

[COMMITTEE PRINT]

3470

REPORT ON FEDERAL, STATE, AND  
TRIBAL JURISDICTION

---

TASK FORCE FOUR: FEDERAL, STATE, AND  
TRIBAL JURISDICTION

---

FINAL REPORT TO THE  
AMERICAN INDIAN POLICY REVIEW COMMISSION



**For Reference Only  
Do Not Remove  
From Library**

SHERWIN BROADHEAD, *Chairman*  
JUDGE WILLIAM ROY RHODES, *Pima*  
MATTHEW CALAC, *Rincon*  
PAUL ALEXANDER, *Special Counsel*  
DONALD R. WHARTON, *Specialist*

---

Printed for the use of the American Indian Policy Review Commission

---

U.S. GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1976

77-467

AMERICAN INDIAN POLICY REVIEW COMMISSION

Senator JAMES ABOUREZK, South Dakota, *Chairman*  
Congressman LLOYD MEEDS, Washington, *Vice Chairman*

Senator LEE METCALF, Montana  
Senator MARK HATFIELD, Oregon  
Congressman SIDNEY R. YATES, Illinois  
Congressman SAM STEIGER, Arizona

JOHN BORBRIDGE, Tlingit-Haida  
LOUIS R. BRUCE, Mohawk-Stoux  
ADA DEER, Menominee  
ADOLPH DIAL, Lumbee

JAKE WHITECROW, Quapaw-Seneca-Cayuga

ERNEST L. STEVENS, Oneida, *Executive Director*

KIRKE KICKINGBIRD, Kiowa, *General Counsel*

MAX I. RICHTMAN, *Professional Staff Member*

(II)

LETTER OF TRANSMITTAL

AMERICAN INDIAN POLICY REVIEW COMMISSION,  
CONGRESS OF THE UNITED STATES,  
*Washington, D.C., July 1976.*

THE AMERICAN INDIAN POLICY REVIEW COMMISSION,  
*Congress of the United States,*  
*Washington, D.C.*

DEAR SIRS AND MADAM: The task force on Federal, State and tribal jurisdiction presents to you this report pursuant to Public Law 93-580.

The report contains the task force's findings and recommendations in some of the major areas of current jurisdictional conflict.

Before this report is published in final form, the task force urges that all Indian tribes and organizations, as well as other interested parties, be given the opportunity to review and comment on the report. It had been the intention of the task force to do this; however, limitations of time precluded such review.

With the above indicated caveat, we urge your consideration of the facts presented, and your good efforts in ensuring implementation of the recommendations made.

Respectively yours,

SHERWIN BROADHEAD,  
*Chairman*

MATTHEW CALAC  
*(Rincon Band of Mission Indians)*  
Judge WILLIAM ROY RHODES  
*(Pima)*

PAUL ALEXANDER,  
*Special Counsel*

DONALD R. WHARTON,  
*Specialist*

(III)

## ACKNOWLEDGMENT

The task force—members and staff—wish to thank the many tribal leaders and individual tribal members for their consistently high level of cooperation with the task force.

The task force also wishes to express its appreciation to the following individuals who assisted in various capacities:

Professor John Barrett, Northwest School of Law—Consultant  
 Michael Chosa (La Courte Orielles Band of Chippewas)—Consultant  
 Rosemarie Cornelius (Sioux/Oneida)—Clerical Assistant  
 Lucy Covington (Colville)—Consultant  
 James Flynn—Attorney  
 Jan Hopkins-Duke—Secretary  
 Professor Ralph Johnson, University of Washington School of Law—Consultant  
 Gene Joseph (Colville)—Consultant  
 Ernestine Lewis—Secretary  
 James McKay (Shoshone-Lummi)—Legal Assistant  
 Sandy McFeeley—Legal Assistant  
 Margaret Pena—Legal Assistant<sup>1</sup>  
 Catherine Romano—Legal Assistant  
 Carole Roop—Secretary  
 Richard Shipman—Attorney<sup>1</sup>  
 Fred Stone—(Colville)—Research Assistant  
 Anthony Strong (Tlingit)—Legal Assistant  
 Kathryn Harris Tijerina (Comanche)—Attorney<sup>1</sup>

<sup>1</sup> Members of Research Unit under the able direction of Gilbert Hall, Esq.

(IV)

## CONTENTS

	Page
Letter of Transmittal.....	III
Acknowledgments.....	IV
I. Preface.....	1
A. Introduction.....	1
B. Methodology.....	2
II. Issues in Public Law 280 States.....	4
A. The Theory and Purpose of Public Law 280.....	7
B. The Current Status of the Implementation of Public Law 280.....	7
1. Status by Tribe and State.....	10
2. Status by Subject Matter.....	10
(a) Hunting and Fishing Rights.....	10
(b) Land-Use Regulations.....	11
(c) Taxation.....	12
C. Retrocession.....	13
1. Generally.....	13
2. Status.....	13
D. The Public Law 280 States.....	15
1. The Indian Perspective.....	15
(a) Law Enforcement.....	15
(i) Adequacy of Law Enforcement.....	16
(ii) Discriminatory Treatment.....	18
(b) Other Services.....	19
2. The Non-Indian Perspective.....	20
E. The Retrocession Movement.....	24
F. Special problem Areas.....	26
1. Recent Retrocession Experience: Lessons Learned.....	26
(a) Nevada.....	26
(b) Menominee.....	28
2. Technical and Legal Services.....	29
(a) Preparation.....	29
(1) Private Resources.....	30
(2) Federal Resources.....	30
Findings.....	32
Recommendations.....	32
III. The Federal Role in Jurisdiction.....	34
A. The defined role.....	34
1. Criminal Jurisdiction.....	35
(1) Major Crimes Act.....	36
2. General and Assimilative Crimes Act.....	40
Findings.....	42
Recommendations.....	42
B. Creeping jurisdiction.....	47
1. Applicability of General Regulatory Statutes to Indian Country.....	48
2. Applicability of Statutes Regulating Federal Agencies to Indians.....	49
3. Applicability to Indians of Federal Statutes Delegating Authority to the States.....	51
4. Applicability to Indians of Domestic Assistance Statutes Giving States Authority to Participate in Program Delivery.....	52
Findings.....	54
Recommendations.....	55

