severe drought."¹⁴⁴ The Three Tribes "were in a definite state of decline and people were living in harsh poverty. It was clear that the federal policies of individual land ownership, education, and Christianization had failed, and that the Indians, like other Americans, had not escaped the devastation of the Great Depression."¹⁴⁵ The Indians would next face a New Deal policy presented by the federal government, the Indian Reorganization Act.¹⁴⁶

be used and that they be outfitted as soldiers because it would save U.S. lives and property and begin to civilize the Indian).

¹³⁸ GILMAN & SCHNEIDER, *supra* note 134, at 214.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 215 (citation omitted).

¹⁴¹ *Id.* at 214.

¹⁴² *Id.* at 216.

¹⁴³ *Id.* at 214.

¹⁴⁴ CASH & WOLFF, *supra* note 98, at 72.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 73.

Indian Reorganization Act Constitutional Debate

After allotment and the Depression, it was clear to federal policy makers and to the Three Affiliated Tribes, that they were better off using Indian governments and making their own tribal decisions. Accordingly, in response to public outcry about the conditions on Indian Reservations, the Indian Reorganization Act was passed.¹⁴⁷ Reformers were particularly concerned about "white-controlled land tenure patterns, growing poverty, and administrative abuse in Indian country."¹⁴⁸

John Collier, Commissioner of Indian Affairs, prepared a bill that became the Indian Reorganization Act.¹⁴⁹ Tribes were given the option of deciding whether to reorganize under a constitution.¹⁵⁰ John Fredericks, an MHA Elder, recalled the three leaders active in promoting the TAT IRA Constitution:

They were Peter Beauchamp who represented the Arikara, Fred Huber who represented the Hidatsa and Arthur Mandan who represented the Mandans. They were sent to Washington, D.C. by our Indian people who worked hard at raising money for their expenses by basket socials and other donations. Otherwise, these leaders of the Tribe were not paid any money for their services.¹⁵¹

¹⁴⁷ 25 U.S.C. §476.

¹⁴⁸ POMMERSHEIM, *supra* note 3, at 63 (1997) (footnote omitted).

¹⁴⁹ *Id.* at 64 (footnote omitted) (His bill addressed "four major areas: self-government, special education for Indians, Indian lands, and a Court of Indian Affairs."). Indians were not asked to include their input in the bill. *Id.* at 65. (footnote omitted). The Indian Reorganization Act as enacted, however, "bore faint resemblance to the original proposal." *Id.* (footnote omitted).

¹⁵⁰ 25 U.S.C. §478 provides, "This Act shall not apply to any reservation wherein a majority of the adult Indians...shall vote against its application." However, the option to incorporate under a federal charter and the extension of the trust status of Indian allotments continued indefinitely even if the Tribe voted not to reorganize under a constitution. 25 U.S.C. §478-1. Tribes that have organized under a constitution may also revoke the constitution or bylaws in the same manner as they adopted their constitution or bylaws. 25 U.S.C. §476(b). Tribes that decided to adopt IRA constitutions exercise inherent sovereignty and not delegated federal powers.

POMMERSHEIM, *supra* note 3, at 65-66 (footnote omitted).

¹⁵¹ John Fredericks, Statement to the Tribal Council for Elders Organization 1 (May 4, 2000) in Mandan, Hidatsa and Arikara Elders Newsletter, vol. 2000, No. 1.

The Three Tribes held meetings and conducted "serious and sustained debate" to determine whether to organize under an Indian Reorganization constitution.¹⁵² The people that supported organization included the educated people, the businessmen, the ranchers, and some traditionalists. The educated people wanted a means to formally express themselves.¹⁵³ The businessmen and ranchers could see the business value of a formal government.¹⁵⁴ The traditionalists wanted to see the younger generations "assume governmental responsibilities like those which their ancestors had enjoyed."¹⁵⁵ Others liked the religious freedom provisions of the Act.¹⁵⁶ The conservatives opposed the Act. They opposed a government offered by untrustworthy white men that required approval by the Secretary of the Interior. To them the IRA government was not true self-government.¹⁵⁷

An election was held, and the Tribes narrowly voted to accept organization by a vote of 366 for and 220 against.¹⁵⁸ The Tribes also had debate about whether to organize under a business charter.¹⁵⁹ They voted to incorporate under a charter which was approved by the Secretary of the Interior on April 24, 1937.

Early IRA Government (1936-1954)

The Three Affiliated Tribes "made much progress toward organizing and establishing itself" prior to World War II.¹⁶⁰ During the 1930s and 1940s the Reservation was still isolated from the outside world. The tribal economy was agricultural. The community raised horses,

¹⁵² CASH & WOLFF, *supra* note 98, at 73.

¹⁵³ *Id.* at 73-74.

¹⁵⁴ *Id.* at 74.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See T.A.T. CONST. CERTIFICATION OF ADOPTION.

¹⁵⁹ CASH & WOLFF, *supra* note 98 at 76.

¹⁶⁰ *Id.*

cattle, and maintained gardens.¹⁶¹ The Tribal Council received little or no compensation. The Live Stock Association administered the economic and business of the members.¹⁶² The Bureau of Indian Affairs (BIA) "managed, with a heavy hand, services such as education, health, judicial and trust services."¹⁶³ Tribal tradition governed social interaction.¹⁶⁴

The TAT IRA Constitution worked well during the 1930s and 1940s because there was a separation of powers; there was an appropriate balance of powers between the federal and tribal government for that period. Power was held in four main areas: (1) the Tribal Council, (2) the Fort Berthold Cattlemen's Association which was managed "by a Board of Directors and a Farm Agent employed by the Bureau of Indian Affairs hired for assisting the board and its members,"¹⁶⁵ (3) the BIA, and (4) the Tribal clans. John Fredericks stated,

Thus [during the 1930s and 1940s] the people of Fort Berthold made their living off of the land and natural resources of our Reservation. More importantly this is the period when we did not have any welfare or unemployment. We were doing what we loved best, making a livelihood out of what the Federal government directed our way – that of using our land and resources available to us and making it work. Think about it, this had to be a period of time when our Indian people enjoyed the fruits of life and liberty from their planning and initiative in the work force. Also, when you take a real serious look at this period of time, we realize that we had a separation of powers. The Tribal Council handled the government, the [Fort Berthold Cattlemen's] Association handled the business affairs and the legal department was handled by the Bureau of Indian Affairs.¹⁶⁶

By the end of World War II, the Tribes had a good economy on the Reservation. They had springs and creeks for water, exposed coal for fuel, building materials, and winter cover for livestock, wild berries and fruits for diet.¹⁶⁷ The Tribe enjoyed a good period of success using

¹⁶¹ Mandan, Hidatsa, and Arikara Elders Organization, Position Paper 1 (2000).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See John Fredericks, Statement to the Tribal Council for Elders Organization 2 (May 4, 2000) in Mandan, Hidatsa and Arikara Elders Newsletter, vol. 2000, No. 1.

¹⁶⁶ *Id.*

¹⁶⁷ CASH & WOLFF, *supra* note 98, at 84.

the Indian Reorganization Act government.¹⁶⁸ However, the Tribe would soon face another devastating policy of the federal government, the Missouri River Basin Project.

The Garrison Dam

The Pick Sloan Act authorized the federal government to flood "over 550 square miles of tribal land in North and South Dakota..."¹⁶⁹ This Act authorized the Corps of Engineers to set up 107 dams on the Missouri River Basin.¹⁷⁰ The goals "of the project were flood control, irrigation, and hydroelectric power."¹⁷¹ The Bureau of Indian Affairs did not inform the Tribes of the Missouri River Basin Development program until 1947, three years after it had been passed through Congress.¹⁷² Vine Deloria, Jr. described the Pick Sloan Act as "the single most destructive act ever perpetrated on any tribe by the United States."¹⁷³ The Three Affiliated Tribes fought the construction of Garrison Dam in Congress and in the courts.¹⁷⁴ Unfortunately, however, the Tribe lost the battle.

The destruction caused by the creation of the Dam was as great as the two smallpox epidemics.¹⁷⁵ The Dam flooded 25% of the bottomlands of the Reservation. Ninety percent of the People lived in the bottomlands before the Dam and were forced to move to the highlands.¹⁷⁶

Forced relocation is always traumatic, even for an individual or a family. When it is done to 90 percent of a people, the effects are awesome. All organizational forms and structures were drastically altered; friendships were ripped apart; community cohesion was totally dissolved; and the habits and customs of

¹⁶⁸ Many have stated that while the Constitution may have worked for a time, the members soon faced many hardships, World War II, the "Garrison Dam, relocation, and [possible] Termination." Mandan, Hidatsa, and Arikara Elders Organization Position Paper 2 (2000).

¹⁶⁹ POMMERSHEIM, *supra* note 3, at 25.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 26 citing MICHAEL LAWSON, DAMMED INDIANS 45 (1982).

¹⁷³ *Id.* citing Vine Deloria, Jr., Foreword to MICHAEL LAWSON, DAMMED INDIANS xiv (1982).

¹⁷⁴ CASH & WOLFF, *supra* note 98 at 82.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 83.

generations were almost completely destroyed. All of these elements now had to be rebuilt practically from scratch.¹⁷⁷

The People were divided into new isolated communities because of the lack of roads and bridges.¹⁷⁸ The Dam also destroyed the economic success that the People had built prior to the end of World War II.¹⁷⁹ The People now had to move to a cash economy.¹⁸⁰ "About this time the people felt that they would be better served by one councilman from each of the ... segments with the chairman of the Tribe ... voted in at large," instead of the previous system where each segment had two representatives and the representatives elected the Chairman.¹⁸¹

Self-Determination Era

In the mid 1970's, the federal government passed the Self-Determination Act and the balance of power shifted back into the hands of tribal government.¹⁸² The Act authorized the Tribe to take over control of federal BIA programs. As the MHA Elders have explained, the Act shifted federal administration of tribal assets back to the Tribe without adequate consideration of whether the IRA government could manage such functions. The MHA Elders have stated, the Act "expanded the authority of our tribal government to manage our affairs and access to millions of tribal and federal dollars with less tribal government representation and no checks and balances in place."¹⁸³

Although Self-Determination is a good policy, very little consideration went into whether the tribal form of government provided by the BIA, was adequately equipped to handle such

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 84.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* The people were paid for the loss of the bottomlands but the money went to individual Indians and was and is often spent unwisely. *Id.* at 84-86.

