

# FIRST NATIONS STRATEGIC BULLETIN

## FIRST NATIONS STRATEGIC POLICY COUNSEL

### Harper Launches Major First Nations Termination Plan: *As Negotiating Tables Legitimize Canada's Colonialism*



Smudging Ceremony at Crown-First Nations Gathering, Jan. 24, 2012, in Ottawa. (Photo courtesy of Chris Wattie, Reuters)

By Russell Diabo

On September 4<sup>th</sup> the Harper government clearly signaled its intention to:

- 1) Focus all its efforts to assimilate First Nations into the existing federal and provincial orders of government of Canada;
- 2) Terminate the constitutionally protected and internationally recognized Inherent, Aboriginal and Treaty rights of First Nations.

**Termination** in this context means the ending of First Nations pre-existing sovereign status through federal coercion of First Nations into Land Claims and Self-Government Final Agree-

ments that convert First Nations into municipalities, their reserves into fee simple lands and extinguishment of their Inherent, Aboriginal and Treaty Rights.

To do this the Harper government announced three new policy measures:

- A **“results based”** approach to negotiating Modern Treaties and Self-Government Agreements. This is an assessment process of 93 negotiation tables across Canada to determine who will and who won't agree to terminate Inherent, Aboriginal and Treaty rights under the terms of Canada's Comprehensive Claims and Self-Government policies. For those tables who won't agree, negotiations will end as the federal government withdraws from the table and takes funding with them.
- First Nation regional and national political organizations will have their core funding cut and capped. For regional First Nation political organizations the core funding will be capped at \$500,000 annually. For some regional organizations this will result in a funding cut of \$1 million or more annually. This will restrict the ability of Chiefs and Executives of Provincial Territorial Organization's to organize and/or advocate for First Nations rights and interests.
- First Nation Band and Tribal Council funding for advisory services will be eliminated over the next two years further crippling the ability of Chiefs and Councils and Tribal Council executives to analyze and assess the impacts of federal and provincial policies and legislation on Inherent, Aboriginal and Treaty rights.

These three new policy measures are on top of the following unilateral federal legislation the Harper government is imposing over First Nations:

- **Bill C-27: First Nations Financial Transparency Act**
- **Bill C-45: Jobs and Growth Act, 2012 [Omnibus Bill includes Indian Act amendments regarding voting on-reserve lands surrenders/**

#### Special points of interest:

- **Harper gov't forcing “take it or leave it” agreements at negotiating tables**
- **Canada-China Treaty Threatens Indigenous Lands**
- **Ed John & Canada work for Trade with China**
- **Russell Means passes on due to cancer at age 72**

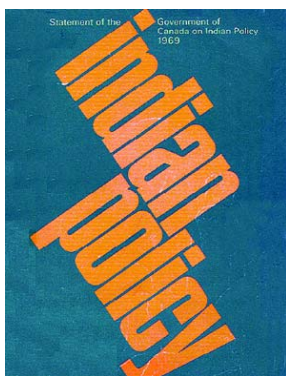
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John Duncan, federal Minister of Aboriginal Affairs.

“Of course “modern” in Conservative terms means assimilation of First Nations by termination of their collective rights and off-loading federal responsibilities onto the First Nations themselves and the provinces”



Cover of 1969 White Paper on Indian Policy.

## ‘Termination Plan’ continued from page 1

designations]

- **Bill S-2: Family Homes on Reserves and Matrimonial Interests or Rights Act**
- **Bill S-6: First Nations Elections Act**
- **Bill S-8: Safe Drinking Water for First Nations**
- **Bill C-428: Indian Act Amendment and Replacement Act [Private Conservative MP’s Bill, but supported by Harper government]**

Then there are the **Senate Public Bills**:

- **Bill S-207: An Act to amend the Interpretation Act (non derogation of aboriginal and treaty rights)**
- **Bill S-212: First Nations Self-Government Recognition Bill**

The Harper government’s Bills listed above are designed to undermine the collective rights of First Nations by focusing on individual rights. This is the “*modern legislative framework*” the Conservatives promised in 2006. The 2006 Conservative Platform promised to:

*Replace the Indian Act (and related legislation) with a modern legislative framework which provides for the devolution of full legal and democratic responsibility to aboriginal Canadians for their own affairs within the Constitution, including the Charter of Rights and Freedoms.*

Of course “*modern*” in Conservative terms means assimilation of First Nations by termination of their collective rights and off-loading federal responsibilities onto the First Nations themselves and the provinces.

One Bill that hasn’t been introduced into Parliament yet, but is still expected, is the **First Nations’ Private Ownership Act (FNPOA)**. This private property concept for Indian Reserves—which has been peddled by the likes of **Tom Flanagan** and tax proponent and former Kamloops Chief **Manny Jules**—is also a core plank of the Harper government’s 2006 electoral platform.

The 2006 Conservative Aboriginal Platform promised that if elected a Harper government would:

*Support the development of individual property ownership on reserves, to encourage lending for private housing and businesses.*

The long-term goals set out in the Harper government’s policy and legislative initiatives listed above are not new; they are at least as old as the **Indian Act** and were articulated in the federal **1969 White Paper on Indian Policy**, which set out a plan to terminate Indian rights as the time.

### Previous Termination Plans: 1969 White Paper & Buffalo Jump of 1980’s

The objectives of the 1969 White Paper on Indian Policy were to:

- Assimilate First Nations.
- Remove legislative recognition.
- Neutralize constitutional status.

## 'Termination Plan' continued from page 2

- Impose taxation.
- Encourage provincial encroachment.
- Eliminate Reserve lands & extinguish Aboriginal Title.
- Economically underdevelop communities.
- Dismantle Treaties.

As First Nations galvanized across Canada to fight the Trudeau Liberal government's proposed 1969 termination policy the federal government was forced to consider a strategy on how to calm the Indian storm of protest.