(V)

	Page
IV. Special Problem Areas.....	57
A. Hunting and Fishing Rights.....	57
1. On-reservation Hunting and Fishing Rights.....	58
(a) State Regulation.....	58
(i) Present Status of the Law.....	58
(ii) States.....	60
(b) Federal Regulation.....	63
(c) Tribal Regulation.....	65
2. Off-Reservation Hunting and Fishing.....	67
(a) The States.....	68
(b) Federal Regulation.....	73
(c) Tribal Regulation.....	74
3. Aboriginal Fishing Rights.....	75
Findings.....	76
Recommendations.....	77
B. Child Custody.....	78
1. The Demography of the Problem.....	81
2. Legal Status—Who Decides?.....	85
Findings.....	87
Recommendations.....	87
C. Jurisdiction over non-Indians.....	88
1. The Legal Case for Jurisdiction Over Non-Indians.....	89
2. Indian country.....	94
3. Viewpoints.....	96
(a) Non-Indians.....	96
(b) Indian Viewpoints.....	98
Findings.....	100
Recommendations.....	101
D. Taxation.....	101
1. Federal Taxation of Indians and Indian Property.....	102
2. State Taxation of Indians and Indian Property.....	103
3. Taxation by Indian Tribes.....	108
Findings.....	110
Recommendations.....	110
E. Land Use Controls.....	111
1. The Federal Government.....	113
2. Federal, State and Tribal Interplay.....	115
3. State Controls on Tribal Land.....	116
4. Tribal Controls of Lands Within Reservation Boundaries.....	117
Findings.....	118
Recommendations.....	119
F. Oklahoma.....	120
V. The Exercise of Jurisdiction by Indian Justice Systems.....	121
A. Background.....	121
B. The Current Justice Systems.....	124
1. Issues.....	125
(a) Capabilities.....	125
(b) Training and Funding.....	126
(c) Coordination and Cooperation.....	128
C. Indian Civil Rights Act.....	129
1. Legislative History and Background.....	129
2. Summary of Provisions of Indian Civil Rights Act.....	131
3. Scope of Intervention by Federal Courts.....	132
(a) Legislative History of Habeas Corpus Pro- vision.....	132
(b) Expansion of Jurisdiction Under 28 U.S.C. 1331 (a) and 28 U.S.C. 1343 (4).....	133
(c) Exhaustion of Tribal Remedies or Limita- tion on Federal Court Intervention.....	134
(d) Lack of Justiciable Issue.....	135
4. Sovereign Immunity of Tribe From Suit.....	135
5. Cases by Subject Matter.....	137
(a) Free Exercise of Religion, Freedom of Speech, Press and Assembly.....	137
(1) Free Exercise of Religion.....	137

V. The Exercise of Jurisdiction by Indian Justice Systems—Continued	
C. Indian Civil Rights Act—Continued	
5. Cases by Subject Matter—Continued	Page
(b) Freedom of Speech.....	138
(c) Equal Protection.....	139
(1) Legislative Reapportionment.....	140
(2) Fair Election Practices.....	141
(3) Age and Residency Requirements for Voting.....	142
(4) Enrollment and Membership in the Tribe.....	142
(d) Due Process.....	144
(e) Property Disputes.....	146
(f) Criminal Procedures and Ordinances.....	147
(1) Attorney Cases.....	147
(2) Jury Trial.....	147
(3) Revocation of Probation.....	147
(4) Imprisonment for Inability To Pay Fine.....	148
(5) Unreasonable Search and Seizure.....	148
Findings.....	149
Recommendations.....	149
Findings and Recommendations.....	151
A. General.....	151
Findings.....	151
Recommendations.....	151
VII. Appendices:	
A. Special Problem Areas: Water Rights.....	153
B. Indian Child Welfare Statistical Survey.....	177
C. Jurisdiction Over Indian Hunting and Fishing Authority.....	243
D. Proposal for Clarifying the Tax Status of Indians.....	254

## I. PREFACE

### A. INTRODUCTION

The concepts of sovereignty and jurisdiction are inherently intertwined, and some understanding of both is a necessary prerequisite to this report.<sup>1</sup>

Sovereignty is a legal concept of western European international law. It defines the political-legal existence of a nation-state. Jurisdiction in its simplest terms is the legitimate power of a sovereign over people and property.

Whatever political definitions the various Indian tribes and nations had applied to themselves before the arrival of the European colonizers, the relationship established between the Indian tribes and the European powers—one characterized by treaties—was based on the concept of sovereignty.<sup>2</sup> Sovereignty has become the starting point for any discussions or decisions with respect to Indian tribes and nations and the jurisdiction they possess over people and property.

Defining jurisdiction in conceptual terms does not, however, give full breadth to the past and present difficulties involved in ascertaining jurisdictional relationships between and among the Federal Government, State governments and tribal governments.<sup>3</sup> The seminal premise is that prior to European colonization and settlement of the North American continent, Indian tribes and nations possessed full jurisdiction over the territories they occupied and the people within those territories. Full jurisdiction has since been eroded.

The three fundamental principles stated by Felix Cohen on the American jurisprudential view of tribal powers, or jurisdiction, have often been quoted:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and in substance terminates the external powers of sovereignty of the tribe, e.g., its powers to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, have full powers of internal duly constituted organs of government.<sup>4</sup>

<sup>1</sup> For discussions of these concepts written for non-lawyers see: National American Indian Court Judges Association, "Justice and the American Indian: vol. 4 Examination of the Basis of Tribal Law and Order Authority," at 27-40, undated (hereinafter cited as NAICJCA, vol. 4; and Coulter, T., "Institute for the Development of Indian Law, Indian Jurisdiction," undated.

