Beyond Listening: Lessons for Native/American Collaborations from the Creation of The Nakwatsvewat Institute

Justin B. Richland

When Listening Is Necessary but Not Sufficient

On Monday, October 12, 2009, less than two weeks before I was to participate in the 40th Anniversary Celebration of the American Indian Studies Center at UCLA, I was at the annual conference of the National Congress of the American Indian (NCAI) held at the Palm Springs Convention Center. There I had an opportunity to hear Larry EchoHawk, the new assistant secretary for Indian Affairs, as well as various other Obama appointees, speak of their hopes and aspirations for a new working relationship between tribal nations and the federal government.

Standing at the elevated podium next to the NCAI executive committee members and before an impressive audience of tribal delegates and other Native and non-Native conference attendees, these officials spoke with passion and force about the renewed commitments and opportunities that the Obama administration was going to provide for Native peoples, including, most immediately, a special conference called by the White House on November 5, 2009, in Washington, D.C. Invitations had already been extended to representatives from every federally recognized tribe.

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After making their statements, tribal delegates were given an opportunity to ask questions of the officials at two microphones placed at either side of the meeting hall. A number of individuals took the microphones, some to express their conditional support for the new administration and its officers, others to address long-standing grievances with the particular regulatory and policy decisions taken by past administrations toward their tribes. After some time, one delegate and executive committee member, sitting next to the speakers on the elevated podium, took an opportunity to pose a comment and concern to the speakers. She expressed her own cautious optimism that the Obama administration, and specifically the officers who had taken the time to appear in person before the NCAI delegates that day, would usher in a new era of cooperation. But she cautioned, "We have had a lot of these 'listening sessions,' but a listening session is not a consultation. We need real consultation, not just listening."

This seemed to me, at least at first, a rather confrontational statement, and given that the administration officials seemed to be saying all the right things, shockingly curt. Yet it was met with perhaps the loudest applause of the day from the hall. All seemed to be in agreement that although having a voice is important and necessary for tribal nations, it won't be enough to say simply that administrative officials are listening; there will have to be evidence that tribal voices have actually been heard—there will have to be not just a space for their voice but a place at the negotiation table.

Two days later, I was at a conference in Potsdam, Germany, where an anthropologist from the ethnological museum in Berlin was discussing his efforts to put together a exhibition around the work of Navajo singer and weaver Hosteen Klah, centering on recordings of songs sung by Klah and recorded on a ceramic cylinder by German ethnologists around the turn of the twentieth century. This ethnologist described how, in his efforts to follow Navajo Nation research protocols and relevant federal laws, he contacted the Navajo Nation's Historic Preservation Department to advise them of the existence of the cylinders, the museum's intent to exhibit them, and his desire to receive approval to do so from the nation. He then described how the tribe rejected his request, requested immediate return of the cylinders, and refused to acknowledge that the cylinders might actually be the property of Klah's descendants and/or the museum, because, he argued, Klah had freely entered into a contract and been paid by the original collectors for his performances. He was particularly flabbergasted by what he saw as their utter recalcitrance even to negotiate with the museum: "They won't even enter any real conversation with the museum; all they say is no, and that is the end."

In both situations I was struck by my and others' expectations about what "listening," "hearing," and negotiating with tribal leaders is supposed to look like, and the possibility that, in effect, the idea that giving voice to

Native American concerns necessarily implies that tribes are going to be happy enough with the opportunity to be heard and then be willing to forgo their most powerful interests once the "listening session" is over.

I wonder if we have reached a moment when listening, although necessary, is not sufficient for building relations between Native and academic and other communities and interests, and that, as a result, in very real ways we have to be able to see success in at least apparent failures of non-Native goals to reach their fruition.

This certainly was and is part of my own ongoing experience in working with the Hopi tribe and various aspects of their contemporary legal system. In this essay I will describe those efforts—in collaboration with Patricia Sekaquaptewa and Ethan Elkind, as well as many others—to assist the Hopi people in addressing their land disputes, particularly through the creation of The Nakwatsvewat Institute (TNI).