In a memo dated April 1, 1970, **David Munro**, an Assistant Deputy Minister of Indian Affairs on Indian Consultation and Negotiations, advised his political masters **Jean Chrétien** and **Pierre Trudeau**, as follows:

*. . . in our definition of objectives and goals, not only as they appear in formal documents, but also as stated or even implied in informal memoranda, draft planning papers, or causal conversation. We must stop talking about having the objective or goal of phasing out in five years. . . We can still believe with just as much strength and sincerity that the [White Paper] policies we propose are the right ones. . .*

*The final [White Paper] proposal, which is for the elimination of special status in legislation, must be relegated far into the future. . . my conclusion is that we need not change the [White Paper] policy content, but we should put varying degrees of emphasis on its several components and we should try to discuss it in terms of its components rather than as a whole. . . we should adopt somewhat different tactics in relation to [the White Paper] policy, but that we should not depart from its essential content. (Emphasis added)*

In the early 1970's, the Trudeau Liberal government did back down publicly on implementing the **1969 White Paper on Indian Policy**, but as we can see from Mr. Munro's advice the federal bureaucracy changed the timeline from five years to a long-term implementation of the 1969 White Paper objectives of assimilation/termination.

In the mid-1980's the Mulroney Conservative government resurrected the elements of the 1969 White Paper on Indian Policy, through a Cabinet memo.

In 1985, a secret federal Cabinet submission was leaked to the media by a DIAND employee. The Report was nicknamed the "**Buffalo Jump of the 1980's**" by another federal official. The nickname referred to the effect of the recommendations in the secret Cabinet document, which if adopted, would lead Status Indians to a cultural death -- hence the metaphor.

The Buffalo Jump Report proposed a management approach for First Nations policy and programs, which had the following intent:

- Limiting & eventually terminating the federal trust obligations;
- Reducing federal expenditures for First Nations, under funding programs, and prohibiting deficit financing;
- Shifting responsibility and costs for First Nations services to provinces and "advanced bands" through co-management, tri-partite, and community self-government agreements;



Jean Chrétien, federal Minister of Indian Affairs introduced 1969 White Paper on Indian Policy.

"the federal bureaucracy changed the timeline from five years to a long-term implementation of the 1969 White Paper objectives of assimilation/termination"



Buffalo Jump

## 'Termination Plan' continued from page 3



“for the last twenty years, the federal government—whether Liberal or Conservative—has continued to develop policies and legislation based upon the White Paper/Buffalo Jump objectives”

- "Downsizing" of the Department of Indian Affairs and Northern Development (DIAND) through a devolution of program administration to "advanced bands" and transfer of programs to other federal departments;
- Negotiating municipal community self-government agreements with First Nations which would result in the First Nation government giving up their Constitutional status as a sovereign government and becoming a municipality subject to provincial or territorial laws;
- Extinguishing aboriginal title and rights in exchange for fee simple title under provincial or territorial law while giving the province or territory underlying title to First Nations lands.

The Mulroney government's "**Buffalo Jump**" plan was temporarily derailed due the 1990 "**Oka Crisis**". Mulroney responded to the "**Oka Crisis**" with his "**Four Pillars**" of Native Policy:

- Accelerating the settlement of land claims;
- Improving the economic and social conditions on Reserves;
- Strengthening the relationships between Aboriginal Peoples and governments;
- Examining the concerns of Canada's Aboriginal Peoples in contemporary Canadian life.

In 1991, **Prime Minister Brian Mulroney** also announced the establishment of a **Royal Commission on Aboriginal Peoples**, which began its work later that year; the establishment of an **Indian Claims Commission** to review Specific Claims; the establishment of a **BC Task Force on Claims**, which would form the basis for the **BC Treaty Commission Process**.

In 1992, Aboriginal organizations and the federal government agreed, as part of the **1992 Charlottetown Accord**, on amendments to the **Constitution Act, 1982** that would have included recognition of the inherent right of self-government for Aboriginal people. For the first time, Aboriginal organizations had been full participants in the talks; however, the Accord was rejected in a national referendum.

With the failure of Canadian constitutional reform in 1992, for the last twenty years, the federal government—whether Liberal or Conservative—has continued to develop policies and legislation based upon the White Paper/Buffalo Jump objectives and many First Nations have regrettably agreed to compromise their constitutional/international rights by negotiating under Canada's termination policies.

### Canada's Termination Policies Legitimized by Negotiation Tables

It has been thirty years since Aboriginal and Treaty rights have been "**recognized and affirmed**" in section 35 of Canada's constitution. Why hasn't the constitutional protection for First Nations' Inherent, Aboriginal and Treaty rights been implemented on the ground?

One answer to this question is, following the failure of the **First Ministers' Conferences on Aboriginal Matters in the 1980's**, many First Nations agreed to compromise their section 35 Inherent, Aboriginal and Treaty rights by entering into or negotiating Modern Treaties and/or Self-government Agreements under Canada's unilateral negotiation terms.

These Modern Treaties and Self-Government Agreements not only contribute to emptying out section 35 of Canada's constitution of any significant legal, political or economic meaning. Final settlement agreements are then used as precedents against other First Nations' who are negotiating.

Moreover, Canada's Land Claims and Self-Government policies are far below the international standards set out in the Articles of the **United Nations Declaration on the Rights of**



## 'Termination Plan' conclusion from page 4

**Indigenous Peoples (UNDRIP).** Canada publicly endorsed the **UNDRIP** in November 2010, but obviously Canada's interpretation of the **UNDRIP** is different than that of most First Nations, considering their unilateral legislation and policy approach.

Canada's voted against **UNDRIP** on Sept. 13, 2007, stating that the **UNDRIP** was inconsistent with Canada's domestic policies, especially the Articles dealing with Indigenous Peoples' Self-Determination, Land Rights and Free, Prior Informed Consent.

Canada's position on **UNDRIP** now is that they can interpret it as they please, although the principles in **UNDRIP** form part of international not domestic law.

The federal strategy is to maintain the **Indian Act** (with amendments) as the main federal law to control and manage First Nations. The only way out of the **Indian Act** for First Nations is to negotiate an agreement under Canada's one-sided Land Claims and/or Self-Government policies. These Land Claims/Self-Government Agreements all require the termination of Indigenous rights for some land, cash and delegated jurisdiction under the existing federal and provincial orders of government.

Canada has deemed that it will not recognize the pre-existing sovereignty of First Nations or allow for a distinct First Nations order of government based upon section 35 of Canada's constitution.

Through blackmail, bribery or force, Canada is using the poverty of First Nations to obtain concessions from First Nations who want out of the **Indian Act** by way of Land Claims/Self-Government Agreements. All of these Agreements conform to Canada's interpretation of section 35 of Canada's constitution, which is to legally, politically and economically convert First Nations into what are essentially ethnic municipalities.