<sup>2</sup> Tribes are "distinct, independent, political communities \* \* \*" *Worcester v. Georgia*, 31 U.S. (6 Pet. 515 (1832)).

<sup>3</sup> For an excellent historical-legal discussion of the relationship, see Taylor, P., "Development of Tripartite Jurisdiction in Indian Country," 22 Kan. L. rev. 351 (1974).

<sup>4</sup> Cohen, F., "Handbook of Federal Indian Law," (University of New Mexico, Ed.), at 123, (1942) (hereinafter cited as Cohen). Note: The task force, like many others in the field, does not use the inaccurate 1958 "revision" produced by the U.S. Department of the Interior. See the preface to the University of New Mexico Press edition for a full explanation.

The report examines the basis of each government's claim of jurisdiction and how such claims operate within a national policy objective of Indian "self-determination,"<sup>5</sup> and suggests Congressional solutions to problems where warranted.

In addressing problem areas, two principles are adhered to throughout the report. The first is the political-legal definition of Indian tribes and nations as sovereign entities.<sup>6</sup> The second is that when faced with ambiguities or conflicting factual materials, the task force will endeavor to be as fair and objective as possible in interpreting testimony, data or any other matter, but will follow those rules of construction utilized by the United States Supreme Court in interpreting U.S. Indian treaties and statutes.<sup>7</sup>

## B. METHODOLOGY

This report relies heavily on the hearing process as a basis for developing its findings and recommendations. During the one year life of the task force, it participated in 28 days of hearings. At these hearings some 250 witnesses testified, representing tribal officials, state and local government officials, Federal officials and private citizens, both Indian and non-Indian. Some 4,500 pages of testimony were taken and an additional 3,000 pages of exhibits and submissions were obtained. In all, approximately 90 tribes had input through the hearing process. These hearings were not precipitously held. Invitations were sent to tribal and state officials to attend; in many cases detailed issue questions were provided to potential witnesses to facilitate factual, thoughtful testimony. Many site visits were conducted by the task force to collect data and hearing testimony.

In addition to hearings and the materials collected and developed through them, the task force has made an extensive review of the literature in the subject area and has utilized consultants in specific areas to prepare position papers.

A review and analysis of the developing case law has also been conducted. Case law, however, is a separate category of source material with distinct limitations and must be explained in some detail. The courts, using the "political question doctrine," defer to Congress apparently in adherence to the "plenary powers doctrine."<sup>8</sup> Congress has plenary power over Indian tribes on all matters. Congressional action in Indian affairs, although subject to the considerable weapon of court interpretation, is not reviewable on the same basis as are acts of Congress in other areas. In effect, the substantial body of case law

<sup>5</sup> Two fairly recent expressions of this policy are found in Public Law 93-638 and President Richard M. Nixon's 1970 Message to Congress, 116 Congressional Record 23131.

<sup>6</sup> The task force specifically rejects suggestions made to it that Indian tribes and nations are definitionally and legally akin to charitable organizations, property owners associations or social clubs as having no factual or legal bases. See e.g., *U.S. v. Mazurie*, 419 U.S. 544 (1975).

<sup>7</sup> These rules are: ambiguities are resolved in favor of Indians; agreements will be read as they would have been understood by the Indians at making; and jurisdiction will not be lost by inference. See generally, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 350, (1832); *Menominee Tribe v. U.S.*, 398 U.S. 404 (1968); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 145, 174 (1973); and *Kimball v. Callahan*, 493 F. 2d 564 (9th Cir. 1974).

<sup>8</sup> Some significant commentaries in this area reject the plenary power doctrine as having neither a basis in international law nor in the U.S. Constitution itself. This view may in fact be accurate as a *de novo* matter. As a matter of functioning in fact, whether the U.S. Congress has such power *de jure*, it clearly exercises such power *de facto*. See *contra*, Report of Task Force One, statement of Hank Adams.

that has been built up, much of which is considered pro-Indian, is merely judicial interpretation of congressional action. For example, it was, and presumably still would be, constitutionally "legal" to remove by legislation all Indian tribes from Georgia to Oklahoma. (It is quite doubtful whether Congress would have the same power over other distinct population groups who are not political units.)

The case law suffers from an even more important disability: it is not Indian case law. Simply put, it is the case law of one side, albeit the powerful side, in the controversies concerning non-Indians and Indians. It is the case law of non-Indians. The Task Force will utilize case law throughout the report and will indicate the directions that case law takes; however, the Task Force will not be precluded from recommending results contrary to those reached by the courts where facts and circumstances warrant.

The format of this report is built around the major subject areas where jurisdictional questions and conflicts currently exist. The report does not purport, however, to be a definitive statement or the last word on Federal, State and tribal jurisdiction.<sup>9</sup>

<sup>9</sup> This report is subject to many limitations based on the period of time available for research, the period of time available for analysis and drafting, the wide-ranging complexity of the subject matter, and the economic resources available to the task force.

Any section of this report could easily be the subject of an individual report requiring at least the same time and financial resources as did the entire report. For example, to collect basic data on the operations of tribal courts the BIA recently spent \$35,000 for a study which is not yet complete. The Navajo Nation alone spent over \$200,000 on a study of its management system.

The task force has participated in separate research efforts and special reports with respect to both Oklahoma and Alaska; however, little to no material pertaining to those areas is contained in this report. Although information was collected concerning terminated and nonrecognized tribes, they too are omitted.

The report covers only some of the subject areas which can be logically classified as being within the jurisdiction framework; the scope of coverage even in these areas varies within the report.

## II. ISSUES IN PUBLIC LAW 280 STATES

### A. THE THEORY AND PURPOSE OF PUBLIC LAW 280

Practically every commentary on Public Law 280 (P.L. 280)<sup>1</sup> begins with a sentence or paragraph which refers to the pendulum swing in federal policy between Indian "self-determination" and Indian "termination." Although the terms are overly broad and the pendulum swing sometimes appears to be going in several directions at once, the point is well taken. In the 1950's, a period that would, in Indian country, be known as the "termination era," Congress shifted policy again and took a number of actions designed to end the unique relationship that had existed between the Federal Government and tribal governments since the formation of the Federal Government.