TNI is a national nonprofit organization designed to assist Native nations and their members in the development of culturally sensitive dispute-resolution services and legal systems. The institute emerged from an earlier effort, the Hopi Customary Law Project, an outreach program of the Hopi appellate court initiated eight years ago, which was based on my experience working on various aspects of Hopi law.

The name of our organization comes from the Hopi word, *nakwatsvewat*, which, roughly translated, means "going along together in cooperation." The concept is perhaps best understood by the symbol that corresponds with it, the *nakwatsveni*, or two interlocking semicircles, which is a stylized image of two hands clasped together (see fig. 1).

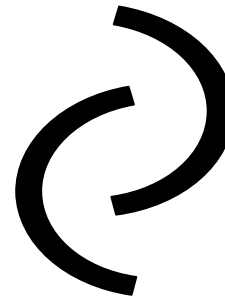

Figure 1. *The nakwatsveni symbol.*

This "going along together in cooperation," captured both by the symbol and the name of our organization, is partly what TNI sets out to help indigenous peoples achieve for themselves—amicable, nonviolent resolution of their disputes. It is also the overriding principle by which we aim to accomplish that goal—entering into respectful, responsive, and empowering working relationships with indigenous peoples as they address these matters. It, however, is an ongoing project, and one that had more than its share of false starts.

The Origins of the Nakwatsvewat Institute

The original idea of TNI had a great goal behind it, and really it's the same goal that we still have—"addressing the dispute-resolution needs of Hopi

people"—particularly those caught in land disputes. When the Hopi appellate court reflected on why and how land disputes became lawsuits, they realized that it was because the village and clan leaders, who would normally have the authority to resolve these cases, had refused to handle them. These traditional leaders essentially told the parties that they didn't want to handle these disputes because they were worried about various legal and political implications that would undermine their authority in the community.

The first plan that TNI put in place, then, was to give the Hopi courts the necessary information about village and clan traditions, so that the courts could better resolve the land disputes that the village and clan leaders didn't want to handle.

The idea we came up with was to draft a "Hopi Custom Law Treatise," a written document compiling all the relevant land and inheritance customs from all twelve villages and every clan that was willing to speak to us, and to put the treatise into a legal document that could be easily referenced and relied upon by the tribal judges. That was the plan. But when we went to the villages to tell them our great idea about a legal document that would list the customary laws of different Hopi villages, it failed. We would later realize it failed because it violated four principles that have come to rest at the heart of the services TNI now offers. These four principles—(1) "Consult, don't conclude," (2) "Listen, don't lecture," (3) "Provide resources, not regulations," and (4) "Follow the tempo, don't try setting it"—sound either too obvious or too flippant to warrant serious consideration. But each of these principles grew directly from specific failures we experienced in our initial efforts to address Hopi property disputes. In this sense, they come directly from the ways in which we and our work were challenged to improve by the people whom we sought to help. I believe that they offer a workable framework for any endeavor that seeks to bridge the divide that has endured for too long between the interests of indigenous peoples and the members of the academy who would seek to conduct research with them. In the remainder of this essay, I will take up each one of these principles, describing not only what they stand for, but also how they emerged from specific challenges we confronted in our work with the Hopi people and how TNI adjusted its programming in response to those challenges.

"Consult, Don't Conclude"

This principle stands for our recognition that no collaboration with the Hopi people (and, we think, with any people) works without the sustained and sustainable involvement of their community. The idea of the "Hopi Custom

Law Treatise," we now realize, didn't spring from consultations with the Hopi people about their needs in resolving land disputes. It actually addressed the Hopi tribal court's need for legal research. Our original plan started from the faulty premise that the "Hopi Custom Law Treatise" would address the problems facing the Hopi people and not just the Hopi court's problem of access to traditional information.