The first groups in Canada who have agreed to compromise their section 35 Inherent and Aboriginal rights through Modern Treaties have created an organization called the **Land Claims Agreement Coalition**. The Coalition Members are:

- Council of Yukon First Nations (representing 9 land claim organizations in the Yukon)
- Grand Council of the Crees (Eeyou Istchee)
- Gwich'in Tribal Council
- Inuvialuit Regional Corporation
- Kwanlin Dun First Nation
- Maa-nulth First Nations
- Makivik Corporation
- Naskapi Nation of Kawawachikamach
- Nisga'a Nation
- Nunavut Tunngavik Inc.
- Nunatsiavut Government
- Sahtu Secretariat Inc.
- Tlicho Government
- Tsawwassen First Nation
- Vuntut Gwitchin First Nation



“Through blackmail, bribery or force, Canada is using the poverty of First Nations to obtain concessions from First Nations who want out of the **Indian Act** by way of Land Claims/Self-Government Agreements”



BC TREATY COMMISSION

“All of these Modern Treaties have resulted in extinguishing Aboriginal Title, converting reserve lands into fee simple, removing tax exemptions, converting bands into municipalities, among other impacts on Inherent and Aboriginal rights”

Terminated

## ‘Termination Plan’ continued from page 5

The **Land Claims Agreement Coalition** Members came together because the federal government wasn’t properly implementing any of their Modern Treaties. So the Coalition essentially became a lobby group to collectively pressure the federal government to respect their Modern Treaties. According to Members of the Coalition Modern Treaty implementation problems persist today.

The fact that Canada has already broken the Modern Treaties shouldn’t inspire confidence for those First Nations who are already lined up at Canada’s Comprehensive Claims and Self-Government negotiation tables.

According to the federal **Department of Aboriginal Affairs** there are 93 Modern Treaty and/or Self-Government negotiation tables across Canada [<http://www.aadnc-aandc.gc.ca/eng/1346782327802/1346782485058>].

Those First Nations who are negotiating at these 93 tables are being used by the federal government (and the provinces/Territories) to legitimize its Comprehensive Claims and Self-Government policies, which are based upon extinguishment of Aboriginal Title and termination of Inherent, Aboriginal and Treaty rights.

The First Nations who have been refusing to negotiate and are resisting the federal Comprehensive Claims and Self-Government negotiating policies are routinely ignored by the federal government and kept under control and managed through the **Indian Act** (with amendments).

Attempts by non-negotiating First Nations to reform the federal **Comprehensive Claims and Self-Government policies** aren’t taken seriously by the federal government because there are so many First Nations who have already compromised their Inherent, Aboriginal and Treaty rights by agreeing to negotiate under the terms and funding conditions of these Comprehensive Claims and Self-Government policies.

For example, following the **1997 Supreme Court of Canada Delgamuukw decision**, which recognized that Aboriginal Title exists in Canada, the Assembly of First Nations tried to reform the Comprehensive Claims policy to be consistent with the Supreme Court of Canada **Delgamuukw** decision.

However, the then **Minister of Indian Affairs, Robert Nault** on December 22, 2000, wrote a letter addressed to then **Chief Arthur Manuel** that essentially said why should the federal government change the Comprehensive Claims policy if First Nations are prepared to negotiate under it as it is?

A fair question: why do First Nations remain at negotiation tables that ultimately lead to the termination of their peoples Inherent and Aboriginal rights, especially since it appears that Modern Treaties are routinely broken after they are signed by the federal government?

Many of these negotiations are in British Columbia where despite the past twenty years of negotiations the **B.C. Treaty process** has produced two small Modern Treaties, **Tsawwassen** and **Maa’Nulth**. The **Nisga’a Treaty** was concluded in 2000, outside of the **B.C. Treaty process**.

All of these Modern Treaties have resulted in extinguishing Aboriginal Title, converting reserve lands into fee simple, removing tax exemptions, converting bands into municipalities, among other impacts on Inherent and Aboriginal rights.

### The Harper Government’s Termination Plan

Aside from the unilateral legislation being imposed, or the funding cuts and caps to First Nation’s and their political organizations, the September 4, 2012, announcement of a “**results based**” approach to Modern Treaties and Self-Government negotiations amounts to a “**take it or leave it**” declaration on the part of the Harper government to the negotiating First Nations.

## 'Termination Plan' continued from page 6

Canada's **Comprehensive Claims Policy** requires First Nations to borrow money from the federal government to negotiate their "**land claims**". According to the federal government:

*To date, the total of outstanding loans to Aboriginal groups from Canada to support their participation in negotiations is \$711 million. This represents a significant financial liability for the Aboriginal community. In addition, the government of Canada provides \$60 million in grants and contributions to Aboriginal groups every year for negotiations.*

It is Canada's policies that forced First Nations to borrow money to negotiate their "**claims**", so the "**financial liability**" was a policy measure designed by the federal government to pressure First Nations into settling their "**claims**" faster. As the federal government puts it, the Comprehensive Claims negotiation process has instead "**spawned a negotiation industry that has no incentive to reach agreement.**"

This **accumulated debt of \$711 million** along with the **\$60 million annual in grants and contributions** have compromised those negotiating First Nations and their leaders to the point that they are unable or unwilling to seriously confront the Harper government's termination plan.

**Over 50% of the Comprehensive Claims are located in B.C.** and the **First Nations Summit** represents the negotiating First Nations in B.C., although some negotiating First Nations have now joined the **Union of B.C. Indian Chiefs (UBCIC)**, thus blurring the historic distinctions between two political organizations. The latter organization previously vigorously opposed the **B.C. Treaty process**, but now the **UBCIC** remains largely silent about it.

These two main political organizations -- **the First Nations Summit and the UBCIC** -- have now joined together into the **B.C. First Nations Leadership Council**, further blending the rights and interests of their respective member communities together, not taking into account whether they are in or out of the **B.C. Treaty process**.

This may partially explain why the Chiefs who are not in the **B.C. Treaty process** also remain largely silent about the Harper government's "**results based**" approach to Modern Treaties and Self-Government negotiations.

First Nations in British Columbia are failing to capitalize on that fact, that since the **Delgamuukw Decision**, the governments have to list unresolved land claims and litigation as a contingent liability. Such liabilities can affect Canada's sovereign credit rating and provincial credit ratings. To counter this outstanding liability, Canada points to the **British Columbia Treaty Process** as the avenue how they are dealing with this liability, pointing to the fact that First Nations are borrowing substantive amounts to negotiate with the governments.