The first major action of Congress was House Concurrent Resolution 108,<sup>2</sup> which declared it to be the national policy to:

... make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof . . . (specific tribes and states) . . . should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians . . .

While at first glance House Concurrent Resolution 108 would seem to fit within traditional American notions of equality and fair play, and many non-Indian citizens would no doubt perceive its language as pro-Indian, Indian people have most often taken quite a different view. House Concurrent Resolution 108 is seen as destroying tribal institutions,<sup>3</sup> as in effect depriving Indian people of their status as nation-states—tribes—and forcing them to assimilate individually into the larger social-political society. Indians perceived the tribal-Federal relationship as one between sovereigns, based on treaty and negotiation, and rooted in the trust responsibility that the Federal Government has legally and morally to Indian tribes.<sup>4</sup>

Another major congressional action of the period was a broad-ranging mandatory and permissive transfer of Federal jurisdiction and responsibility in Indian affairs to State governments. This enactment is known as Public Law 280 and contains three mechanisms for the

assumption of federal jurisdiction by the individual states: (1) Assumption is mandatory in five named States—California, Minnesota, Nebraska, Oregon, and Wisconsin;<sup>5</sup> (2) Assumption is at the option of the State by affirmative action which must include removing State constitutional disclaimers barring such jurisdiction.

This mechanism applies to Arizona, Montana, New Mexico, North Dakota, South Dakota, Utah, and Washington; and (3) Assumption is at the option of the State by affirmative legislative enactment (no constitutional disclaimers being present). This applies to all other States wherein federally-recognized tribes reside. Congress specially excluded three areas from the Federal jurisdiction the States were allowed to assume. Excluded is any State jurisdiction pertaining to the alienation or taxing of trust property, or any State jurisdiction pertaining to treaty recognized hunting, fishing, or trapping rights. As originally passed, Public Law 280 required neither the consent of the affected tribes nor even consultation with the affected tribes.<sup>6</sup> Several individual tribes managed to get themselves excluded from the coverage of Public Law 280 on the premise that they had " \* \* \* a tribal law and order system that functions in a reasonably satisfactory manner \* \* \*." Not all tribes which objected were excluded. Some 15 years later, as the pendulum was swinging once more, the Indian Civil Rights Act of 1968 amended Public Law 280 prospectively to require tribal consent before any State assumption of jurisdiction.<sup>7</sup>

There are several interrelated, although distinguishable, underlying assumptions inherent in the termination philosophy upon which Public Law 280 was, at least in part, based: the assimilation of Indian people into the mainstream of American life; the removal of an oppressive and paternalistic BIA bureaucracy; and the provision of adequate law enforcement services to non-Indians, and Indians, in reservation areas.

Others, who take a more historical and perhaps economic view of the Federal Government's relationship to Indian nations, have asserted that the primary motivation—whether acknowledged or not—was the desire for Indian land:<sup>8</sup>

\* \* \* and finally, the question: Why do states want the additional responsibility of jurisdiction over Indian reservations with all the added costs this would incur? This answer too is simple. Above all they are interested in "control." Control over the territory or lands of the Indian tribes. Why do they want this control? Because, since the first European set foot on the eastern shore, the non-Indian population of America has coveted the Indians' land.

The assimilationalist philosophy has been periodically applied to Indians. The philosophy contains many elements, some of which have a surface attraction, such as allowing Indians to share in the educational, material, et cetera, benefits of American society. There are, however, several basic flaws in this view. It is baseline racism to

<sup>1</sup> Codified as 18 U.S.C. § 1162 and 28 U.S.C. § 1360.  
<sup>2</sup> 83d Cong., 1st sess. (1953).  
<sup>3</sup> The following tribes were in fact terminated: 61 tribes, groups, communities, rancherias or allotments in California terminated 1954-60; Pature (Bands), Public Law 762 (1954); Klamaths, Public Law 357 (1954); Menominee Public Law 399 (1954); mixed-blood Utes; Wyandotte; Ottawa; Alabama Indians; and Texas Coushatta.

<sup>4</sup> See Task Force No. 1's Report on Trust Responsibility.  
<sup>5</sup> With statehood, Alaska would be added to this mandatory group.  
<sup>6</sup> President Eisenhower objected to this lack of tribal consent on Aug. 5, 1953; his message of Aug. 5, 1953, accompanying the act. He did sign the legislation. Reprinted in: 102 Cong. Rec. 399 (Jan. 12, 1956). A number of States did, however, institute tribal consent provisions.  
<sup>7</sup> 25 U.S.C. § 11231-26 (1970). The act also provides for retrocession of jurisdiction to the Federal Government by States.  
<sup>8</sup> Statement of Wayne Ducheneaux, chairman, Cheyenne River Sioux Tribe, hearings on S. 2010 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st sess. (1975). (Hereafter cited as S. 2010 hearings.)

assume that because a culture is different from the dominant culture it is inferior. The notion of the "white man's burden," whether applied to Victoria's India, or to the Indians within the continental United States, suffers conceptually from the same cultural elitism.