¹⁸¹ John Fredericks, Statement to the Tribal Council for Elders Organization 2 (May 4, 2000) in Mandan, Hidatsa and Arikara Newsletter, vol. 2000, No. 1.

¹⁸² 25 U.S.C. §450, *et seq.*

¹⁸³ Mandan, Hidatsa, and Arikara Elders Organization, Position Paper 3 (2000).

administration. Moreover, this discussion makes clear how little control the Tribe possesses over federal policy and the direct relationship of that federal policy to internal tribal government. The next sections deal with these tensions and the current balance of internal governmental powers.

V. THE BALANCE OF POWERS BETWEEN THE TRIBAL COUNCIL AND THE TRIBAL JUDICIARY

This section addresses whether the Three Affiliated Tribes should amend its Constitution to create a separate independent judiciary. The purpose of this section is to define the structure of the Fort Berthold Court and to delineate the present separation of powers between the Tribal Business Council and the Fort Berthold Court.¹⁸⁴

Form of Government

The current government of the Three Affiliated Tribes is an Indian Reorganization Act form of government, which has changed little since 1936. The Three Affiliated Tribes Constitution states that the "governing body of the Three Affiliated Tribes of the Fort Berthold Reservation shall be known as the Tribal Business Council."¹⁸⁵ The Three Affiliated Tribes Constitution provides:

The people of the Fort Berthold Reservation hereby grant to the Tribal Business Council of the Three Affiliated Tribes all necessary sovereign authority — legislative and *judicial* — for the purpose of exercising the jurisdiction granted by the People in Article I of this Constitution. Further, the People hereby authorize the Tribal Business Council to *delegate to the Tribal Court such judicial power and authority as may be necessary to realize the jurisdiction granted by the People in Article I of this Constitution.*¹⁸⁶

¹⁸⁴ The research in the next three sections consists of samples of Fort Berthold Tribal Court and Northern Plains Intertribal Court of Appeals decisions from 1990 through 2000 as printed in the Indian Law Reporter. Judges submit their opinions to the Indian Law Reporter; accordingly the samples may not be random. Telephone interview with Diane Johnson, Former Practicing Attorney & Judge Fort Berthold Tribal Court (Dec. 2000). However, I also talked with two former Fort Berthold Judges about these cases. I also went to the Tribal Court and was told that constitutional cases are rare and that I probably had the main cases.

¹⁸⁵ T.A.T. CONST. art. III, § 1.

¹⁸⁶ T.A.T. CONST. art VI, § 3 (emphasis added).

The Constitution vests all governing power, including both legislative and judicial power, in the Tribal Business Council. The Council may, however, delegate "such judicial power and authority as may be necessary to realize the jurisdiction granted by the People in Article I" of the Constitution to the Tribal Court.¹⁸⁷ Article I is a *broad* grant of jurisdiction to the Tribe covering "all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Reservation."¹⁸⁸

The Tribal Business Council has chosen to delegate all judicial power to the Tribal Judiciary by statute.¹⁸⁹ The statute provides that "The judicial power of the people of the Three Affiliated Tribes shall be vested in the Fort Berthold judiciary and shall extend to all cases and controversies in law, equity and custom arising under the laws of the Three Affiliated Tribes."¹⁹⁰ The Code provides that "It is the intent of this Code that the jurisdictional powers be *liberally construed* to serve the ends of justice, and a failure to legislate in a particular area shall not be deemed a waiver of that authority."¹⁹¹ Therefore, the Code makes certain that the delegation of

¹⁸⁷ *Id.*

¹⁸⁸ The full text of art. I provides:

The jurisdiction of the Three Affiliated Tribes of the Fort Berthold Reservation shall extend to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Reservation as defined by the Act of March 3, 1891, (26 Stat. 1032) to all lands added to the Fort Berthold Reservation by Executive Order of June 17, 1892; and to such other persons and lands as may hereafter come within the jurisdiction of the Three Affiliated Tribes, except as otherwise provided by law.

T.A.T. CONST. art. I. Article I was amended by Amendment No. VIII, approved by the Secretary of the Interior's delegate on March 11, 1985. The prior Article I approved June 29, 1936 provided that the jurisdiction of the Three Affiliated Tribes would be limited "to Indian Trust and Tribal lands" within the Fort Berthold Reservation.

¹⁸⁹ See *In The Matter of the Guardianship and Conservatorship of William Bell, Sr.*, 24 Indian L. Rep. 6105, 6106 (Ft. Bert. Tr. Ct. 1997) *citing* Chapter 1, §2.1. Code of Laws of the Three Affiliated Tribes.

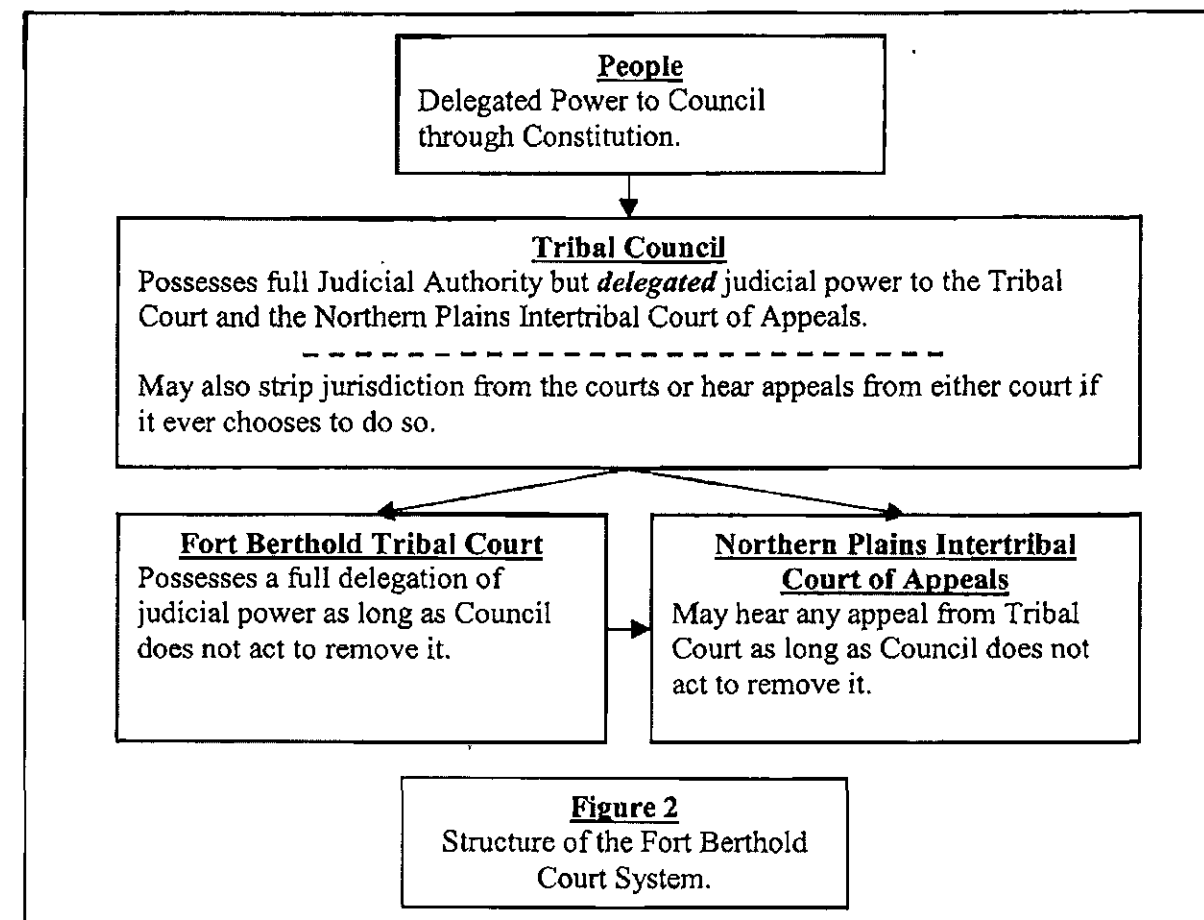
¹⁹⁰ *See id.*

¹⁹¹ *Fredericks v. Continental Western Insurance Co.*, 20 Indian L. Rep. 6009, 6010 (N. Plns. Intertr. Ct. App. 1992). (emphasis in opinion) (citation omitted).

power to the Court is nearly absolute.¹⁹² See Figure 2. Federal law, however, limits the jurisdiction of the Court particularly over non-Indians on non-Indian fee land.¹⁹³

¹⁹² *Id.*

¹⁹³ See generally *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).



The Council, as the legislative body, is empowered to redraft statutes that the Court has misconstrued or redraft statutes when it appears that the old statute was ineffective.¹⁹⁴ Tribal members also use Council meetings to air grievances and to express dissatisfaction with Tribal Court opinions.¹⁹⁵

Thus, the Three Affiliated Tribes IRA government vests all power in the Council. The Council granted all judicial power to the Tribal Judiciary. Accordingly, the Tribal Court and the

¹⁹⁴ See e.g., *Three Affiliated Tribes v. Howling Wolf*, 27 Indian L. Rep. 6085, 6085 (N. Plns. Intertr. Ct. App. 2000) (noting that the Three Affiliated Tribes Code was amended to allow preemptory challenges for judges in addition to challenges for cause).