Another recent example of how disconnected B.C. First Nations and their organizations are on international versus domestic policy and law, is the First Nations' outcry over the recent **Canada-China Treaty**.

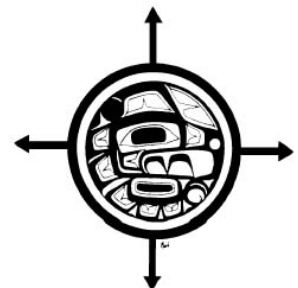
The B.C. Chiefs and their organizations are publicly denouncing the **Canada-China Foreign Investment Promotion and Protection Agreement** as adversely impacting on Aboriginal Title and Rights, yet they say or do nothing about Harper's accelerated termination plan. It seems the negotiating First Nations are more worried about the **Canada-China Treaty** blocking a future land claims deal under the **B.C. Treaty process**.

The Chiefs and their organizations at the **B.C. Treaty process** negotiation tables have had twenty years to negotiate the "**recognition and affirmation**" of Aboriginal Title and Rights, but this continues to be impossible under Canada's policies aiming at the extinguishment of collective rights. As a result only two extinguishment Treaties have resulted from the



First Nations Summit Logo

**"the First Nations Summit and the UBCIC -- have now joined together into the B.C. First Nations Leadership Council, further blending the rights and interests of their respective member communities together, not taking into account whether they are in or out of the B.C. Treaty process"**



UBCIC Logo



Sophie Pierre, Chair, B.C. Treaty Commission

“it seems the negotiating First Nations are so compromised by their federal loans and dependent on the negotiations funding stream that they are unable or unwilling to withdraw from the tables en masse and make real on the demand that the Harper government reform its Comprehensive Claims and Self-Government policies”



*First Nations*

## ‘Termination Plan’ continued from page 7

process. Even **Sophie Pierre, Chair of the B.C. Treaty Commission** has said “*If we can't do it, it's about time we faced the obvious - I guess we don't have it, so shut her down*”.

By most accounts the twenty year old **B.C. Treaty process** has been a failure. It has served the governments’ purpose of countering their contingent liabilities regarding Indigenous land rights. Yet it seems the negotiating First Nations are so compromised by their federal loans and dependent on the negotiations funding stream that they are unable or unwilling to withdraw from the tables en masse and make real on the demand that the Harper government reform its Comprehensive Claims and Self-Government policies to be consistent with the Articles of the **UNDRIP**.

The same can also be said for the negotiating First Nations in the Ontario, Quebec and Atlantic regions.

The Chiefs who are not in the B.C., Quebec or Atlantic negotiating processes have not responded much, if at all, to Harper’s “**results based**” approach to Modern Treaties and Self-Government. The non-negotiating Chiefs seem to be more interested in managing programs and services issues than their Aboriginal Title and Rights. As one federal official put it, the Chiefs are involved in the elements of the **1969 White Paper on Indian Policy** like economic and social development while ignoring the main White Paper objective—termination of First Nations legal status.

### Conclusion

Given their silence over the Harper government’s “**results based**” “*take it or leave it*” negotiations approach, it seems many of the negotiating First Nations at the Comprehensive Claims and/or Self-Government tables are still contemplating concluding Agreements under Canada’s termination policies.

This can only lead to further division among First Nations across Canada as more First Nations compromise their constitutional and international rights by consenting to final settlement agreements under the terms and conditions of Canada’s termination policies, while undermining the political positions of the non-negotiating First Nations.

In the meantime, Harper’s government will continue pawning off Indigenous lands and resources in the midst of a financial crisis though free trade and foreign investment protection agreements, which will secure foreign corporate access to lands and resources and undermine Indigenous Rights.

Some First Nation leaders and members have criticised **AFN National Chief Shawn Atleo** for agreeing to a joint approach with the Harper government, including the **Crown-First Nations Gathering (CFNG)**, but to be fair, the Chiefs across Canada did nothing to pressure Prime Minister Harper going into the **CFNG**. Instead, many Chiefs used the occasion as a photo op posing with the Prime Minister.

The negotiating First Nations who are in joint processes with Canada seem to be collectively heading to the cliff of the “**Buffalo Jump**” as they enter termination agreements with Canada emptying out section 35 in the process.

Much of the criticism of **AFN National Chief Atleo** has come from the Prairie Treaty Chiefs. Interestingly, if one looks at the federal chart of the 93 negotiation tables [<http://www.aadnc-aandc.gc.ca/eng/1346782327802/1346782485058>] not too many First Nations from historic Treaty areas are involved in the Self-Government tables, except for the Ontario region where the **Union of Ontario Indians** and **Nisnawbe-Aski Nation** are negotiating Self-Government agreements.

As a result of the September 4, 2012 announcements regarding changes to Modern Treaties and Self-Government negotiations, cuts and caps to funding First Nations political or-





## 'AFN Question' conclusion from page 8

ganizations and unilateral legislation initiatives, it is obvious that Prime Minister Harper has tricked the AFN National Chief and First Nations by showing that the **CFNG** "outcomes" were largely meaningless.

One commitment that **Prime Minister Harper** made at the **CFNG**—which he will probably keep—is making a progress report in January 2013. The Prime Minister will probably announce the progress being made with all of the negotiating tables across Canada, along with his legislative initiatives.

It appears First Nations are at the proverbial "**end of the trail**" as the Chiefs seem to be either co-opted or afraid to challenge the Harper government. Most grassroots peoples aren't even fully informed about the dangerous situation facing them and their future generations.

The only way to counter the Harper government is to:

1. have all negotiating First Nations suspend their talks; and
2. organize coordinated National Days of Action to register First Nations opposition to the Harper government's termination plan;
3. Demand Canada suspend all First Nations legislation in Parliament, cease introducing new Bills and
4. Change Canada's Land Claims and Self-Government Policies to "recognize and affirm" the Inherent, Aboriginal and Treaty Rights of First Nations, including respect and implementation of the Historic Treaties.

If there is no organized protest and resistance to the Harper government's termination plan, First Nations should accept their place at the bottom of all social, cultural and economic indicators in Canada, just buy into Harper's jobs and economic action plan—and be quiet about their rights.