Assimilation as a philosophy takes many forms; it assumes that the trust responsibility of the United States runs to individual Indians as opposed to the tribes. Most arguments, therefore, are cast in terms of how termination can better the lot of individuals, with little or no reference to the tribal relationship. In an interesting twist of logic and historical reality, it also defines Indian tribal identity as separatism and, hence, unconstitutional segregation.<sup>9</sup>

The role of the Bureau of Indian Affairs has been subject during its existence to recurrent criticism from a variety of quarters, not the least of which comes from Indian tribes. In the 1920's, the Meriam report acknowledged the poor quality of services that were being provided to Indians by the Federal bureaucracy.<sup>10</sup> In fact, one response to the Meriam view that State services were generally superior to the BIA's was the legislation authorizing the Secretary of the Interior to enter into contracts with States for the provision of various social services.<sup>11</sup> The dissatisfaction with the BIA was growing in the period preceding the passage of Public Law 280. In 1943, the Senate Committee on Indian Affairs issued a critical report on the BIA's activities, concluding that it should be abolished.<sup>12</sup> Felix Cohen published a blistering attack on the BIA bureaucracy shortly before the passage of Public Law 280.<sup>13</sup> Cohen, who was opposed to the philosophy of Public Law 280, made an interesting point about termination that apparently, and unfortunately, has been ignored. The essence of the argument is that although the BIA periodically supports termination or withdrawal of its stewardship, the historical reality is that each such attempt is followed by huge increases in the Bureau's budget and staffing pattern. In other words, the Bureau seems to have manipulated termination into a mechanism to insure its continued bureaucratic survival.<sup>14</sup>

The major argument, however, for the passage of Public Law 280 was "the hiatus of criminal law enforcement on Indian reservations."<sup>15</sup>

Indian tribes do not enforce<sup>16</sup> [in certain areas]<sup>17</sup> the laws covering offenses committed by Indians \* \* \*.<sup>18</sup>

Complaints were multiple and of different influences concerning the quality of law enforcement on Indian reservations; for example, the multiplicity of laws which were felt to apply, depending on who was the victim and/or perpetrator of the criminal act; the distance and

<sup>9</sup> This argument has no basis. See *U.S. v. Mazurie*, 419 U.S. 544, 557 (1976).

<sup>10</sup> Meriam & Associates, "The Problem of Indian Administration," 1928.

<sup>11</sup> See Cohen, *supra*, at 83, for a brief discussion of the Johnson-O'Malley Act of 1934, 25 U.S.C. § 452.

<sup>12</sup> S. Rept. No. 310, 78th Cong., 1st sess. (1943) cited in Congressional Research Service, "Background Report on Public Law 280" (Senate Committee on Interior and Insular Affairs print 1975).

<sup>13</sup> The Erosion of Indian Rights, 1950-53: "A Case Study in Bureaucracy," 62 Yale L. J. 348 (1948).

<sup>14</sup> *Ibid.*, at 387.

<sup>15</sup> Rept. No. 848, 83d Cong., 1st sess. (1953).

<sup>16</sup> H. Rept. No. 1506, 80th Cong., 2d sess. (1948).

<sup>17</sup> See Goldberg, C., "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," 22 U.C.L.A. L. Rev. 535, 541 (1975). Hereinafter cited as Goldberg. An interesting contrast during this period of congressional complaint about the efficacy of law enforcement on Indian reservations is that Congress was at the same time consistently reducing Federal funds for law enforcement on reservations. See BIA, Division of Law Enforcement Services, "Indian Law Enforcement History," at 55-59 (1975).

<sup>18</sup> *Ibid.*, at 536.

inefficiency of Federal police providing services to rural, dispersed reservations; the lack of efficient justice—in the common law sense—for Indians from tribal governments; and the cost of the Federal provisions of police services. A major component of the argument over criminal law enforcement seems, however, to have reflected congressional concern for the safety of non-Indians:

\* \* \* lawlessness on the reservations and the accompanying threats to anglos living nearby.<sup>19</sup>

The situation concerning California Indians in the 1940's and the 1950's played a large part in the drive for Public Law 280. In fact, several commentaries and the legislative history itself indicate that the whole P.L. 280 legislative effort began as a specific effort to unravel the economic and political problems of California Indians, particularly those of the Aqua Caliente Band and the city of Palm Springs.<sup>20</sup>

The California focus which was predominantly related to criminal law enforcement spread to all Indian country and then somehow, without much congressional indication of why, to most civil matters as well.<sup>21</sup> In fact, Public Law 280, as finally passed, was a poorly drafted piece of legislation that has caused more confusion and problems than it has resolved.

## B. THE CURRENT STATUS OF THE IMPLEMENTATION OF PUBLIC LAW 280

### 1. STATUS BY TRIBE AND STATE

There is considerable variation in Indian country as to what jurisdiction<sup>22</sup> over specific reservations the different States have assumed. In addition to the jurisdiction assumed pursuant to Public Law 280, the current jurisdictional status is influenced by a series of specific Federal statutes which transferred jurisdiction piecemeal to States with respect to some or all of the tribes within their geographical borders, and by certain distinct historical relationships.<sup>23</sup>

The following chart<sup>24</sup> summarizes by State the current status of jurisdictional transfer to States where federally recognized tribes are found. It also indicates whatever case law exists pertaining to the mechanism or validity of the transfer of jurisdiction.<sup>25</sup>

<sup>19</sup> *Ibid.*, at 541.

<sup>20</sup> See California Department of Housing and Commercial Development, "California Indians and Public Law 280," at 15 (1974), and Goldberg, *supra*, at 540.

<sup>21</sup> The act of Oct. 5, 1949, ch. 604, 63 Stat. 705, transferred civil and criminal jurisdiction over Aqua Caliente to California. Goldberg, *supra* nt. 17. One major historical, factual fallacy in the process of legislative development is that the tribal history of California Indians bears little to no relationship to the histories of other tribes in Indian country. The status of tribal government, reservations, treaty relationship, acculturation patterns, size, wealth, et cetera, all reflect the unique California system of tribal destruction tied to church slavery systems that ultimately manifested itself in reorganization of Indians into bands associated with particular missions—the "mission Indians." See generally Kroeber, A. L., "Handbook of the Indians of California" (1925) and Forbes, J. D., "Native Americans of California and Nevada" (1969).

<sup>22</sup> This section does not define, since Public Law 280 does not affect, the jurisdiction that tribes and/or States may or may not have over non-Indians on reservations. This issue is treated separately in chapter III, section C.

<sup>23</sup> E.g., the relationship between North Carolina and the eastern band of Cherokees and the relationship (treaties) between certain States and tribes preceded the United States.

