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MEMORANDUM

DATE: September 12, 2005

TO: Delaware Nation

FROM: Steven D. Sandven

RE: **Organization of the Tribes - Tribal Constitutions**

This memorandum is provided in response to earlier questions from the Constitution Revision Committee regarding the purposes of sections within your Tribe's Constitution and some characteristics of those Tribes that are not formed pursuant to the Indian Reorganization Act.¹ *This memorandum is provided in response to earlier questions and should not be construed as a recommendation for an alternative form of tribal government.*

Tribes Organized Under the Indian Reorganization Act

At the time of their first contact with the Europeans, Indian tribes were characterized by a variety of traditional forms of government. As the tribes were pushed westward and ultimately confined to reservations, these ancient systems were totally disrupted. The social fabric of most of the tribes was severely damaged, and federal administration replaced traditional forms of communal decision-making and internal control. Only a few tribes, most notably the Pueblos, escaped this fate and retained most of their customary ways.

Federally induced erosion of tribal organization reached its peak during the period of allotment of Indian lands, when the professed goal of national policy was to break up the Indian tribes. By the 1920's, when that policy came to be acknowledged as a failure, very little was left of the once-healthy tribal structures. The Indian Reorganization Act of 1934, which marked the shift in federal policy toward preservation of the tribes, did little to revive them in their familiar form. Instead, the Act built upon the tribal situation as it found it, and created an entirely new framework for tribal self-government.

¹American Indian Law 3rd Ed., (William C. Canby, Jr., Senior Judge, United States Court of Appeals for the Ninth Circuit)

The Indian Reorganization (Wheeler-Howard) Act provided that any tribe or tribes “residing on the same reservation” had the right to organize and adopt a constitution and by-laws which became effective upon a majority vote of the adult members of the tribe and upon approval by the Secretary of the Interior. 25 U.S.C.A. § 476. The Act also permitted the tribe to incorporate under a charter issued by the Secretary and approved by a majority vote of the members. 25 U.S.C.A. § 477. Under these provisions, a large number of the tribes adopted constitutions within a few years of passage of the Act, and many also became incorporated as an aid to the transaction of tribal business. Because these measures were adopted for entire reservations, the new constitutional “tribes” often included more than one ethnic tribe.

In light of the degree of tribal disorganization prevailing at the time of passage of the Reorganization Act and the novelty of the governmental structures proposed by the Act, it is not surprising that the newly constituted tribes were in a poor position to take immediate charge of their destinies. Nor was the Act designed to confer complete autonomy; the Secretary’s approval was required for all new constitutions. The conditions for continued federal guidance were abundantly present. As a consequence, virtually all of the new constitutions were reproductions, with insignificant variations, of a model produced in Washington with little attention to the needs of individual tribes. *See* attached diskette containing a wide array IRA Tribal Constitutions

General Constitution Provisions under the Indian Reorganization Act

The standard constitution under the IRA contained provisions describing the tribal territories, specifying eligibility for membership, and establishing the governing bodies and their powers. It also contained provisions for amendment (subject, of course, to the approval of the Secretary of the Interior), and many of the tribes have since revised their constitutions to reflect individual tribal concerns and a desire to exercise more complete tribal autonomy.

The Tribal Council: Most of the tribes vest the legislative authority in a tribal council, although it is not always called by that name. The council members are normally elected for a specified number of years. In some tribes they are elected by district, in others at large. The council is given general governmental powers over internal affairs of the tribe.

The Tribal Chairman: Most of the tribal constitutions provide for a tribal chairman, sometimes called president or governor. In some of the tribes, the chairman is elected by a vote of the council: in others, he or she is directly elected by the voting tribal members. Tribal by-laws typically recite that it is the chairman’s duty to preside over the tribal council, and then confer varying degrees of executive authority. The role of the Chairman consequently differs substantially from tribe to tribe, depending upon both the governmental structure of the tribe and the individual characteristics of the particular chairman.

Tribal Courts: The tribal courts have a history long before the IRA. Their forerunners were Courts of Indian Offenses, first established in the 1880s by the Secretary of the Interior to help “civilize” the Indians. Those courts administered a code promulgated by the Secretary and incorporated in volume 25 of the Code of Federal Regulations. Courts of Indian Offenses continued in existence even after the passage of the IRA, because the

tribes lacked the resources to establish new courts on their own authority. Some still function today. During the past thirty years, however, most tribes have organized their own tribal courts that administer tribal codes passed by the councils. Tribal court systems vary from the highly structured, multiple court system of the Navajo Nation, served by tribal prosecutors and defense advocates, to very informal single-judge courts operated on a part-time basis without supplementary services. Some of the Pueblos utilize their traditional governing councils to adjudicate cases under the guidance of customary law. In recent years there has been an emphasis on re-establishing traditional methods of dispute-resolution, either by created alternative courts such as the Navajo Peacemaker Court,, or by providing alternative litigation tracks in existing tribal courts. Appellate court structures have only recently been developed by most of the tribes. In many tribes, panels of tribal judges are assembled ad hoc for each appeal. In others, judges from other tribes are used. Some tribal appellate courts employ outside lawyers or law professors as judges.

Tribal Corporations under the Indian Reorganization Act

Those tribes that incorporated under the provisions of the Indian Reorganization Act did so under charters that were also formulated in Washington and standardized to a greater degree even than the tribal constitutions. These charters, designed to permit the tribes to engage in economic activity in corporate form, created perpetual membership corporations encompassing all tribal members. Usual corporate powers were conferred, but many actions such as the pledging of tribal income or the entering of leases were made subject to approval of the Secretary of the Interior. The charters also provided for termination of the Secretary's supervisory powers upon a vote of the tribe, but again with the requirement that the Secretary approve such termination. *See* attached memorandum regarding Section 17 corporations.

Tribes Not Organized under the Indian Reorganization Act

The Indian Reorganization Act provided that tribes could vote not to be governed by its organizational provisions, and several tribes rejected application of the Act. The Navajos and many of the Pueblos are examples. As a consequence, these tribes do not necessarily follow the constitutional pattern described above, and it is unsafe to generalize about their characteristics. For example, the Navajo Nation has no written constitution although provisions are made for one in the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C.A. § 631 et seq. Yet the Navajos operate under a detailed tribal code, and have an elected tribal council and chairman in much the same manner as the IRA tribes. On the other hand, many of the Pueblos operate entirely under unwritten customary law, with traditional leaders and a governmental structure wholly different from the IRA constitutional model.

Please contact me if there are any questions.