**"If there is no organized protest and resistance to the Harper government's termination plan, First Nations should accept their place at the bottom of all social, cultural and economic indicators in Canada, just buy into Harper's jobs and economic action plan—and be quiet about their rights"**

### Editorial Cartoon

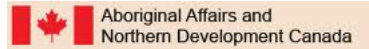


Editorial cartoon courtesy of Ross Montour, Kahnawake Mohawk





## Department of Aboriginal Affairs & Northern Development Canada - Powerpoint Presentation



### Results Based Approach to Canada's Participation in Treaty and Self-Government Negotiations

#### Engagement Process

##### New Approach

##### Overview

“The goal of the engagement process is to have frank discussions with Canada’s negotiating partners (Aboriginal groups and provincial/territorial governments) regarding progress at the tables”

- This material provides a general overview of the results-based approach to Canada’s participation in treaty and self-government negotiations and the objectives of the engagement process, but is not intended to identify or address table-specific negotiation issues

##### What is the new approach?

- Canada is working towards implementing a new approach to accelerate progress on treaty and self-government negotiations and effectively addressing s.35 rights claims
- Based on three pillars:
  1. Results-Based Negotiations to Achieve Results with Partners: focus resources and efforts on negotiating tables with the greatest potential to conclude agreements in a timely way within existing federal mandates
  2. Promoting More Effective Use of Other Tools to Address Aboriginal Rights and Promote Economic Development and Self-Sufficiency: improving access to other tools and options outside the negotiation process that address Aboriginal rights and promote economic development and self-sufficiency
  3. Speeding Up Federal Mandating Processes: improving the federal approval and reporting processes

##### What are we engaging on?

- The goal of the engagement process is to have frank discussions with Canada’s negotiating partners (Aboriginal groups and provincial/territorial governments) regarding progress at the tables
- After seeking the views and input from its negotiating partners during the engagement process, Canada will be conducting an internal assessment of tables

##### These discussions will include:

- Do Aboriginal and Provincial/Territorial parties support an agreement that is consistent with the principles of the federal policies for the negotiation of a comprehensive land claim or self-government agreement (i.e. federal core elements)?
- ⇒ Do the parties share a common vision for resolution?
- ⇒ Can the agreement be achieved in a timely manner?

##### What are we engaging on?

- The following slides are some examples of federal core elements in treaty and self-



## 'AANDC Powerpoint' continued from page 10

government negotiations

- While the slides do provide examples of some federal core elements, they are not exclusive
- There are other elements not listed that are integral for Canada in concluding an agreement
- The parties' position with respect to the federal core elements will form part of Canada's assessments of the tables



AANDC Headquarters

### Examples of Federal Core Elements

#### Certainty

- Treaties must provide finality and certainty with respect to an Aboriginal group's claimed Aboriginal rights, as well as clarity with respect to Aboriginal, federal and provincial/territorial jurisdictions and responsibilities
- A treaty must provide a comprehensive picture comprised of:
  - ⇒ the precise and exhaustive articulation of the s.35 rights that the Aboriginal group may be able to exercise post-treaty;
  - ⇒ the full and final settlement of claims to Aboriginal rights including the elimination of any contingent Crown liability for past infringement of Aboriginal rights; and
  - ⇒ provisions to manage legal risks in the event that the certainty technique is interpreted by the courts in a manner not intended by the parties

#### Land

- Land that will be involved in any treaty or self-government agreement must be clearly identified, and the Aboriginal group's rights and responsibilities with respect to the land must be clearly set out in the agreement
- Land held in fee simple by the Aboriginal group post effective date of the treaty will not be lands reserved for Indians within the meaning of s.91(24) of the Constitution Act, 1867 nor "reserves" as defined in the Indian Act
- Depending on where the land claim is situated, federal and provincial land management regimes in place must be respected in the agreement

#### Governance

- The **Canadian Charter of Rights and Freedoms** applies to all Aboriginal governments and institutions in relation to matters within their respective jurisdictions and authorities
- Aboriginal governments and institutions exercising the inherent right of self-government will operate within the framework of the **Canadian Constitution**
- Aboriginal governments and institutions **must be fully accountable** to their members or clients for all decisions made and actions taken in the exercise of their jurisdictions or authority
- It is essential that Canada retain its exclusive law-making authority in matters of **national interest**, including:
  - ⇒ Powers related to Canadian sovereignty, defence and external relations
  - ⇒ Management and regulation of the national economy

**"Land held in fee simple by the Aboriginal group post effective date of the treaty will not be lands reserved for Indians within the meaning of s.91(24) of the Constitution Act, 1867 nor "reserves" as defined in the Indian Act"**





Aboriginal Self-Government  
Logo

“Self-government funding is a shared responsibility and will be determined using a formula-based approach, including own source revenue components”



## ‘AANDC Powerpoint’ continued from page 11

- ⇒ Maintenance of national law and order and substantive criminal law
- ⇒ Protected of the health and safety of all Canadians
- ⇒ Federal undertakings and others powers
- Scope and content of Aboriginal laws must be clearly defined and the relationship between federal, provincial/territorial and Aboriginal laws (**priority of laws**) must be set out in the treaty or self-government agreement

### Others

- **Funding Framework:** Self-government funding is a shared responsibility and will be determined using a formula-based approach, including own source revenue components
- **Aboriginal Mandate and Representation:** Canada requires that individuals negotiating on behalf of Aboriginal groups be duly mandated and that this requirement be satisfied by evidence of the Aboriginal community’s knowledge and support throughout the negotiation process
- **Ratification:** Canada requires clear and adequate evidence that the negotiated agreement is acceptable and that the members of the Aboriginal group have given consent to the agreement

### Outcomes

#### What happens after the engagement?

- Following the engagement process, Canada will use information gathered to inform internal review of the tables
- Possible outcomes could include:
  - ⇒ **Expediting negotiations**  
As this is a results-based approach to negotiations:
    1. Canada will introduce multi-year negotiation plans where there is sufficient common ground
    2. These plans will ensure that all parties share the same goals and objectives over the next years in terms of reaching milestones and ultimately concluding an agreement-in-principle or a final agreement
    3. Federal mandates for reaching these milestones will be time limited
    4. On an annual basis, Canada will review annual and multi-year plans in order to re-confirm federal participation at the table
  - Possible outcomes could also include:
    - ⇒ Reducing federal participation
    - ⇒ Suspending tables or disengaging from tables, following an orderly process
  - For tables where participation is reduced, table is suspended or where disengagement is proposed, Canada could consider alternative measures for managing Aboriginal rights
- Negotiation tables should be advised of the outcome in spring 2013

**[EDITOR’S NOTE: This text is reprinted from a powerpoint deck prepared by the Federal Department of Aboriginal Affairs & Northern Development, further to a Sept, 4, 2012 AANDC Press Release]**

**ALERT: THE CANADA - CHINA FOREIGN INVESTMENT PROMOTION AND PROTECTION AGREEMENT (FIPA) THREATENS INDIGENOUS RIGHTS**



Canada has negotiated a **Foreign Investment Promotion and Protection Agreement (FIPA)** with China, which was finalized in September 2012. It has the **Government of Canada** and the **Government of the People's Republic of China** as parties and states as its purpose the "**Promotion and Reciprocal Protection of Investments**".