<sup>24</sup> This chart is based, in part, on a comprehensive analysis on a reservation-by-reservation basis showing State jurisdiction pursuant to Public Law 280 or other statutes as it presently exists (Mar. 1, 1975), as submitted by the Department of the Interior, to hearings on S. 2010, Subcommittee on Indian Affairs, of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d sess., at 642; and NAICJA, "Justice and the American Indian," vol. I at 83 (undated).

<sup>25</sup> Section II-B(2) discusses the scope of State jurisdiction as to subject matter.



State	Status Re Public Law 280	Other assumption of jurisdiction	Case law development/ validity of assumption
Alaska	Full assumption of jurisdiction except for Metlakatla Reservation over which criminal jurisdiction is not asserted.		
Arizona	Assumption of jurisdiction only over air and water pollution.		
California	Full assumption of jurisdiction		
Colorado	No jurisdiction		
Florida	Full assumption of criminal and civil jurisdiction.		
Idaho	Assumption of jurisdiction in the following areas: Compulsory school attendance; Juvenile delinquency and youth rehabilitation; Dependent, neglected, and abused children; Insanities and mental illnesses; Public assistance; Domestic relations; Operation and management of motor vehicle upon highways and roads maintained by the county, or State, or political subdivision thereof.		
Iowa		Limited criminal jurisdiction re Sac and Fox pursuant to act of June 30, 1948, ch. 759, 62 Stat. 1161.	
Kansas	No jurisdiction	Criminal jurisdiction pursuant to act of June 8, 1940, ch. 276, 54 Stat. 249.	
Louisiana	do		
Maine	do	Issue open to question, re Federal recognition of previously only State recognized tribes.	
Michigan	do	State asserts historically; no apparent legal basis.	
Minnesota	Full assumption of jurisdiction except for the Red Lake Reservation, and criminal jurisdiction has been retroceded over Bois Forte—Nett Lake Reservation.		
Mississippi	No jurisdiction		
Montana	Assumption of limited civil and criminal jurisdiction on Flathead Reservation in the following areas: Compulsory school attendance; Public welfare; Domestic relations (except adoptions); Mental health and insanity; care of the infirm, aged, and afflicted; Juvenile delinquency and youth rehabilitation; Adoption proceedings (with consent of tribal court); Abandoned, dependent, neglected, orphaned or abused children; Operation of motor vehicles upon public streets, alleys, roads, and highways.	McDonald v. District Court 496 p. 2d 78 (Mont, 1972) court held constitutional disclaimer amendment and that statutory action was sufficient. <del>See also</del> Kennerly v. District Court of 9th District of Montana, 400 U.S. 423 (1971). Consent provision of the 1968 amendments literally construed to void tribal council consent where statutory language referred majority of the tribe.	
Nebraska	Full assumption of jurisdiction that criminal jurisdiction (excluding traffic) retroceded to Federal Government for Thurston County portion of Omaha Reservation.	U.S. v. Brown, 334 F. Supp. 536 (1971), and Omaha Tribe of Nebraska v. Village Walthill, 460 D. 2d 1327 (1972). The Secretary of the Interior has discretion to accept less than a State offers to retrocede. Robinson v. Wolf, 468 F. 2d 438 (1972), Public Law 280 held not to be an unconstitutional delegation of power reserved to the Federal Government.	
Nevada	Originally asserted over some reservations. Now retroceded for all reservations, except for Ely Colony.		

State	Status Re Public Law 280	Other assumption of jurisdiction	Case law development/ validity of assumption
New Mexico	No assumption pursuant to Public Law 280.	Claim of criminal jurisdiction re particular felony crimes pursuant to New Mexico Constitution art. 19, sec. 14. No apparent legal basis to State claim.	
New York	do	State jurisdiction pursuant to act of Sept. 13, 1950 ch. 947, 64 Stat. 845.	
North Carolina	do	Full jurisdiction assumed by State pursuant to citizens of state provision of the treaty of 1835, and by court decision Eastern Band of Cherokee v. U.S. and Cherokee Nation, 117 U.S. 288 (1886).	
North Dakota	Civil jurisdiction extended where tribe or individual Indian consents. No tribal consent—individuals have consented.	Criminal jurisdiction on Devils Lake Reservation, pursuant to act of May 31, 1946, ch. 279, 60 Stat. 229.	
Oklahoma	No jurisdiction pursuant to Public Law 280.	Jurisdiction exercised in all matters pursuant to various Federal statutes.	
Oregon	Full assumption of jurisdiction except for Warm Springs Reservation.		
South Dakota	No jurisdiction. Attempt at assumption defeated in statewide referendum vote in 1966.		
Utah	No jurisdiction. State has passed a statute establishing tribal consent mechanism for assumption.		
Washington	Assumption of jurisdiction is piecemeal and varies per individual tribe: 1. State assumed full civil and criminal jurisdiction with respect to—Colville, Chehalis, Nisqually, Muckleshoot, Quileute, Skokomish, Squaxin Island and Tulalip. 2. State assumed full criminal and civil jurisdiction on fee patented lands re Swonomish. 3. State has assumed civil and criminal jurisdiction with respect to only nontrust land, in the following areas: (a) Compulsory school laws; (b) Public assistance; (c) Domestic relations; (d) Mental illness; (e) Juvenile delinquency; (f) Adoptions of minors; (g) Dependent Status; (h) Motor vehicle operations on public roads. On the following reservations: Hoh, Kalispel, Lower Elwha, Lummi, Makah, Nooksack, Port Gamble, Port Madison, Puyallup, Quinault, Shoal Water, Spokane. Retrocession of some with respect to Port Madison Reservation.	Quinault v. Gallagher, 368 F. 2d 648 (9th cir. 1966), 387 U.S. 907 (1967). Defers to State court determination of what State action is necessary to assert jurisdiction pursuant to sec. 6 of Public Law 280 when a State constitutional disclaimer exists. See also State v. Paul, 53 W. 2d, 789; 337 P. 2d 33 (1959) and Makah Tribe v. State, 76 W. 2d, 645, 457 P. 2d 590 (1969).	
Wisconsin	Full assumption of jurisdiction except that jurisdiction has been retroceded over the Menominee Reservation.		
Wyoming	No jurisdiction		