But this error revealed itself soon enough when we met with village and clan leaders, who did not hesitate to pose some tough questions to us. Among them was the basic question, "Why does the court need to know village and clan traditions, many of which are secret and sacred?" Some asked, "Those judges aren't from our village. Why do they need this information?" Others challenged, "If we have waived our jurisdiction to hear a case, it means that we don't want our customs and traditions even talked about in court. So why should we tell them to you so you can write them down?"

What we began to realize, after several of these kinds of meetings, was that Hopi community members didn't have a clear sense of what exactly the tribal court was doing with these disputes—how they were addressing them and what kinds of law (traditional or nontraditional) they were trying to apply in them. Moreover, they explained that a central reason why villages and clans were waiving their traditional authority to resolve land disputes was because they thought that their decisions, particularly if they were based on custom and tradition, would not be respected or enforced by the "Anglo-style" adversarial legal system of the tribal court.

After that experience, we realized that we had failed to consult properly with the clans, villages, and Hopi people directly affected by land disputes before concluding that a custom law treatise was the best way to address their needs. Subsequently, we rethought our efforts and initiated one of the four services that TNI currently offers to Hopi communities—to schedule regularly held legal workshops in which information is exchanged with the Hopi people about the rules, procedures, and relevant case law of the Hopi tribal legal system. In these meetings we update Hopi village and clan leaders on particular cases that are pending before the court that concern members of their communities, in a proactive effort to keep them appraised of the legal matters affecting their friends and families.

"Listen, Don't Lecture"

To say that we should be listening more and lecturing less to Native peoples about their social and political circumstances seems almost obvious. Likewise, it goes without saying that indigenous peoples can speak for themselves about

their dispute-resolution needs, and that their voices deserve to be heard on those issues. Yet affording indigenous peoples the opportunity to do this still seems not to happen nearly often enough. This is true even (perhaps especially) in contexts in which nonindigenous peoples claim to be working for and on behalf of improving Native peoples lives. Unfortunately, the "Hopi Custom Law Treatise" was a perfect example of the latter.

When it came time to start writing the "Hopi Custom Law Treatise," those of us working on that project were going to have to ask ourselves, whose customs and traditions, exactly, were we going to be writing down? Were we really going to be able to get every different version of Hopi custom and tradition on these matters from every village and every clan in every village? If not, whose voices were we going to include and whose were we going to exclude? Moreover, isn't it really the case, that when you transfer what are essentially oral traditions into a written format and put them in a form of legal rules, the voice that would be speaking the loudest would be the person doing the transferring? If we were going to go out there and start writing this information down, wouldn't this treatise begin to sound an awful lot more like the Anglo-style statutes and legislation that we had been trained to write and read as law students? If that were true, who then would be able to access that information, if you would need a law degree to be able to read and apply the lessons of the treatise?

So the alternative approach that we came up with, and which is a service we continue to provide at TNI, is what we call the Hopi Custom Law Video Archive. The video archive consists of digital video recordings of the Hopi people engaging each other in discussions spoken in Hopi and English about what they understand to be their customs and traditions of property holding, use, and distribution. These discussions are then transcribed in Hopi and English. The result is a searchable database of recordings in which the Hopi people can see and hear Hopi people talking about their customs and traditions in their own voices.

The Hopi social unit that agrees to be recorded, whether that is a village, clan, or family, determines access to each archive. We see these video archives as the most direct way to keep a searchable record of Hopi customs and traditions about property in and through which Hopi people can maintain maximum control over the information, while also making it accessible in ways that allow the Hopi people to listen (without being lectured) to Hopi voices speaking about the complex customs and traditions surrounding their land disputes.

"Provide Resources, Not Regulations"

In our work as Hopi justices and scholars of contemporary Native law and politics, we are keenly aware that the Hopi, like all indigenous peoples, need to be supported, not supplanted, in exercising their sovereign powers for themselves. The Hopi tribal court got started when it replaced the US-run Court of Indian Offenses that had operated on the Hopi Reservation from 1950 to 1972. Although today this act still stands as a strong expression of Hopi self-governance, interestingly enough, the original impulse to create a Hopi court came from non-Hopi lawyers of the Hopi tribe who recommended the change in the face of potential legal violations being committed by the US-run court. The Hopi tribal council passed a resolution creating its own court, but when it came time to running the court, they relied upon nonaboriginal lawyers to draft rules and civil and criminal procedures that adhered largely to the Anglo-style adversarial procedures found in US federal and state courts.