The agreement applies to all measures adopted by the Government of Canada relating to investments, and all entities that exercise any regulatory, administrative or other governmental authority delegated to it. It accords most-favoured nation treatment and national treatment to Chinese investors; and prohibits expropriation of Chinese investments in Canada, which are defined very broadly. Most-favored nation treatment mean Canada cannot treat China and its investors less favourably than those from other countries, while national treatment means Canada cannot treat its own investors, including the economic ventures of Indigenous Peoples, more favourably than those of China. The agreement includes **Part C** - on settlement of investment disputes which allows investors from China to bring a claim for breach of an obligation under the agreement against Canada. The claim will be dealt with by way of arbitration, which can result in large settlement awards, and serve as a disincentive to impose regulations and negotiate honourably with First Nations.

**Prime Minister Harper** has already signed off on the **FIPA** with China, which is now in the ratification process. It has been submitted to parliament, where it has to be tabled for 21-sitting days, before steps can be taken to bring it into force, a time period that will expire by the end of October 2012. The **FIPA** will enter into force after the exchange of diplomatic notes between Canada and China; it cannot be terminated for 15 years and even if Canada gets out at that time, after termination **FIPA's** rules would continue to apply to existing Chinese investments for another 15 years.

**VIOLATION OF INDIGENOUS RIGHTS**

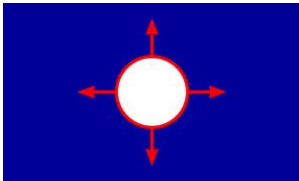
**FIPA** does not directly reference Aboriginal and Treaty Rights, borrowing instead the limited provisions from the **Canada-Peru Free Trade Agreement** in which Canada "**reserves the right to adopt or maintain any measure denying investors from the other party, service providers and their investments, any rights or preferences provided to Aboriginal Peoples.**" These reservations do not protect against claims of expropriation under the **FIPA** protections, which investment panels have interpreted very broadly. The language in the **FIPA** clearly aims to provide increased free access to indigenous lands and resources for Chinese investors (which is in effect a subsidy to them, an argument Indigenous Peoples from British Columbia have been the first to make before international trade tribunals).

The **Supreme Court of Canada** has set out tests to ensure that Aboriginal Title and Rights are not violated and unjustifiably infringed. In response to Canada's business as usual approach it has developed requirements for consultation and accommodation of Indigenous Peoples in regard to developments and decisions that could negatively impact Aboriginal Title and Rights. Yet the government of Canada did not even engage in any consultation with Indigenous Peoples in Canada regarding the proposed **FIPA** with China.

Furthermore, international legal standards and principles foresee that Indigenous Peoples have to provide their prior informed consent to: developments proposed to take place on or impact their traditional territories; and to access to their resources. **Article 19** of the **UN Declaration on the Rights of Indigenous Peoples (UNDRIP)** sets out that: "**States shall consult and cooperate in good faith with the indigenous peoples concerned...in order to**

"language in the FIPA clearly aims to provide increased free access to indigenous lands and resources for Chinese investors (which is in effect a subsidy to them, an argument Indigenous Peoples from British Columbia have been the first to make before international trade tribunals)"





“The Canada-China FIPA could have devastating effects on Indigenous Peoples and Territories. It stated intent is to open the territories up for foreign investment and development.”



## ‘Canada-China FIPA’ continued from page 13

*obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.”*

China voted in favour of **UNDRIP** on September 13, 2007, during the vote in the **UN General Assembly**, Canada has since also endorsed **UNDRIP**. Rather than taking steps to implement **UNDRIP** and the constitutional protection for Aboriginal and Treaty Rights, Canada continued its policies that undermine indigenous rights, when entering into the **FIPA** with China.

The **FIPA** provides greater protection for Chinese investors than for Indigenous Peoples; it applies to all measures adopted by the Government of Canada relating to investments, and all entities that exercise any regulatory, administrative or other governmental authority delegated to it. It could enable Chinese investors to challenge regulations, including to protect the environment and indigenous rights.

The Canada-China **FIPA** could have devastating effects on Indigenous Peoples and Territories. It stated intent is to open the territories up for foreign investment and development. Indigenous Peoples have long been pushing for more sustainable development and priority resource allocation to Indigenous Peoples, which is also recognized by the **Supreme Court of Canada**, but could potentially be challenged under the **Canada-China FIPA**.

### IMMEDIATE ACTION REQUIRED

This time before the **Canada China FIPA** comes into force is a critical time to raise awareness among Indigenous Peoples about its potential consequences on Aboriginal and Treaty Rights and to exercise pressure to ensure it is not brought into force. Indigenous Peoples as holders of constitutionally protected rights have standing to challenge the **Canada China FIPA**. A first potential avenue would be to seek injunctive relief to stop its ratification, due to the potential violation of Aboriginal and Treaty Rights. Another avenue could be a judicial review of the government decision to enter into the **FIPA** absent consultation with Indigenous Peoples and the potential impacts on Aboriginal Title and Rights. Now is also the time to let **Prime Minister Harper** know that Canada has not yet dealt with its legal obligations to First Nations regarding the **FIPA** with China and thus cannot give notice to China that it has done so; nor should Canada proceed with steps to finalize ratification until it has addressed its legal obligations to First Nations.



**L to R:** Prime Minister Harper with Chinese Premier Wen Jiabao. (Photo by Diego Azubel-Pool/Getty Images)

## Canadian Indigenous Leader Sees Potential, Prospects for Cooperation with China



Courtesy of Governor of General Canada's Office

Source: Xinhua

Published By Jane B. Hatcher

BEIJING, Nov. 4 — There are huge potential and broad prospects for cooperation between the Canadian Indigenous People and China, a Canadian Indigenous leader said on Sunday.