¹⁹⁵ Telephone Interview with Diane Johnson, Former Practicing Attorney & Judge Fort Berthold Tribal Court (Dec. 2000); *Hall v. Tribal Business Council*, 23 Indian L. Rep. 6039, 6042 (Ft. Bert. Tr. Ct. 1996) (In this case, Austin Gillette argued that a traditional remedy under due process is that an aggrieved party should place himself on the agenda of the next Tribal Council Meeting).

Northern Plains Intertribal Court of Appeals' existence depends upon the Council or on the reliance of the People to protect the Courts.

Tribal Court

The Tribal Judiciary consists of two courts: the Fort Berthold Tribal Court and the Northern Plains Intertribal Court of Appeals. The Tribal Court is a modern court and not a traditional court. The Court uses formal procedures and is modeled after a state court.¹⁹⁶ The Court may have any number of judges at one time.¹⁹⁷ Members, Indians, and non-Indians are eligible to serve as judges.¹⁹⁸ The Judge usually conducts bench trials; however, juries may be used, although this is rare.¹⁹⁹ Only a licensed attorney or a licensed advocate may appear on behalf of another person.²⁰⁰ A party may appear pro se. The attorneys are subject to a Tribal disciplinary code.²⁰¹ The Court uses the Federal Rules of Civil Procedure.²⁰² The Court construes pleadings liberally and may consider matters outside the pleadings.²⁰³ However, the Court may dismiss a claim sua sponte.²⁰⁴

The Tribal Judiciary holds membership in an Intertribal appellate court, the Northern Plains Intertribal Court of Appeals. This Court is treated exactly as it were solely a Fort Berthold

¹⁹⁶ Telephone Interview with Diane Johnson, Former Practicing Attorney & Fort Berthold Tribal Court Judge (Dec. 2000).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See generally First Bank v. Knight, 24 Indian L. Rep. 6156, 6156 (Ft. Bert. Tr. Ct. 1997) (citation omitted).

²⁰¹ See Matter of Attorney License of William E. Woods, Jr., 25 Indian L. Rep. 6034, 6035 n. 2 (Ft. Bert. Tr. Ct. 1997).

²⁰² Telephone Interview with Diane Johnson, Former Practicing Attorney & Judge Fort Berthold Tribal Court (Dec. 2000). See e.g., Hall v. Lakeside State Bank of New Town, 26 Indian L. Rep. 6032, 6032 (Ft. Bert. Tr. Ct. 1998) (allowing consolidation of hearings when cases involve similar issues); Gwin v. Bolman, 25 Indian L. Rep. 6121, 6122 (Ft. Bert. Tr. Ct. 1998) (outlining requirements for an injunction); Bordeaux v. Wilkinson, 21 Indian L. Rep. 6131, 6131-6132 (Ft. Bert. Tr. Ct. 1993) (allowing a party to raise the defense of failure to state a claim).

²⁰³ See generally White Horse v. 4 Bears Casino & Lodge, 25 Indian L. Rep. 6079, 6080 (Ft. Bert. Tr. Ct. 1997).

²⁰⁴ Good Iron v. Hall, 26 Indian L. Rep. 6029, 6030 (Ft. Bert. Tr. Ct. 1998).

Tribal Appellate Court. It has the right to review the lower Tribal Court and to reverse incorrect decisions.²⁰⁵ It also has the power to make *critical decisions* about tribal law.²⁰⁶

Separation of Powers Between the Council and the Judiciary

Although the Constitution does not provide for constitutional separation of powers, the Council has provided for statutory separation of powers through a resolution passed in the 1980s, which states that the Council will not interfere with the Tribal Judiciary.²⁰⁷

Not only this Tribe but also many tribes "have moved to a policy of de facto, if not de jure, separation of powers."²⁰⁸ Although statutory separation of powers is the easiest way to facilitate separation of powers, a leading Tribal Constitutional Scholar, Frank Pommersheim, recommends that "more detailed and thoughtful approaches are needed to meet the persistent, long-term need for legitimacy...of the tribal judiciary."²⁰⁹ In fact, this short term approach may already have its flaws at Fort Berthold; the Council has in one very rare instance passed a resolution that removed jurisdiction from the Court.²¹⁰

The Constitution *could*, however, be amended to provide for a separate constitutional Judiciary. Many tribes are now amending their constitutions to provide for constitutional separation of powers. For example, the Cheyenne River Sioux of South Dakota recently

²⁰⁵ See Indian Credit Corp. v. Gillette, 18 Indian L. Rep. 6001, 6002 (N. Plns. Intertr. Ct. App. 1990) (holding that the Tribal Court erred in making a choice of law decision).

²⁰⁶ See Francis v. Wilkinson, 20 Indian L. Rep. 6015, 6015 (N. Plns. Intertr. Ct. App. 1993) (holding that Art. VI, §3(b) waives the sovereign immunity of the Tribe for ICRA claims); See also Fettig v. Danks, 18 Indian L. Rep. 6057, 6057-6058 (N. Plns. Intertr. Ct. App. 1990) (affirming the lower court decision's that the defendant was negligent but also adopting a new rule of law unnecessary to the opinion. Such action demonstrates that the N. Plns. Inter. Ct. App. is quite powerful).

²⁰⁷ Telephone Interview with Diane Johnson, Former Practicing Attorney & Judge Fort Berthold Tribal Court (Oct. 2000); Interview with Kip Quale, Three Affiliated Tribes Attorney, at Fort Berthold, ND (March 12, 2001) (stating he wrote the Resolution but he did not have a copy for me to cite).

²⁰⁸ POMMERSHEIM, *supra* note 3, at 74 (footnote omitted).

²⁰⁹ *Id.*

²¹⁰ Good Iron v. Hall, 26 Indian L. Rep. 6029, 6030 (Ft. Bert. Tr. Ct. 1998) (a majority of the Tribal Business Council passed Resolution No. 98-010 which removed the case of *Good Iron v. Hall* from the Court's jurisdiction to avoid relitigating issues in two previous cases).

amended its constitution to provide that “Decisions of tribal courts may be appealed to tribal appellate courts, but shall not be subject to review by the Tribal Council.”²¹¹

In theory, however, there might be a simpler constitutional solution. The Court could breathe life into the second constitutional provision that mentions the Court, the Indian Civil Rights Act (ICRA) provision, to find a textual hook for constitutionally based court authority.²¹²

Art. VI, §3(b) provides that:

The People...hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.*, including the award of injunctive relief only against the Tribal Business Council if it is determined through an adjudication that the Tribal Business Council has in a specific instance violated that Act.²¹³

The Court, however, has apparently not interpreted §3(b) broadly. Instead, the Court has interpreted this provision only as a waiver of sovereign immunity so that the People can sue the Council but the remedy is limited to injunctive relief.²¹⁴ A former judge for the Tribal Court has stated that the only function of §3(b) is to give effect to the Indian Civil Rights Act, no more, no less.²¹⁵ It is as if the provision reads “The People . . . hereby specifically waive the sovereign immunity of the Tribal Council.”

It is significant that the Court or advocates have not used this provision to broaden the powers of the Court. The language clearly could be read to achieve more than one purpose: (1) a specific grant to the Tribal Court of authority to enforce the provisions of the Indian Civil Rights Act, as well as (2) the necessary waiver of sovereign immunity. This reading would give

²¹¹ POMMERSHEIM, *supra* note 3, at 74 n. 72 (1997) citing CHEYENNE RIVER SIOUX TRIBAL CONST. art. IV, § 1(k) (1992).

²¹² See T.A.T. CONST. art. VI, §3(b).

²¹³ *Id.* (emphasis in original). Section 3(b) was amended by Amendment No. VIII, effective March 11, 1985.

²¹⁴ Francis v. Wilkinson, 20 Indian L. Rep. 6015, 6015 (N. Plns. Intertr. Ct. App. 1993).