In addition to the court decisions defining the validity of the process used pursuant to Public Law 280 for States to assume jurisdiction in Indian country, there is a developing line of cases which indicates that States may only acquire jurisdiction in Indian country pursuant to congressional action.<sup>26</sup> The theory of the "cases" is, however, not necessarily predicated exclusively on inherent tribal sovereignty, but rather on the court's notion of Federal statutory preemption of the jurisdictional field—the Federal Congress has established the "contours" of both Federal and State jurisdiction over Indian reservations<sup>27</sup> and the mechanisms for any State to acquire any jurisdiction, and almost any State action that does not fall within the statutory scheme should fail.<sup>28</sup>

## 2. STATUS BY SUBJECT MATTER

Indian tribes have objected to assertions of jurisdiction by States under Public Law 280 on several basic theories: Public Law 280 only gives States the right to apply laws of general application, thereby precluding all ordinances and regulations of municipal or local government units; the exemptions to State jurisdiction should be broadly construed in favor of Indian interests; and the grant of civil jurisdiction to States should be narrowly construed to be limited primarily to "causes of action," that is, civil disputes to be settled in State courts.

Controversies surrounding the implementation of Public Law 280 generally fall within three specific subject areas: Hunting and fishing rights; land use regulations and laws; and taxation.

### (a) *Hunting and fishing rights*<sup>29</sup>

Public Law 280 reads:

Nothing in this section shall . . . deprive any Indian or Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof.

While this area is the focus of much emotionalism, concern, and litigation, it has not been a conceptual problem for the Federal courts. In fact, the developing law is uniquely consistent—consistent in favor of Indian hunting and fishing rights free from practically all State intrusion.<sup>30</sup> Analytically, the major Public Law 280 problem area has been to define whether or not, in a specific case, a particular tribe of

<sup>26</sup> E.g., see *Kennerly v. District Court* 400 U.S. 423 (1971); *McClanahan v. State Tax Commission*, 411 U.S. 164 (1973); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965); *William v. Lee*, 358 U.S. 217 (1959); and *Bryant v. Itasca County*, — U.S. —, 96 S.Ct. 2102 (1978).

<sup>27</sup> Not to be confused with the Supreme Court's redefinition of the physical perimeters of specific Indian reservations; for example, *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

<sup>28</sup> See Goldberg, supra, at 567–575 for an excellent discussion of this point.

<sup>29</sup> Sec. D of this chapter discusses this issue in the context of the individual Public Law 280 States. Ch. III, sec. A provides an extensive analysis of hunting and fishing whether or not in the Public Law 280 context.

<sup>30</sup> *Meitokalla v. Egan*, 369 U.S. 56 (1962). Power of the Secretary of the Interior to regulate on a reservation contrary to State law; *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968). Termination statute did not terminate Menominee hunting and fishing rights secured by treaty; *Callahan v. Kimball*, 493 F. 2d 564 (9th cir. 1974) cert. denied 419 U.S. 1019 (1974). Terminated Klamath Indians retained hunting and fishing rights on former reservation lands which had been sold; *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. supp. 1001 (D. Minn. 1971). Cession of land on reservation did not terminate hunting and fishing rights; *Contra Organized Village of Kake v. Egan* 369 U.S. 60 (1962). State hunting and fishing regulatory authority found to exist where no Federal reservation existed. Case distinguishable because Alaska Indians for the most part had neither reservations nor treaties; cf. *Puyallup v. Department of Game* 391 U.S. 397 (1968). Limited State regulation of the manner that hunting and fishing rights could be upheld.

Indians has a hunting and fishing right that can be traced to or implied in a treaty, statute, or agreement. The scope of the hunting and fishing exemption is generally more limited than aboriginal rights. In fact, the statutory language is a reversal of the normal rules of construction. Treaties are documents that do not confer rights; at best they may recognize preexisting rights, and at worst terminate such preexisting rights. The Federal courts, adopting the best rule of construction available which requires resolving ambiguities in favor of Indians, have generally found in favor of finding the necessary documents.<sup>31</sup>

### (b) *Land use regulations*

The operation of Public Law 280 in this area involves both a discussion of what is a law of general application and what, in fact, is an alienation or encumbrance on real property or personal property held in trust.<sup>32</sup> The early litigation results were varied. California, the State for which earlier versions of Public Law 280 were drafted, has been the major arena for litigation concerning the issue of State versus local laws. Several U.S. district court cases<sup>33</sup>—*Madriral v. County of Riverside*, Civ. No. 70-1893 E.C. vac'd (other grds) 496 F. 2d 1 (9th cir. 1974); *Rincon Band of Mission Indians v. County of San Diego*, 324 F. supp. 371 (S.D. Cal. 1971) vac'd (other grds) 496 F. 2d 1 (9th cir. 1974); and *Aqua Caliente Band of Mission Indians v. City of Palm Springs*, 347 F. supp. 42 (C.D. Cal. 1972)—have held that local municipal or county laws were applicable on reservations. Such holdings if followed by higher courts would have had a far-ranging impact on Public Law 280 States, since most economic and land use regulation occurs at the local level. Recently, however, the ninth circuit has considered the issue of State versus local law, as well as the issue of whether zoning ordinances are encumbrances within the meaning of the exception provision of Public Law 280. In *Santa Rose Band of Indians v. Kings County*,<sup>34</sup> a unanimous three-judge panel held that Public Law 280 was only a grant of jurisdiction to apply State, not local law, and that the zoning ordinances in the particular case were an encumbrance upon trust property. The reasoning of the court is instructive. Utilizing both the current theory of Federal preemption coupled with the concept of inherent tribal sovereignty,<sup>35</sup> the court required that any power over Indian reservations claimed by the State or political subdivision be specifically found in a congressional enactment. In its review of Public Law 280 and its legislative history the court found only ambiguity. Reviewing case law interpretations of statutory language in analogous cases, the court stated:

<sup>31</sup> Goldberg, supra, nt 17, at 584, footnote 218.