***“China is a country on the move. It develops in a tremendous degree with a tremendous pace, which is unimaginable for this to happen in***

***Canada,”*** Edward John, grand chief of the First Nations or Canada’s Indigenous People, told Xinhua.

It’s high time for Canada to facilitate ties with China, the world’s second largest economy, as the two countries celebrated the 40th anniversary of the establishment of diplomatic relations last year, he said.

The Indigenous People should be involved when the Canadian government and business leaders develop relations with China, said John, who has given lectures at Chinese universities on cross-cultural communication.

***“That’s why we come here to tell our stories to the Chinese. That’s why we brought here drums and dances featuring our culture,”*** the Indigenous leader said, explaining that cultural understanding and appreciation could connect the peoples of the two countries better than just economic bond.

John, who is from Northern British Columbia, also stressed the significance of cross-cultural exchanges, saying it’s the best way to protect minorities’ rights, sustain their cultures, enhance understanding and decrease prejudices.

***“Living with differences, which has nothing to do with superiority or inferiority of a culture but with the unique and independent things in it, is a lesson we are yet to learn,”*** he added.

He said that the First Nations only had limited communication with China in trade before a devastating earthquake hit China’s southwest Sichuan province in 2008.

A Canadian indigenous delegation came to Sichuan and donated a totem pole to the ethnic Qiang people as a symbol of respect and healing.

***“It was a gift from the heart to do two things,”*** John said. ***“To honor and remember those who lost their lives in the earthquake, and to let the spirits wipe away the tears of the survivors who lost families and relatives.”***

In 2010, then **Governor General of Canada Michaëlle Jean** and John brought the five-meter pole on a military jet during a state visit to China.

The pole, now standing in the new city of Beichuan county, is a celebration of cultures and a ***“symbolic and generous gesture that is very much appreciated,”*** John quoted **Chinese President Hu Jintao** as saying when meeting him at that time.

***“It is important for a community that has experienced so much difficulty to have this support,”*** Hu said.

The Canadian Indigenous People have sought to increase trade and economic cooperation with China in recent years, as the Indigenous authorities are facing a pressing task to better their people’s livelihood.



***“There are huge potential and broad prospects for cooperation between the Canadian Indigenous People and China”***



### ‘Ed John & China’ conclusion from page 15

As Chinese investment goes into British Columbia, the First Nations has been working with foundations to develop business plans.

*“For now we have offices in four Chinese cities, but we want to see an office in every city of China,”* John said.

*“I really appreciate China for being supportive when we managed to get the UN to adopt the Declaration on Rights of the Indigenous Peoples in 2007,”* said John, who was newly appointed North American Representative to the **United Nations Permanent Forum on Indigenous Issues**.

*“I am glad to see China has now an increasingly important role in international affairs, and that will help secure world peace and minimize crashes,”* he said.

[Reprinted from The First Perspective Website - <http://www.firstperspective.ca/news/2302-canadian-indiginous-leader-sees-potential-prospects-for-cooperation-with-china>]



“For now we have offices in four Chinese cities, but we want to see an office in every city of China”



©Mark Ceolin

Dave Porter, CEO, B.C. First Nations Energy & Mining Council in China.





## **AANDC Press Release on First Nation Organizations Funding Cuts & Caps**

### **Government of Canada Focuses Funding on Essential Programs and Services for Aboriginal Peoples**

Ref. #2-3704

**OTTAWA, ONTARIO (September 4, 2012)** –The Honourable John Duncan, Minister of Aboriginal Affairs and Northern Development, announced today changes to funding for Aboriginal Representative Organizations (AROs) and Tribal Councils.

"The Government of Canada is taking concrete steps to create the conditions for healthier, more self-sufficient Aboriginal communities," said Minister Duncan. "To sustain that progress we are changing the funding model for Aboriginal Organizations and Tribal Councils, to make funding more equitable among organizations across the country, and ensure funding is focused on our shared priorities: education, economic development, on-reserve infrastructure, land management and governance programs."

The new model will make core funding for AROs more equitable and cap it for regional AROs, while project funding will be directed primarily at initiatives that address priorities such as education and economic development, and that promote healthier, more self-sufficient Aboriginal communities.

Tribal Councils will be funded based on several considerations, including the size of the populations they serve, the number of First Nations in their membership, and the range of major programs they deliver. This is the first significant change to the Tribal Council funding program since its launch nearly 30 years ago.

The new approach includes a simplified application and reporting process for Tribal Councils which will reduce the reporting burden on organizations. These changes will be introduced over the next two years, allowing organizations time to adapt their operations and, should they desire to, seek out new sources of funding.

Over the last six years the Government of Canada has invested in creating the conditions for healthier, more self-sufficient Aboriginal communities. Economic Action Plan 2012 builds on that progress with \$275 million in new funding for First Nation education, an additional \$330.8 million to build and renovate water infrastructure on reserve and improve water quality for First Nation communities, \$27 million to renew the Urban Aboriginal Strategy, and \$13.6 million to support Aboriginal consultation on resource development projects.

For more information on the new funding approach, please visit:

- **Backgrounder - Funding for Aboriginal Representative Organizations** [<http://www.aadnc-aadnc.gc.ca/eng/1346805987011/1346806044261>]
- **Backgrounder - Funding for Tribal Councils and Band Advisory Services** [<http://www.aadnc-aadnc.gc.ca/eng/1346806096669/1346806137011>]

### **For more information, please contact:**

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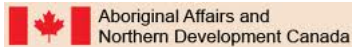
Michael Wernick, Deputy Minister of Aboriginal Affairs & Northern Development Canada

**“the Government of Canada will no longer be providing funding to Tribal Councils for advisory services and funding for Band Advisory Services will be eliminated in 2014-2015”**



NC, PM, GG, CFNG 2012.  
(Photo by Fred Cattroll)

## Letter From AANDC Deputy Minister to First Nation Leaders



### DEPUTY MINISTER

September 5, 2012

To: Chiefs and Councils  
Leaders of Aboriginal Representative Organizations  
Executive Directors of Tribal Councils

We are taking concrete steps to create the conditions for healthier, more self-sufficient Aboriginal communities. To sustain our progress, we are ensuring that government funding is directed primarily at the delivery of essential services and programs for Aboriginal Peoples.