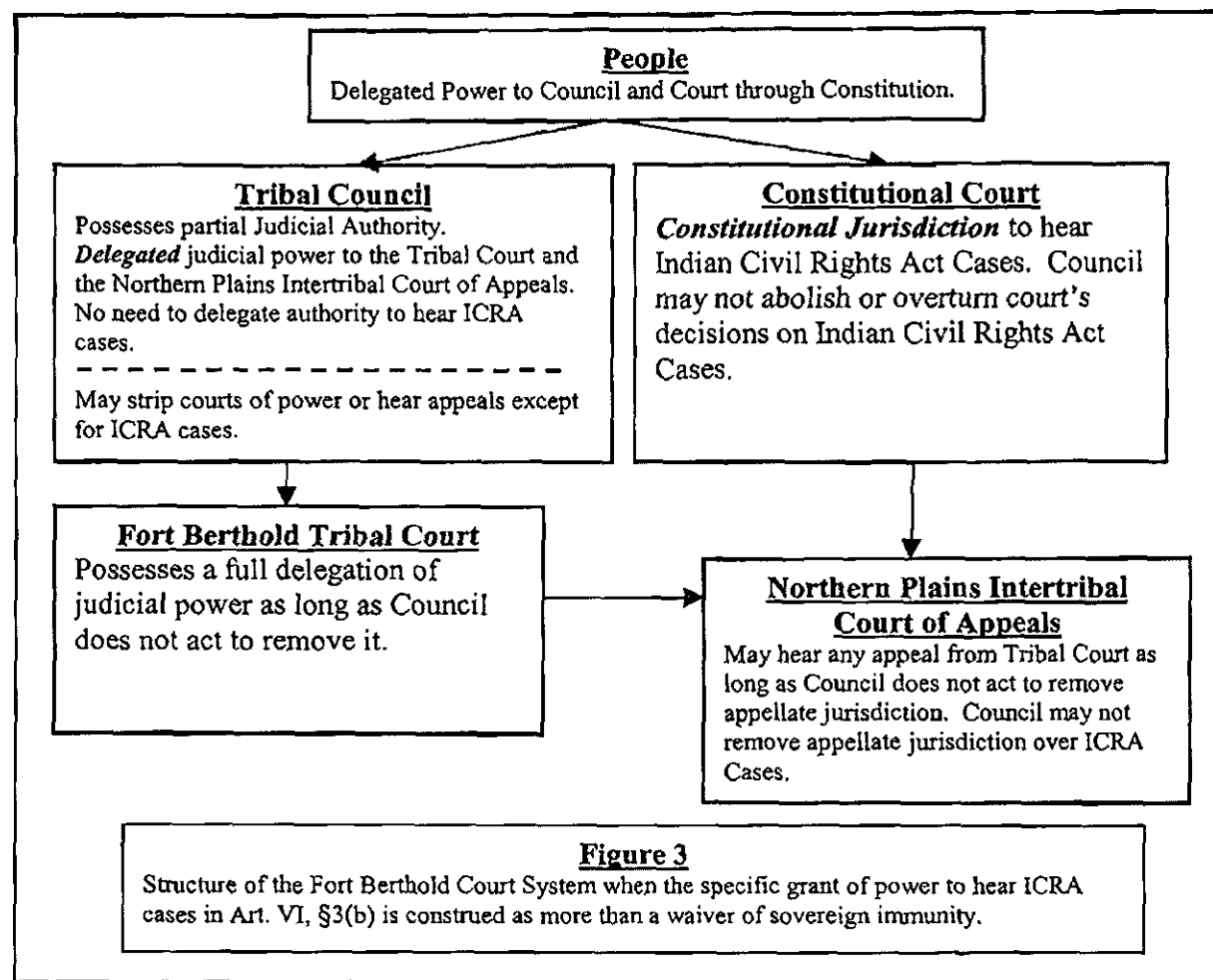
²¹⁵ Telephone Interview with Diane Johnson, Former Practicing Attorney & Judge Fort Berthold Tribal Court (Dec. 2000) (clarifying that this is a limited waiver of sovereign immunity to make the provisions of the ICRA functional but nothing further).

effect to every word of the Constitution. In other words, if the provision were read only as a waiver of sovereign immunity then the language “The People...hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act...,” would be superfluous. Therefore, to give meaning to the entire constitutional provision, the Court should read the provision as authorizing jurisdiction over ICRA claims.

Accordingly, the broadest construction of Art. VI, §3(b) grants the Court inherent *constitutional authority* to construe and enforce the Indian Civil Rights Act. The Court would be the sole arbiter of the Indian Civil Rights Act and the Council could never take away jurisdiction over the Indian Civil Rights Act because to do so would violate constitutionally mandated separation of powers. See Figure 3.

However, as a practical matter the Council would probably not take away criminal and civil jurisdiction from the Court because it would then have to conduct judicial matters in addition to its other work.²¹⁶

²¹⁶ Interview with Vance Gillette, Former Chief Judge Fort Berthold Tribal Court, at Fort Berthold, ND (March 15, 2001).



It should be noted that in at least one case the Court has construed §3(b) broadly as a constitutional grant of authority. In *Hall v. Lakeside State Bank of New Town*, the Court held that the newly elected Chairman could vote twice on his successor to the Mandaree Segment. Chairman Hall was the first Chairman to be elected from the position of a sitting Councilman and the question of how to fill his former seat raised several constitutional and election issues for the Tribe and the Court.²¹⁷ In the wake of the election, the newly constituted Council passed Resolution 98-010, which removed the case of *Good Iron v. Hall* from the Court to avoid

²¹⁷ *Hall v. Lakeside State Bank of New Town*, 26 Indian L. Rep. 6032, 6032-6036 (Ft. Bert. Tr. Ct. 1998).

relitigating issues previously decided in *Hall v. Lakeside State Bank of New Town*.²¹⁸ The Court held that regardless of the Resolution, it would still have jurisdiction to hear valid claims under the Indian Civil Rights Act.²¹⁹ The Court wrote:

The only specific grant of authority to the tribal court in the Constitution comes by virtue of Art. VI, § 3(b) under which the people confer jurisdiction on the court to 'enforce the provisions of the Indian Civil Rights Act...' Thus, this Court must comply with the directive of Resolution No. 98-010 JPH *unless* the complaint sufficiently states a basis for an Indian Civil Rights Act violation.²²⁰

The Court construed §3(b) broadly as jurisdictional authority over ICRA claims. However, the Court found that the complaint did not state a claim under the ICRA and did in fact attempt to relitigate issues previously decided in *Hall v. Lakeside State Bank of New Town*, so the Court dismissed for lack of subject matter jurisdiction and for failure to state a claim.²²¹

Former Chief Judge Vance Gillette, however, has questioned the precedential value of *Good Iron v. Hall*.²²² First, Resolution No. 98-010 was passed without the necessary quorum to do business. Instead, it was passed by "a majority of the Tribal Business Council."²²³ Accordingly, Resolution No. 98-010 may be invalid.²²⁴ Second, there is also a question whether there was a valid quorum to hire Judge B.J. Jones, the presiding judge in both *Good Iron v. Hall* and *Hall v. Lakeside State Bank of New Town*.²²⁵ Finally, Vance Gillette argues that *Good Iron*

²¹⁸ See *Good Iron v. Hall*, 26 Indian L. Rep. 6029, 6030 (Ft. Bert. Tr. Ct. 1998) citing *Hall v. Lakeside State Bank of New Town*, 26 Indian L. Rep. 6032 (Ft. Bert. Tr. Ct. 1998).

²¹⁹ *Id.*

²²⁰ *Id.* (citation omitted) (emphasis added) (opinion by Judge B.J. Jones).

²²¹ *Id.* at 6030-6032.

²²² Interview with Vance Gillette, Former Chief Judge Fort Berthold Tribal Court, at Fort Berthold, ND (March 15, 2001).

²²³ *Id.*; *Good Iron*, at 6030.

²²⁴ Interview with Vance Gillette, Former Chief Judge Fort Berthold Tribal Court, at Fort Berthold, ND (March 15, 2001).

²²⁵ *Id.*; *C.f.* *Hall v. Lakeside State Bank of New Town*, at 6032-6036, (where parties consented that Judge Jones had authority to hear the matters in *Hall v. Lakeside* stating Judge Jones was appointed by the previous Tribal Business Council [before the election dispute]. I am not sure what effect the holding that Chairman's double vote on his successor does not violate the ICRA has on the arguments about whether a legal quorum was present to do business).

has questionable value because no appeal *could be* taken from *Good Iron*. The Tribe had failed to pay the annual fee for membership with the Northern Plains Intertribal Court of Appeals, and the Tribe's membership lapsed.²²⁶

However, even if *Good Iron* has little precedential value, the Court has also indicated that it has jurisdiction over ICRA cases in *Bordeaux v. Wilson*.²²⁷ In *Bordeaux*, the Court stated that "section 3(b)) [sic] contains a *specific grant of authority* from the people of the Three Affiliated Tribes to the tribal court to enforce the provisions of the Indian Civil Rights Act...."²²⁸ However, it is less clear whether the Court considered its authority as constitutional jurisdiction or mere authority.

Although the Court could construe this provision as constitutional authority to hear ICRA claims, the People should evaluate whether it would be best to amend the Constitution. There are several reasons why a constitutional amendment may be warranted. First, the People would make the decision and not have to wait for the Court to construe Art. VI, §3(b) as a constitutional grant of power over ICRA cases, which might never happen. Second, it might be better to have a separate and independent judiciary for all claims, not only ICRA claims. For example, a leading reason to have a separate and independent judiciary has been suggested by the Harvard Project on Economic Development. These scholars and students reason that a separate and independent judiciary should be available to hear disputes between tribes and the businesses that contract with them. Such provision for an independent forum stimulates investment within Indian country because investors are more willing to enter into tribal contracts when they know that the Council which usually fashions the terms of the contract, will not also be construing the terms should a

²²⁶ *Id.*

²²⁷ See *Bordeaux v. Wilkinson*, 21 Indian L. Rep. 6131 (Ft. Bert. Tr. Ct. 1993).

²²⁸ *Id.* at 6133 (emphasis added).

dispute arise.²²⁹ This statement is also true of Fort Berthold. Two Harvard students that chose to study the economic circumstances at Fort Berthold opined that investors want "an impartial body that will hear business-related disputes."²³⁰ On the other hand, the People should consider the purpose of the Harvard students' statements: to open the Reservation to economic development. Therefore, if the goal of the People is not economic development, then it may not be necessary to separate the judiciary.

Third, the People should consider what control, if any, they want the Council to retain over the Court's jurisdiction. This question is especially difficult; it goes to whether the Council should be able to "check" the power of the Court by defining or limiting its jurisdiction.

In conclusion, the Tribal Council is the supreme law of the land for the Three Affiliated Tribes. The Court system exists at the sufferance of the Tribal Council. However, there is statutory separation of powers and this division of powers may be an adequate balance of powers because the Court has created enormous power for itself. However, there could be constitutional separation of powers. First, the Court could formalize its interpretation of Art. VI, §3(b) to authorize constitutional jurisdiction over Indian Civil Rights Claims, thereby precluding the Council from ever dissolving the Court at least for the purpose of Indian Civil Rights Claims. Alternatively, the People could adopt an amendment to the Constitution granting the Tribal Court independent authority for all disputes. The People should also consider what checks the Council should retain, if any, over the Court's jurisdiction.