Although most Hopi people have worked with this system effectively, and some have come to understand the court as the main forum for resolving disputes, many still challenge the legitimacy of the court, its decisions, and its enforcement powers on the grounds that it is fundamentally a non-Hopi institution. We came to realize that we were running the risk of the same kinds of legitimacy problems with the "Hopi Custom Law Treatise." Who's empowered by such a treatise? As mentioned before, treatises are legal documents that assume knowledge of legal procedures and that are first and foremost meant to provide information to be used in Anglo-style courts, and not necessarily by Hopi village and clan leaders. What about the sovereign powers of the villages that are recognized by the Hopi tribal constitution but that were not being exercised in the resolution of land disputes? Many Hopi village and clan leaders expressed a desire to use those powers, even as they were waiving their jurisdiction over land disputes, but were concerned with how their actions and decisions in such cases would be recognized by the court. Additionally, a treatise can't address the concerns of Hopis who may not want to use custom law to resolve their disputes, but who also may not want to spend the money and time to hire a lawyer to go to court.

We thus realized that village and clan leaders were asking that we not replace their authority with a written treatise that would serve as sort of a Hopi custom "crib sheet" that the tribal court justices could turn to in deciding their cases. Instead, what they were saying they wanted was to be provided the kinds of informational and technical assistance resources to help them further develop the kinds of village and clan dispute-resolution systems that would best meet their needs. They were clear that such systems would have to be ones that came from them—whether they are systems based in traditional or

nontraditional Hopi practices—insofar as that was the only way they would be viewed as legitimate by the Hopi people.

TNI has been working with Hopi villages to provide technical assistance to explore different modes of traditional, mediational, arbitrational, and adversarial dispute resolution. In so doing, we in TNI have come to recognize our role as putting resources before Hopi village and clan leaders, listening to their views and concerns about each, and allowing them to generate their own dispute-resolution processes. This is a long process, insofar as the legacies of colonization have created a situation in which even the Hopi people, despite their successes in maintaining their culture, have nonetheless been disempowered. It will thus take time to reverse this process, to remind Hopi village and clan leaders that the powers they are now wanting to exercise in the resolution of land disputes are powers that they have always had and that really can never be taken away. TNI is thus prepared to work in the long term on this component of its services, insofar as we know that this is the only way real, lasting, and sustainable change will be accomplished for Hopi people. This is our fourth principle.

"Follow The Tempo, Don't Try Setting It"

Those of us who have experience trying to get funding from private and public agencies in order to work in indigenous communities think that this is perhaps one of the most important of the four principles, one that we must try constantly to remind ourselves of. It refers to the tension between the kinds of "progress" that funding agencies want to see versus the kinds of progress that are ever really tenable in indigenous communities like the Hopi. It took us a long time to realize—and there are still moments that we need to be reminded—that for justice reforms to work out at Hopi, as we suspect in any indigenous nation, no other time frame matters but that of the aboriginal nation you're working with and you serve. Although it may matter to you as the recipient of funding to attend to the time lines imposed by those agencies, and although it may matter to you as a conscientious professional to attend to your own personal project schedule for accomplishing your goals, you must do whatever you can not to expect or attempt to impose those time frames on the indigenous nations you are serving. Not only will they not let you impose those time frames on them, your project will almost certainly fail if you try.

The idea of a custom law treatise was designed with funding-agency reporting in mind. It was designed to be what we call in the nonprofit world a "deliverable," some material realization of our efforts that we could send off at the end of the funding period to show what their money had been used for.

Deliverables are undoubtedly critical in the competitive world of nonprofit fundraising. To get funding, you need to be able to promise concrete goals when you write funding proposals, and you need to deliver on those promises in order to maintain and renew funding. But real, sustainable progress among Native communities will take decades and generations because such progress only comes through the rectification of decades and generations of injustice wrought by colonization. This is something that cannot and will not be rushed.