To that end, we are introducing a new approach to funding for Aboriginal Representative Organizations (AROs) and Tribal Councils.

Under the new funding formula, all National and Regional AROs in receipt of core funding in 2012-2013 will have their funding reduced. Effective April 1, 2014, core funding for national Aboriginal Representative Organizations will be reduced by 10%. Regional AROs will receive a 10% reduction or have a ceiling up to \$500K applied to their core funding.

There will also be gradual reductions in the resources available for proposal-based project funding. Project funding will be more closely aligned with shared priorities: education, economic development, community infrastructure, and other initiatives that promote greater self-sufficiency in Aboriginal communities.

For the first time in over 30 years we are changing the Tribal Council funding program. Since many advisory services are now provided by other organizations, the Government of Canada will no longer be providing funding to Tribal Councils for advisory services and funding for Band Advisory Services will be eliminated in 2014-2015.

Instead, funding provided to Tribal Councils will be focused on the more effective, efficient delivery of essential programs and services to Aboriginal Peoples and communities. Tribal Councils will continue to receive base funding, with incentives to support increased delivery of Aboriginal Affairs and Northern Development programs and services to communities.

Overall, our new approach to funding will create greater funding equity among Aboriginal organizations across Canada, and it will streamline reporting requirements for funding recipients. It is also consistent with government-wide efforts to ensure that public funds are being used primarily for the delivery of essential services and programs, and that our operations are streamlined and efficient.

We recognize that these measures will require some organizations to adapt their operations. That is why implementation will occur over the next two years, allowing your organization to make any necessary operational changes, as well as to seek out other potential sources of funding should you require it.

In the coming days your organization will be contacted by AANDC officials to discuss the changes to the funding model.

Yours Sincerely,

“Original Signed By”

Michael Wernick

## Russell Means Remembered as Man of Inspiration (1939-2012)



Russell Means talking to reporters. (Photo: Lloyd Cunningham, Gannett/Argus Leader)

29 October 2012

AARON ORLOWSKI, Rapid City Journal

KYLE, S.D. (AP) – No single individual likely will ever fill Russell Means' shoes, but his legacy likely will be multiplied many times over by the Native Americans he inspired, his brother said at the Native American activist's funeral service in Kyle.

Means died Monday of throat cancer at the age of 72. On Wednesday, more than 300 people attended the funeral service on the Pine Ridge



Empty saddle for Russell Means last ride.

**"No single individual likely will ever fill Russell Means' shoes, but his legacy likely will be multiplied many times over by the Native Americans he inspired,"**

Indian Reservation.

"He will be replaced by thousands," said Bill Means, Russell Means' only surviving brother. "One person is not going to replace him, but through his work, through his family, he will be replaced 1,000 times over."

Those attending the service said Means made them feel proud to be a Native American by encouraging them to take pride in their heritage and challenging them to live it.

Means himself never shied away from confrontation. As a young American Indian Movement leader, he spearheaded the 71-day occupation of Wounded Knee, which grabbed the attention of the entire nation.

But Means was never meant to be a warrior, said Chief Leonard Crow Dog, a Lakota medicine man who participated in the Wounded Knee occupation in 1973. Means, he said, was first and foremost a spiritual leader, but the times called for a warrior, and like Crazy Horse, that is what he transformed into.

"He will enter the happy hunting grounds," Crow Dog said before a procession that consisted of horseback riders who met several miles outside Kyle for a solemn journey to Little Wound High School, where an honoring was held into the night.

Means' cremated remains were brought Wednesday from his ranch in Porcupine to the spot several miles outside of Kyle, where friends and family carried him the rest of the way on horseback on a dreary and cold day.

One horse had no rider, a horse Means never had a chance to ride. On Wednesday, it was said to carry his spirit.

"I never did ride with him," Scott Siquah Means, Russell Means' second son, said before the ride. "Today is my first time I'll be riding with him."

Before the ride, Scott fondly recalled how his father always encouraged him when he lost a boxing match, saying that he lost on a split decision. Only later did he realize that likely wasn't true and his father was just building his confidence.

Along the way to Kyle, the riders made four stops, each time saying a prayer.



Russell Means as an actor.

Advancing the Right of First Nations to Information

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The First Nations Strategic Policy Council is a collection of individuals who are practitioners in either First Nations policy or law. We are not a formal organization, just a network of concerned individuals.

This publication is a volunteer non-profit effort and is part of a series. Please don't take it for granted that everyone has the information in this newsletter, see that it is as widely distributed as you can, and encourage those that receive it to also distribute it.

Feedback is welcome. Let us know what you think of the Bulletin—Russell Diabo, Publisher and Editor, First Nations Strategic Bulletin.

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For Back Issues Go To:

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## 'Russell Means' conclusion from page 19

The horseback procession carried Means' ashes to the Little Wound High School gymnasium. The riders chanted traditional songs as they approached the school and emerged from the fog. A drum beat and cries were heard as the group neared the school.

A long trail of cars followed the riders – friends and family members – to pay their respects to a man many on the reservation admired.

At the school, the riders gathered in a half-circle, facing an audience of admirers before a Lakota prayer was said. Tatanka Means carried his father's ashes into the school and brought them before the crowd that had gathered.

For hours afterward, family, friends and admirers shared stories of Russell Means with each other, taking turns at the microphone. Some stories were told in the Lakota language, others in English.



Well-wishers from across the country attended, with tribal members and others coming from as far away as Florida, Oklahoma, California, Colorado and Minnesota.

Leaders from the Yankton Sioux Tribe and Oglala Sioux Tribe made appearances, including OST President John Yellow Bird Steele. Numerous other dignitaries paid their respects, including Rapid City Mayor Sam Kooiker and a representative of Sen. John Thune's office.

"He gave pride to something that was systematically crushed," said Ward Churchill, an activist, writer and former co-director of the Colorado chapter of AIM. "To be Indian was to not be human. He turned that around in a real fundamental way."

Churchill, a former professor at the University of Colorado Boulder, said Means could speak with elderly Indians as easily as lifelong academics.

"He took the language back from them," he said.

Arthur Zimiga, a lifelong friend of Means, said Means redefined what it meant to be Indian and helped Native Americans understand who they were apart from how the United States government defined them.

"He was looking for equality. He said, 'I am a man, and I have a right to be a man and be free,'" Zimiga said.