VI. BALANCE OF POWERS BETWEEN THE LEGISLATIVE AND EXECUTIVE FUNCTIONS

This section examines whether there should be a separate constitutionally created executive branch of government. The Constitution does not mention the word "executive."

²²⁹ See generally, Overview, Harvard Project on Economic Development, www.harvard.edu/hpaied/overview.

²³⁰ Sue W. Wong & Armando L. Ramirez, *A New Direction: Building a Foundation for Successful Economic Development on The Three Affiliated Tribes' Fort Berthold Reservation* (Executive Summary) (1996).

However, it is common knowledge that the Council exercises executive as well as legislative power. The Council's exercise of executive power materializes in two ways. First, most tribal members look to the Chairman for oversight of the executive businesses and departments. Second, the Constitution delegates powers to the Council that are executive in nature.

As discussed in the previous section, the Council holds all governing power.²³¹ Besides granting all general legislative power to the Council, the Constitution also grants specific powers to the Tribal Business Council.²³² The Council has the power to define membership.²³³ The Council has the power to create the budget, to tax, and to expend funds as long as its actions are made a matter of public record.²³⁴ The Council regulates hunting, fishing, inheritance, and cultural traditions and arts.²³⁵ The Council also has the power to advise the Secretary of the Interior or the Superintendent as to tribal affairs or pending federal actions and pending federal appointments.²³⁶ It has the power to appoint officers and committees and it has the power to regulate their procedure.²³⁷ The Council also holds the impeachment power. It has the power to remove one of its members for cause.²³⁸

In addition, the Council exercises executive powers. It has the power to administer the government and its business ventures,²³⁹ the power to hire and fire all tribal employees,²⁴⁰ and it

²³¹ T.A.T. CONST. art. III, § 1; art. VI, § 3.

²³² See generally T.A.T. CONST. art. II, III, VI, and IX.

²³³ T.A.T. CONST. art. III, § 3. This power to define membership is one of the few that is not subject to the laws of the United States. See *Santa Clara v. Martinez*, 436 U.S. 49, 52 (1978). All other powers of the Council are subject to the statutes of the United States. T.A.T. CONST. art. VI, § 2. Additionally, all powers of the Council are subject to (1) popular referendum by the people and (2) internal constraints within the Three Affiliated Tribe's Constitution and Bylaws. T.A.T. CONST. art. VI, §§ 1-2.

²³⁴ T.A.T. CONST. art. VI, § 5(b), (c).

²³⁵ T.A.T. CONST. art. VI, § 5(h), (j).

²³⁶ See T.A.T. CONST. art. VI, § 5(f), (k).

²³⁷ T.A.T. CONST. art. III, § 5; art. VI, § 5(l).

²³⁸ T.A.T. CONST. art. V, § 2.

²³⁹ T.A.T. CONST. art. VI, § 5(a).

²⁴⁰ T.A.T. CONST. art. III, § 5; art. VI, § 5(c), (l).

also possesses the prosecution power.²⁴¹ Often, the exercise of these powers is the most controversial.

First, the Council controls tribal lands and all economic affairs and enterprises.²⁴² The Tribal Council also manages the IRA Corporate Charter.²⁴³ Therefore, the Council exercises both the lawmaking power and the administration power over the Tribe's two most valuable assets: land and economic enterprises.

Leading Tribal Constitutional Scholar Frank Pommersheim has stated: many tribes fail to properly distinguish between governmental and proprietary functions.²⁴⁴ This causes inappropriate action by legislators, when for example, they might "terminate a particular project without understanding that the business venture is proprietary and must be regulated independently of direct control by the governing body."²⁴⁵ For this reason, tribes need to educate themselves on the role of government and may need "a more exacting use and understanding" of their tribal IRA constitutions and federal charters.²⁴⁶

To improve the Three Affiliated Tribes' economy, the Three Tribes requested the assistance of Harvard specialists in tribal economic development. The Harvard Project on Economic Development has also found that stronger tribal institutions improve a tribe's chances for economic success. Among their findings is that tribes should separate "the functions of elected representation and business management."²⁴⁷ They suggest there should be a separate office from the Council that handles economic planning. The two Harvard students that prepared the economic analysis for Fort Berthold noted that the centralization of power in the Council

²⁴¹ T.A.T. CONST. art. VI, § 3(a).

²⁴² T.A.T. CONST. art. VI, § 5(a); art. IX.

²⁴³ See T.A.T. CORPORATE CHARTER § 4 MANAGEMENT (1934).

²⁴⁴ POMMERSHEIM, *supra* note 3, at 170.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 171.

²⁴⁷ See Overview, Harvard Project on American Indian Economic Development, www.harvard.edu/hpaied/overview.

"can create incentives for opportunist behavior."²⁴⁸ It can also discourage investment from outside parties and tribal members.²⁴⁹

Accordingly, the Three Affiliated Tribes should seriously consider moving the administration of the business into the hands of another independent branch. Perhaps, an easy transition would be to allow the Chairman to conduct these affairs without the Council. This could be accomplished through a small change such as separating the administration of the businesses through economic departments with less control by the Council. Alternatively, the People could amend the Constitution to create a separate executive branch. As discussed above, however, the Tribe should only consider the suggestions of Pommersheim and the Harvard students if a major goal of the Tribe is economic development and investment by outsiders.

However, if the People believe there is value in separating the executive and legislative branches, there should be a discourse on how this will affect the Council's current power which allows it to represent the Tribe and to advise the Secretary of the Interior and the federal government. Care should be taken to *avoid the appearance* that there are two representatives of the Tribe, i.e., the problems of having both the Council and the Chairman deal with the federal government.²⁵⁰

Second, the Council holds the prosecution power.²⁵¹ The Council appoints and hires the prosecutors; in turn, the prosecutors decide whom to prosecute. This has caused some problems in the past. For example, in *Matter of Consolidated Criminal Cases*, the Public Defender moved to dismiss ten pending cases against criminal defendants on the grounds of equal protection and

²⁴⁸ Sue W. Wong & Armando L. Ramirez, *A New Direction: Building a Foundation for Successful Economic Development on The Three Affiliated Tribes' Fort Berthold Reservation* (Executive Summary) (1996).

²⁴⁹ *Id.*

²⁵⁰ Discussion with P.S. Deloria, Director of American Indian Law Center, in Albuquerque, NM (March 2000).

²⁵¹ T.A.T. CONST. art. VI, § 3(a).

due process.²⁵² The Public Defender argued that due to the failure to prosecute Councilman Mark Fox, it was unfair to prosecute the other defendants.²⁵³ Mark Fox had been charged with assault but actively used his position as Councilman to avoid hiring a special prosecutor for his case.²⁵⁴ The Prosecutor assigned to Mark Fox's case, El Marie Conklin, was transferred to the Tax Department. The acting Prosecutor requested that the Council hire another Prosecutor. Councilman Mark Fox assigned the task to the Judiciary Committee of which he was a member, and the appointment died in Committee.²⁵⁵ The Court agreed with the Public Defender that the rights of the defendants were violated because they could not hide behind a public office as Councilman Fox did to avoid prosecution. Accordingly, the Court dismissed the cases.²⁵⁶

There should be some debate as to whether moving the prosecution power to the executive branch would be the best remedy. As the above case suggests, the Court was able to address this situation through its interpretation of the ICRA. Moreover, this same problem could arise in the executive branch if and when an executive branch is created.

Third, the Tribal Council hires and fires all tribal employees.²⁵⁷ It also controls the salaries of tribal officials and employees as long as it is a matter of public record.²⁵⁸ Frank Pommersheim has also addressed this matter. He states that when tribes conduct economic development they run into a classic problem: "political considerations in hiring, maximizing employment opportunities, and dealing with the inadequate segregation of governmental and proprietary functions."²⁵⁹ Among the Fort Berthold People, the politicized hiring and firing is

²⁵² *Matter of Consolidated Criminal Cases*, 25 Indian L. Rep. 6062, 6062-6063 (Ft. Bert. Tr. Ct. Nov. 1997).

²⁵³ *Id.*

²⁵⁴ *Id.* at 6063.

²⁵⁵ *Id.*

²⁵⁶ *Id.*; See also *Matter of Consolidated Criminal Cases*, 25 Indian L. Rep. 6062, 6062 (Ft. Bert. Tr. Ct. Oct. 1997) (dismissing five earlier cases on the ground of equal protection).

²⁵⁷ T.A.T. CONST. art. III, § 5; Art. VI, § 5(1).

²⁵⁸ T.A.T. CONST. art. VI, § 5(c).

²⁵⁹ POMMERSHEIM, *supra* note 3, at 170.

the most commonly cited problem in the current government.²⁶⁰ The members note that the Tribe is the largest employer on the Reservation and yet there is little job security because of tribal politics.²⁶¹

To combat this problem, Pommersheim notes that some tribes "adopt hiring and selection criteria that minimize nepotism" and tribal politics.²⁶² The Three Affiliated Tribes has attempted to implement a Civil Service. The Council commissioned the Constitutional Revision Committee to conduct hearings and determine what amendments should be made to the Constitution. The Constitutional Revision Committee recommended the establishment of a Civil Service Commission for tribal employees.²⁶³

The recommendation of the Committee is interesting because it could be implemented regardless of whether or not there is a separate and independent executive branch. In fact, the problems inherent in political hiring and firing may not go directly to the form of government but to the absence of ethical standards for Councilmen or lack of hiring and firing criteria.

Moreover, the People should keep in mind that there are in general "people issues" that could interfere with any system of government, no matter what the form. However, it is still useful to examine the proposed Civil Service Commission.

The Commission, as proposed, would remove the power to hire and fire tribal employees from the Tribal Council and grant it to a Civil Service Commission. The stated goal of the proposed Civil Service Commission was to "ensure that, as far as practicable, the hiring,

²⁶⁰ The Special Committee for Constitutional Amendment Process, Interim Report 25-26 (May 5, 1998) (community meeting minutes and surveys); Discussion with MHA Elders, at Fort Berthold, ND (March 12, 2001).