TNI's information workshops, custom law archives, and dispute-resolution system-development programs are designed to be ongoing. They're designed to be progressive—to continue to be improved upon while running independently of TNI and self-running once we give the tools to these communities. Built into these services are options in which any Hopi or other indigenous community that has worked with us can ask that we return to help them address specific dispute-resolution issues or assist in answering specific dispute-resolution questions as they emerge. This is the case because just as we discovered that the "Hopi Custom Law Treatise" would offer no "quick fix" to the problems of land disputes among Hopi villages, neither could we now expect villages to design and implement their own dispute-resolution systems in the one or two years dictated by the time lines of our funders.

At the same time, there are Hopi people who are currently suffering with the uncertainty of their unresolved land disputes, and more disputes seem to emerge every day. These people should not have to wait for the decades and generations to pass before Hopi village and clan leaders will be ready to run their own dispute-resolution systems. In addition to the other three ongoing services that TNI provides to ensure the long-term sustainable legal reforms that the Hopi people have called for, TNI also had to become prepared to offer dispute-resolution services for those Hopi people who need them right now. As officers of TNI, and based on our experiences as justices of the Hopi court, we felt it would have been irresponsible for us to acknowledge the dispute-resolution needs of the Hopi people but not offer them any immediate resource for addressing those needs. We felt that if the Hopi people wanted our help, it was important to offer our help as an option, perhaps the last option. TNI is prepared to offer that help in multiple ways, either to sit alongside clan and village leaders in order to assist them in live disputes to exercise their constitutionally recognized dispute-resolution jurisdiction or under the auspices of their authority. But we are also prepared to offer dispute-resolution services independent of village or clan authority as a service available to private Hopi parties. TNI has its own set of dispute-resolution rules designed specifically to address the unique cultural circumstances that surround our work with Hopi communities and their land disputes, and those rules are flexible

enough to accommodate the different ways in which Hopi people currently in disputes can approach us to seek our help in resolving those issues.

Moreover, as a side issue, this aspect of the services provided by TNI can provide clear proof of progress, a deliverable, to our funders. We can give them figures concerning the number, type, and community distribution of disputes addressed by TNI. In this way, we can meet the many and varied expectations of the people and communities we serve in Hopi country, and we can also ensure that we are making productive use of the resources given to us by funding agencies, so that we can continue to call upon them to support and maintain our efforts in the future.

Conclusion

As you saw, four principles emerged from our failed attempt to compile the "Hopi Custom Law Treatise," and from those principles emerged the four programs that today constitute the services offered by TNI. This entire process then constituted one in which our organization, a collection of Native and non-Native, Hopi and non-Hopi scholars, lawyers, and advocates, had to rethink our relationship with the Hopi community so that our efforts would address their justice needs, as they saw them, and in flexible and responsive ways. This is a continuing effort, and "reenvisioning" TNI's relationship with Hopi and other indigenous communities is an ongoing process. From our initial plan to draft the "Hopi Custom Law Treatise" to our current multipronged and multi-principled approach to serving the Hopi people, we have come to recognize four central principles that, we hope, will lead to real and lasting changes to the achievement of justice for the Hopi people. We now understand that we must be guided by these four principles if we hope to achieve a working relationship that is rooted in mutual trust and commitment. Self-determination is a process, one that can often easily be talked about as a goal, but one that takes time and effort to enact and undertake. Indigenous nations that are raising their voices for self-determination and sovereignty should be "listened to, not lectured"; they should be "supported, not supplanted" in making efforts to achieve that self-determination. When nonindigenous organizations like TNI are given the opportunity to assist Native nations in those efforts, they must do their best to "consult, not conclude" about indigenous peoples and their needs, and be ever careful that they "follow the tempo, don't try setting it" when attempting to set time lines for the accomplishment of real and lasting change for indigenous peoples.

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