²⁶¹ Interview with MHA Elder, at Fort Berthold, ND (March 15, 2001).

²⁶² POMMERSHEIM, *supra* note 3, at 170.

²⁶³ Resolution No. 98-82 (1998).

promotion, retention and dismissal of tribal employees shall be done according to merit and fitness standards" as developed and enforced by the Commission.²⁶⁴

The proposal states that the Commission shall have five members.²⁶⁵ The Council shall appoint two members; the Tribal employees shall appoint two members; and the four members shall elect the fifth member. If the four members cannot reach a majority, the members shall hold a drawing from two members that were originally proposed.²⁶⁶ The Commission shall serve four years and members shall be removed only for "Good Cause."²⁶⁷

The Commission "shall establish a category of 'excepted employees' who may serve as personal aides, advisors, or assistants to elected tribal officials" as long as this class is less than ten percent of the workforce.²⁶⁸ The excepted category represents political advisors and aides that serve at the discretion of elected officials. Every other employee would survive changes in administration. The Civil Service Amendment passed the Council by a vote of 4 for 2 against and 0 not voting.²⁶⁹ Unfortunately, the Secretary of the Interior never called for the required amendment election on this matter, and the Commission was never established.²⁷⁰

In conclusion, the People could amend the Constitution to provide for a separate executive branch. Alternatively, the People could rely on other easily implemented methods to separate the powers and alleviate the present problems in the system. In addition, whether or not the People amend the Constitution to provide for a separate executive to control the prosecution power, the People could rely on the Tribal Court to enforce ICRA rights thus making sure that

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*; Interview with Phyllis Old Dog Cross, Member of Constitutional Revision Committee, at Fort Berthold, ND (March 14, 2001).

Council Members do not misuse their power. The Court's enforcement of individual rights under the ICRA is discussed in the next section.

VII. BALANCE OF POWERS BETWEEN THE GOVERNMENT AND THE PEOPLE

The previous two sections addressed the internal government structure of the Three Affiliated Tribes. That analysis involved classic separation of powers issues. This section examines the relationship between the powers of the people and the powers of the IRA government. This division of powers is not usually referred to as separation of powers. In light of the People's extensive traditional involvement in government, however, this term could also be applied to the balance of powers between the government and the People.

The constitutional powers of the People include four rights: the right to amend the constitution;²⁷¹ the right to elect the members of the Council;²⁷² the right to call a referendum on actions by the Council;²⁷³ and the right to practice civil rights as adopted by the Court through its interpretation of the Indian Civil Rights Act.²⁷⁴

First, the People have the right to amend the Constitution by asking the Secretary of the Interior to call a special amendment election.²⁷⁵ The Secretary has the duty to call the election if 1/3 of the qualified voters present a signed petition.²⁷⁶ Thirty percent of those entitled to vote must attend the election and cast a vote. A majority vote amends the Constitution.²⁷⁷

The Secretarial approval provision addresses the previous discussion of balancing federal power with tribal power. This provision could be amended to omit the Secretary's involvement in the Tribe's Constitution. However, this may be a good use of federal power because if the

²⁷¹ T.A.T. CONST. art. X.

²⁷² See generally, T.A.T. CONST. art. IV.

²⁷³ T.A.T. CONST. art. VIII.

²⁷⁴ T.A.T. CONST. art. VI, § 3(b).

²⁷⁵ T.A.T. CONST. art. X.

²⁷⁶ *Id.* This provision also places a duty on the Secretary of the Interior to call an election if 2/3 of the Tribal Council requests such an election.

²⁷⁷ *Id.*

Secretary does not call the election, another entity must do so, and because the likely entity is the Council, the Council may be reluctant to call the election.²⁷⁸

Although the Amendment provision is clear, there is another provision mentioning the right of the People to amend the Constitution. It provides that

Any rights and powers heretofore vested in the Three Affiliated Tribes of the Fort Berthold Reservation, but not expressly referred to in this Constitution, shall not be abridged by this Article, [the Powers of the Council] but may be exercised by the people of the Fort Berthold Reservation through the adoption of appropriate Bylaws and Constitutional amendments.²⁷⁹

Unlike the 10th Amendment in the federal constitution, which states that powers not delegated to the federal government are reserved to the states or to the people,²⁸⁰ the tribal provision is a mere truism. It does not add substantive value to the Constitution. It is not effective to protect the civil rights of the People because it requires no more than the affirmative action of the People through their existing right to amend the Constitution. This is not a true constraint on the Council.

Perhaps the People should amend this provision of the Constitution so that it does constrain the Council. The provision could be rewritten to mirror the federal 10th Amendment. As such it would restrict the Council's ability to legislate only as to its enumerated powers. However, even the 10th Amendment might be labeled a mere truism. Indeed, there is substantial debate as to whether the 10th Amendment adds any substance to the federal constitution or whether it only confirms that the federal government may only exercise its limited enumerated powers.²⁸¹

²⁷⁸ T.A.T. CONST. art. VIII.

²⁷⁹ T.A.T. CONST. art. VI, § 7.

²⁸⁰ U.S. CONST. amend. X.

²⁸¹ FARBER, ESKRIDGE & FRICKEY, *supra* note 30 at 766-768.

Alternatively, this provision could state that the Council only has the right to enact laws affecting the health, safety, and welfare of tribal members. This revision could restrict the Council's exercise of its enumerated powers by requiring that the exercise is tied to the health, safety, and welfare of the People.²⁸² Perhaps the People could also amend the Bylaws to implement this protection.

Second, the People have the right to elect a segment representative to the Tribal Business Council.²⁸³ They also have the right to elect the Chairman.²⁸⁴ Remarkably, this right differs from the federal and state right to vote because there is no "one person one vote" requirement as in the federal model. In the surveys that the Constitutional Committee conducted, many tribal members remarked on this difference.²⁸⁵ Currently, the communities are not districted by population and there may be a need for an additional segment.²⁸⁶ During the Four Bears Community Meeting, one person voiced concern about the influx of members moving from houses in the country into town.²⁸⁷

In addition, many members have moved off the Reservation and are excluded from voting. This matter, too, is highly debated within the membership. While the federal government provides funding to the Tribe based on its total membership, many off-Reservation members are disenfranchised. This question is quite complicated and should be addressed by the entire tribal membership.

Third, the People have the right to petition for a referendum election. If ten percent of the qualified voters of each community sign a petition, the Council must call a referendum

²⁸² *C.f.* Resolution No. 98-81 (1998).

²⁸³ *See generally* T.A.T. CONST. art. IV.

²⁸⁴ *Id.*

²⁸⁵ The Special Committee for Constitutional Amendment Process, Interim Report 26 (May 5, 1998).

²⁸⁶ *Hall v. Lakeside State Bank of New Town*, 26 Indian L. Rep. 6032, 6036 n. 16.

²⁸⁷ The Special Committee for Constitutional Amendment Process, Interim Report 26.

election.²⁸⁸ The majority vote of the qualified voters binds the Council as to any proposed or enacted ordinance or resolution, provided that at least 30% of the eligible voters vote in such an election.²⁸⁹

The referendum is a hotly debated provision of the Constitution. Apparently, there is no provision in the Constitution or Bylaws to call a referendum election if the Council fails to call the election after receiving a valid petition from the People.²⁹⁰ There could be at least three methods to avoid this problem. This provision could be changed to mirror the amendment article by requiring the Secretary of the Interior to call the election.²⁹¹ This provision could also be amended to include a no-action approval by the Council. If the Council does not act to call an election by a certain date, the petition for referendum will be deemed passed. In fact, the Constitutional Revision Committee proposed a new referendum article that would allow a no-action approval by the Council.²⁹² Alternatively, there could be a provision in the Constitution authorizing the Court to act when the Council fails to call the election or the Court might possess a Mandamus power over the Council to compel it to call the election.

However, referendum provisions create negative effects too. For example, the People could decide to take money out of governmental operations and mandate its use for other purposes. Theoretically, this could hit the "purse" of the Tribal government and prevent funding for its smooth operation. However, if the referendum provision is altered it could have a provision restricting its use in monetary matters.

²⁸⁸ T.A.T. CONST. art. VIII.

²⁸⁹ *Id.*

²⁹⁰ Resolution No. 98-81 (1998).

²⁹¹ *See* T.A.T. CONST. art. X.

²⁹² Resolution No. 98-81 (1998).

Indian Civil Rights Act

Finally, the People have the right to sue the Council for injunctive relief for rights in the Indian Civil Rights Act.²⁹³ The People never included civil rights in the Constitution, nor did the BIA suggest any similar provisions. Instead, federal policy changed and intervened to shift the balance in favor of the People and non-Indians with the passage of the Indian Civil Rights Act.²⁹⁴ Since its passage, the Tribal Court has implicitly recognized and executed the provisions of the federal Indian Civil Rights Act, through its interpretation of the Constitution.

The federal Indian Civil Rights Act has also been highly debated. The first debate surrounds whether Tribes should have been left alone to draft their own civil rights or have been left free to continue without them. However, even though the Act has been passed, there is still room for the Fort Berthold People to consider officially enacting each provision of the ICRA into the Constitution or to draft their own individual rights provisions.

The second debate is whether the Act is self-executing or whether it requires the Council or the People to adopt the Act and thereby make it a tribal law.²⁹⁵ The third debate has been whether the Act itself waives the sovereign immunity of the tribes in tribal court.²⁹⁶ The final debate is whether tribes should waive sovereign immunity and if so what remedies should be provided to tribal members and non-Indians.²⁹⁷

In a precedent setting decision, *Francis v. Wilkinson*, the Northern Plains Intertribal Court of Appeals settled some of the above ICRA debates with respect to the Three Affiliated

Tribes.²⁹⁸ It reversed the Tribal Court and held that Art. VI, §(3)(b) of the Three Affiliated Tribes Constitution does contain an express waiver of sovereign immunity and therefore implicitly held that the Tribe, through its waiver, had executed the law.²⁹⁹ The Fort Berthold Tribal Court had relied upon *Santa Clara v. Martinez* which held that tribes enjoy sovereign immunity unless there is a clear and unequivocal waiver by the tribe or congress.³⁰⁰ The Appellate Court disagreed finding clear language. The language of §3(b) provides:

The People...hereby specifically grant to the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act...including the award of injunctive relief only against the Tribal Business Council if it is determined through an adjudication that the Tribal Business Council has in a specific instance violated the Act.³⁰¹

Furthermore, the Appeals Court majority held that the Tribal Court could hear a case against the Tribal Council but that relief would be limited to an injunction.³⁰² The dissenting judge wrote that the Three Affiliated Tribes' attempt to limit the remedy against the Council violated the Indian Civil Rights Act because the ICRA does not impose any limitations on relief.³⁰³ He reasoned that because federal law trumps tribal law and because the Three Affiliated Tribe's Constitution Art. VI, §2 states that it is subject to federal law, "the type of relief sought for and granted in any ICRA suit against the tribe should be consistent with the substance of the Indian Civil Rights Act."³⁰⁴ The dissent further rationalized that under the majority's holding, "it is possible for the tribe to confiscate and immediately liquidate the private property of any person within their jurisdiction without providing an adequate remedy.

²⁹³ T.A.T. CONST. art. VI, § 3(b); 25 U.S.C. §1301, *et seq.*

²⁹⁴ 25 U.S.C. §1301, *et seq.*

²⁹⁵ Discussion with Christine Zuni Cruz, Professor of Law, University of New Mexico, in Albuquerque, NM (February 2001).

²⁹⁶ Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 359 Den. U.L. Rev. vol. 70:2 380-382.

²⁹⁷ *Id.* at 389-392.

²⁹⁸ See *Francis v. Wilkinson*, 20 Indian L. Rep. 6015 (N. Plns. Intertr. Ct. App. 1993).

²⁹⁹ See *Id.* at 6015.

³⁰⁰ *Id.* (citation omitted).

³⁰¹ T.A.T. CONST. art. VI, § 3(b).

³⁰² *Francis v. Wilkinson*, at 6016.

³⁰³ *Id.* at 6016-6017; *c.f.* *Santa Clara v. Martinez*, 436 U.S. 49, 66-67 (1978) (stating federal review of tribal court ICRA decisions is limited to habeas corpus).

³⁰⁴ *Francis v. Wilkinson*, at 6017.

Injunctive relief would not satisfy an aggrieved party...At times, injunctive relief is no relief at all.³⁰⁵

The dissent's viewpoint illustrates the extent to which federal law relates to tribal affairs. It also raises the question whether the People should consider amending the Constitution to provide for more than injunctive relief. However, whenever sovereign immunity is considered, a waiver of sovereign immunity affects the sustainability of the tribal purse. Therefore, an intriguing question is whether the People would be the best judge of whether to waive sovereign immunity. The balance of power may favor that the government make this decision so that the government which controls tribal funds can appropriately tailor the waiver of sovereign immunity, if any. Therefore, any changes to sovereign immunity should be weighed very carefully.

The Court's Interpretation of the Indian Civil Rights Act

Among other provisions, the Indian Civil Rights Act provides that no tribe shall deny to any person the equal protection of its laws nor deny to any person liberty or property without due process of law.³⁰⁶ The Court has construed the due process clause to cover the alleged deprivation of tribal funds as community property when Councilmen grant bonuses or merit pay to themselves.³⁰⁷ The Court agreed that it is well established in the field of Indian law and the law of the Three Affiliated Tribes that each member has an interest in communal property whether or not the property would actually go to a certain member. This interest in property was found to be sufficient under the due process clause.³⁰⁸

³⁰⁵ *Id.* at 6018.

³⁰⁶ 25 U.S.C. §1302(8)

³⁰⁷ *Bordeaux v. Wilkinson*, 21 Indian L. Rep. 6131, 6132 (Ft. Bert. Tr. Ct. 1993).

³⁰⁸ *Id.*

In another case, the Court construed the ICRA due process clause to protect a judge's suspension *with pay*.³⁰⁹ The defendant, Chairman Tex Hall, argued that a suspension with pay is not cognizable under the due process clause of the ICRA.³¹⁰ The Court disagreed and reasoned that the right to serve the people of Fort Berthold and Judge Gillette's reputation and respect were protected property rights under the due process clause of the ICRA.³¹¹

The Tribal Court has also construed the equal protection clause of the Indian Civil Rights Act. Three opinions by three different judges demonstrate that the Court's interpretation of this clause is challenged by unique situations. First, in a case discussed in the previous section, the Public Defender successfully moved to dismiss ten pending cases against criminal defendants on the grounds of equal protection and due process because of the Council's failure to hire a prosecutor to investigate and prosecute Councilman Mark Fox.³¹²

Second, Special Judge Pommersheim considered whether the plaintiff's argument that Council members awarded either themselves or family members grazing units violated equal protection because the Council failed to exclude themselves and their families from the award process.³¹³ He held that the plaintiffs presented a valid interest in property, a leasehold interest under the due process clause.³¹⁴ However, Judge Pommersheim held that there was no violation of *equal protection* under the minimum rationality test.³¹⁵

³⁰⁹ *Gillette v. Hall*, 26 Indian L. Rep. 6028, 6029 (Ft. Bert. Tr. Ct. 1998).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Matter of Consolidated Criminal Cases*, 25 Indian L. Rep. 6062, 6062-6063 (Ft. Bert. Tr. Ct. Nov. 1997); *See* discussion on page 46.

³¹³ *Hall v. Tribal Business Council*, 23 Indian L. Rep. 6039, 6040-6041 (Ft. Bert. Tr. Ct. 1996).

³¹⁴ *Id.* at 6041.

³¹⁵ *Id.* Although Judge Pommersheim used scrutiny levels, later opinions did not invoke scrutiny levels for equal protection or due process.

The third case, *Hall v. Lakeside State Bank of New Town*, is a much-criticized ruling of the Fort Berthold Court.³¹⁶ A midterm election was called and for the first time a sitting Councilman, Tex Hall, was elected at large as Chairman.³¹⁷ Tex Hall's Chairmanship raised several constitutional questions, among them the question of how to fill his former Mandaree segment seat.³¹⁸ Tex Hall decided that he could not resign his Councilman seat until a replacement was duly appointed; however, as duly elected Chairman, he could not abandon that post either.³¹⁹ Accordingly, to break a tie he voted twice on his successor to the Mandaree segment seat.³²⁰ The opposing Councilmen challenged the double vote as a denial of equal protection and due process under the ICRA.³²¹

The Court held that in this limited situation "where a sitting tribal councilperson is elected as Tribal Chairman and where the Chairman votes twice, once as a segment representative and once as the Chairman, on the single issue of how to fill his vacated seat..." such action does not violate the Indian Civil Rights Act.³²² The Court went on to hold that if Hall had *not* voted twice, his inaction would have violated the rights of the Mandaree segment. The Court wrote, "*Strange as it may sound*, Hall's actions in voting twice protected the rights of the Mandaree segment to equal protection of the law."³²³

It is unclear whether the Court addressed the claims of the other Councilmen as to their segments' equal protection rights or whether the Court avoided this question and addressed only

³¹⁶ Telephone Interview with Diane Johnson, Former Practicing Attorney & Judge Fort Berthold Tribal Court (Dec. 2000) (stating even the author, B.J. Jones, has second-guessed his opinion).

³¹⁷ See *Hall v. Lakeside State Bank of New Town*, 26 Indian L. Rep. 6032, 6033 (Ft. Bert. Tr. Ct. 1998).

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* at 6034.

³²¹ *Id.* at 6034-6035.

³²² *Id.* at 6036.

³²³ *Id.* (emphasis added).

the Mandaree segment's rights if Hall had *not* voted twice. For this opinion the Judge faced criticism and has been called "Two-vote Jones."³²⁴

In conclusion, the People have four rights: the right to elect the Council; the right to amend the constitution; the right to call for a referendum; and the rights under the ICRA as construed by the Court. Some of these provisions could be revised; however, these rights are probably adequate especially in light of the Court's interpretation of the ICRA.

VIII. COMPARISON OF THE MODERN INDIAN REORGANIZATION ACT CONSTITUTIONAL GOVERNMENT WITH THE TRADITIONAL GOVERNMENT

Some scholars state that the ICRA boilerplate constitutions do not reflect traditional tribal governments but should in some manner.³²⁵ This section attempts to evaluate the truth of this statement for Fort Berthold by referring to the historical structure of the government and by discussing how to integrate specific cultural values into the current ICRA Constitution of the Three Affiliated Tribes.

The task of balancing cultural structures of power and cultural values of the Three Tribes into the modern Self-Determination era is quite challenging. When tribal members, unlike scholars, are confronted with this question, some inevitably respond, "We can't go back."³²⁶ There is no doubt that the Three Affiliated Tribes cannot go back to a full traditional government. In fact, there are valid limits to tradition. For example, the Crow Tribe, historically related to the Hidatsa, has a constitutional provision stating that every member is also a member of the Council.³²⁷ This provision is related to the tradition of allowing everyone a voice in the

³²⁴ Telephone Interview with Diane Johnson, Former Practicing Attorney & Judge Fort Berthold Tribal Court (Dec. 2000).

³²⁵ See e.g., POMMERSHEIM, *supra* note 3, at 65.

³²⁶ Interview with MHA Elders, at Fort Berthold, ND (March 14, 2001).

³²⁷ Discussion with Stephanie Pretty Weasel, Member Crow Tribe, in Albuquerque, NM (February 2001).

Council.³²⁸ The large Crow Council has proved unworkable because Council meetings are too long and the Council cannot act quickly but must wait for consensus of the entire membership. Accordingly, the Crow Tribe is looking for ways to reduce the membership of the Council.³²⁹ On the other hand, there has to be valid and functional ways to implement culture into the modern era. Therefore, at minimum, there must be some open discussion about this subject.

First, the IRA form of government is generally consistent with the historical government in that the Three Tribes did use councils.³³⁰ However, there are several variations. The IRA Council is elected, whereas the historical Council Members rose to power through prestige and the consent of public opinion. Today there is one Chairman, and not two chiefs. Also, there is currently only one Council, whereas each historic village had its own Village Council. There is a cap on the number that may serve on the Council, whereas historically there was no defined limit to membership. In fact, chiefs "retired" to belong to the Council when they were replaced with younger chiefs.

There is less accountability of the Council to the People. Although the Council members are elected, there is no natural mechanism for their removal as there was in the traditional government where new leaders replaced the chiefs.

More importantly, however, the current structure removes the historical rights of the People to disband or to remove their support for Tribal Council officials when they disapprove of government action. It may be difficult to include some of these traditions because the Tribe may encounter problems similar to the Crow Tribe. Perhaps, however, it would be easier to

³²⁸ *Id.*

³²⁹ See generally, Eric Lemont & Cheryl Powell, *Crow Constitutional Development, Empowering the Crow Nation* (April 1999).

³³⁰ See also WEATHERFORD, *supra* note 40 at 144 (stating that most tribes used councils for decision making: "In almost every North American tribe, clan, or nation for which we have detailed political information, the supreme authority rested in a group rather than in an individual.").

implement the historical voice of the People through amending the Constitution to include a recall provision. Such a provision has been proposed by the Constitutional Revision Committee. The People have voiced their dissatisfaction with Council members and their inability to remove them prior to expiration of their term.³³¹ The Constitutional Revision Committee proposed the power to recall elected tribal officials.³³²

The Tribal Council approved the Committee's proposed amendment with 6 of 7 members present, and with 5 members constituting a quorum. The vote was 4 for, 1 opposed, 1 abstained and 0 members not voting.³³³ The Secretary of the Interior is required to hold a special election to vote on amendments under the constitution.³³⁴ The Secretary did not call an election, however, and accordingly, this amendment failed.³³⁵ It should be noted, too, that the membership is discouraged when Tribal government reform efforts fail because the *federal* government has failed to complete required actions.

Second, the new government does not provide for express control by the clans as for example the Mandan tradition of appointing a peace and war chief one from each moiety. Third, the new government may allow for department heads and appointed leaders but it doesn't provide for the overall participation in government by all people. On the other hand, anyone may still attend Council meetings.

³³¹ The Special Committee for Constitutional Amendment Process, Interim Report 24 (May 5, 1998).

³³² The procedure included the delivery of a petition to the Executive Secretary of the Tribal Business Council with the signature of at least 51% of qualified voters who voted in the last district election for a Council Member or in the last general election in the case of the chairman. Resolution No. 98-80 (1998). The Executive Secretary has 30 days to determine and certify that 51% of the qualified voters signed the petition. The Tribal Council then has 60 days to set a recall election administered by a five member Election Board. *Id.* Within 90 days of the certification the recall election should be held and determined by a simple majority of qualified voters. If a recall election is not held within 90 days, "the affected tribal official shall be deemed removed from office." *Id.*

³³³ Resolution No. 98-80 (1998).

³³⁴ T.A.T. CONST. art. X.

³³⁵ Interview with Phyllis Old Dog Cross, Member of the Constitutional Revision Committee, at Fort Berthold, North Dakota (March 14, 2001).

Finally, a more simple expression of tradition is through the Court. The Court has been able to apply tribal custom particularly in regards to the ICRA discussed in the previous section. Interestingly, because of an emphasis on tribal rights, this at times may run contrary to individual rights.

The Tribal Court has jurisdiction to construe tribal tradition and culture.³³⁶ The Tribal Court uses custom when it is needed and presented by the parties and when the custom can function in the modern age.³³⁷ Additionally, the Court will reject custom when it is argued as a mere pretext.³³⁸

In a good example of the need for custom, the Court considered whether a tribal member owned the Hidatsas' copy of the 1851 Fort Laramie Treaty document and could therefore sell it.³³⁹ The Court heard testimony from the Tribe's expert witness, Tillie Walker.³⁴⁰ Ms. Walker testified that the current possessor of the Treaty of Fort Laramie received it from his father and grandfathers who received it from Chief Four Bears of the Hidatsa.³⁴¹ Chief Four Bears went to the Fort Laramie Conference to represent the Mandan as well as the Hidatsa.³⁴² He requested a Treaty for the Mandan Tribe too, but received only one. Before he left for Fort Laramie, religious leaders told Four Bears about religious sites and landmarks that needed protection. Ms.

³³⁶ See generally *In The Matter of the Guardianship and Conservatorship of William Bell, Sr.*, 24 Indian L. Rep. 6105, 6106 (Ft. Bert. Tr. Ct. 1997).

³³⁷ *Id.* at 6106; Telephone Interview with Diane Johnson, Former Practicing Attorney & Judge Fort Berthold Tribal Court (Dec. 2000).

³³⁸ Telephone Interview with Diane Johnson, Former Practicing Attorney & Judge Fort Berthold Tribal Court (Dec. 2000).

³³⁹ See *In The Matter of the Guardianship and Conservatorship of William Bell, Sr.*, 24 Indian L. Rep. 6105, 6105 (Ft. Bert. Tr. Ct. 1997).

³⁴⁰ *Id.* at 6106.

³⁴¹ *Id.* at 6105-6107.

³⁴² *Id.* at 6106.

Walker testified that when Chief Four Bears accepted the Treaty he accepted it not for himself but on behalf of his people.³⁴³

The Treaty was a symbol and official certification that Four Bears had entered into a treaty with the United States.³⁴⁴ Four Bears became a designated "Keeper" of the Treaty. According to custom, he served as a trustee but did not own the document.³⁴⁵ The Three Affiliated Tribes was the "Holder" of the document.³⁴⁶ Four Bears passed the Treaty on to his oldest son until it reached the present possessor according to custom. The Court found that "the tradition of 'Keeper' and 'Holder' can be maintained even in this modern age."³⁴⁷ Accordingly, the Court held that the current possessor did not own the document and permanently enjoined the possessor and his family and the *entire tribe* from ever selling it.³⁴⁸

The Court stated,

It is the decision of this court that the original copy of this historic agreement given to Chief Four Bears 150 years ago cannot be sold by Wilma Nelson [daughter of the "Keeper"]. It cannot be sold by the Tribal Council. It cannot be sold by *anyone*. It is not a part of the Conservatorship of William Bell, Sr. ["Keeper"]. It is as sacred to the Hidatsa Nation as the original copy of the Declaration of Independence is to the United States of America.³⁴⁹

The Court declared that the Tribal Council would serve as "Holder" on behalf of the Three Affiliated Tribes and further ordered that "the tribal business council as "Holder" was forever enjoined from selling, or transferring the possession or ownership of this treaty document."³⁵⁰

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 6106-6107.

³⁴⁹ *Id.* at 6106 (emphasis added).

³⁵⁰ *Id.* at 6106-6107; See also *Bell, Jr. v. Nelson*, 25 Indian L. Rep. 6032, 6034 (N. Plns. Intertr. Ct. App. 1998) (affirming the decision of the lower court).

In conclusion, the general structure of the Council is similar to the traditional government of the TAT. However, it is also distinct in several ways. The People should consider what values they still support from their history and tradition and whether these values could be maintained in the current governing structure and current Self-Determination era.

IX. CONCLUSION

The Three Affiliated Tribes granted all governmental power to one representative entity, the Tribal Council. The Tribal Council exercises mostly legislative powers and executive power. The Tribal Council has acted to delegate power to the Tribal Court system but unfortunately, this system is at the mercy of the Council. However, the system is quite effective because there is a statutory separation of powers between the Council and the Court. The Court has also actively used its role to enforce the ICRA whether or not it has explicit constitutional jurisdiction over ICRA claims. The People retained in themselves the right to amend the Constitution, to elect Council Members, to have a referendum election on actions by the Council, and through intervention of the federal government, certain civil rights in the Indian Civil Rights Act.

I have recommend and explored several changes but my main recommendation is that the Tribe conduct an open discourse on the values of the TAT. The People should discuss the values they want their government to reflect and those that they do not want to include. Only then will the People be able to effectively evaluate their Constitution.

The time is ripe to begin to formulate research and public opinion about the values that should be included in the Constitution. The next steps should involve compiling tribal input, interpreting tribal surveys, and holding tribal community meetings.

A more difficult question is who should lead the discussion, the People, the Council or the MHA Elders? As stated in the beginning of this paper, there is a split in the Elders as to

whether the MHA Elders should lead this discussion or whether the Council should. Therefore, I will leave this paper with a challenge from one MHA Elder:

We need to separate the powers again. We have so much more resources to work with at the present time, both human and natural. We have large sums of money, valuable resources, our leadership is more educated, and the work force is greater and also more educated. Come on you in the leadership role, reach way down into your soul and bring out that "Indigenous" in you. You all have it in you and we are counting on you. Let's get that unemployment down and make history of welfare once again.³⁵¹

³⁵¹ John Fredericks, Statement to the Tribal Council for Elders Organization 2 (May 4, 2000) *in* Mandan, Hidatsa and Arikara Elders Newsletter, vol. 2000, no. 1.