<sup>32</sup> Pertinent Public Law 280 sections provide: \* \* \* those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian county as they have elsewhere within the State \* \* \*

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation \* \* \* or authorize regulation of such \* \* \* in a manner inconsistent with any Federal treaty, agreement, or statute or any regulation made pursuant thereto, or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

<sup>33</sup> *Contra*, *Snehomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 p. 22 (1967) cert. denied 389 U.S. 1016 (1967). County regulation of garbage disposal site struck down.

<sup>34</sup> 532 F. 2d 655 (9th cir. 1975).

<sup>35</sup> *Ibid.* \* \* \* any concurrent jurisdiction the States might inherently have possessed to regulate Indian use of reservation lands has long ago been preempted by extensive Federal policy and legislation (citations omitted), at 658.

\* \* \* we find those cases unhelpful except insofar as they demonstrate the obvious—that the phrase “state statute” \* \* \* is ambiguous.

Faced with overwhelming ambiguity, the court adopted an old, well-worn rule of construction—resolve the ambiguity in favor of the Indians—and found no jurisdictional grant to local governments.

The court then considered the issue of State zoning versus county zoning (an issue the court did not have to reach) and whether it would then pass the encumbrance or alienation exemption in Public Law 280. The court found in this specific context, the zoning ordinance to have been both preempted by Federal action<sup>36</sup> and to be an encumbrance in the sense of \* \* \* “the negative impact the regulation would have on the value, use and enjoyment of the land.”<sup>37</sup>

If the logic and principles applied by the Circuit Court in *Santa Rosa* prevail, it is likely that the only governmental disputes remaining to be rectified will be the relationship between individual tribal governments and the Federal Government with respect to land use controls—issues that are beyond the scope of Public Law 280.<sup>38</sup>

### (c) Taxation

Taxation is perhaps the most vexing problem within the Public Law 280 context. As one commentator accurately relates,<sup>39</sup> the economic pressure that State and local governments have felt in general the last several decades has sent the States looking for previously untapped sources of revenues. Coupled with this overall economic need is the perception of many States that they are providing extensive services to Indians without being able to derive tax revenues from them. This perception is bolstered by the developing case law which holds that States cannot, as a Constitutional matter, deprive individual Indian citizens whether residing on a reservation or not, of any services the State provides generally to other citizens. It should be noted here that Public Law 280 did not provide any specific funds to States to carry out the jurisdiction that was being transferred to them.

A literal reading of the exemption against taxation of Indian real or personal trust property would at first seem to preclude any State activity. When there is an economic need, however, the attempts at creating income producing exceptions will be frequent. A very recent decision by the U.S. Supreme Court,<sup>40</sup> however, has made clear that Public Law 280 does not affect the ability or inability of a State to tax in Indian country.

Starting with the premise that States have no inherent right to tax Indians or Indian property,<sup>41</sup> the U.S. Supreme Court reviewed the legislative history and statutory language of Public Law 280 to determine whether any taxing authority was granted to the States by the exemption language referring only to trust property and the language referring to the State laws of general application. The holding was

<sup>36</sup> *Ibid.*, at 658.

<sup>37</sup> *Ibid.*, at 667.

<sup>38</sup> See ch. III, sec. D for fuller discussion of land use controls.

<sup>39</sup> Goldberg, *supra*.

<sup>40</sup> *Bryon v. Itasca County*—U.S.—96 S.Ct. 2102. (1976).

<sup>41</sup> *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). Neither *McClanahan* or *Bryan* deal with the tricky issues of tax of non-Indians on reservations or non-Indian leasees of Indian property et cetera. See ch. VI, sec. F for fuller discussion of these issues which are not impacted on by Public Law 280.

that the States received no congressional grant of authority through Public Law 280 to tax.

## C. RETROCESSION

### 1. GENERAL

Retrocession simply means a return of whatever jurisdiction was assumed pursuant to Federal grant, usually Public Law 280, to the Federal Government. The Indian government in this situation is free from any State regulation, and the only jurisdictional relationship to be resolved is the division of powers between tribal governments and the Federal Government.<sup>42</sup>

The only existing mechanism for ousting State jurisdiction over Indian tribes is the retrocession provision of the 1968 Amendments to Public Law 280, contained in the Indian Civil Rights Act.<sup>43</sup>

This provision states:

§ 1323. Retrocession of jurisdiction by State.

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

This retrocession procedure excludes the major affected party in the process—the Indian tribe. The congressional history of the adoption of the “retrocession provision” provides several distinct components of congressional purpose. There was from the time of passage of Public Law 280 significant dissatisfaction with the absence of any tribal consent provision. This dissatisfaction led to many attempts to modify Public Law 280. Some of the support for modification came from those tribes over whom jurisdiction had been assumed by States without their consent.

The major impetus for the retrocession provision, however, appears to have been an economic one; the State complaints concerning the purported high cost of asserting jurisdiction in Indian country.<sup>44</sup>

Overall, the retrocession component of the Indian Civil Rights Act was at that time seen as a relatively minor part of this significant and far-reaching legislation,<sup>45</sup> and the Indian viewpoints and input received little recognition in the retrocession provision as passed.

### 2. STATUS

Since 1968, there have been relatively few developments in the retrocession area.

The case-law has established several significant factors in the implementation of the Public Law 280's retrocession provisions. The

<sup>42</sup> Adopting a view that rejects Federal Plenary Power—or for that matter, “The Federal Preemption” test developed of late by the Supreme Court leaves the view that this power relationship should be negotiated between the two sovereigns and may well differ tribe by tribe. The traditional view would leave the tribes with all sovereign powers.

\* \* \* \* \*  
See letter to Senator Abourezk, from Chief Leon Shenandoah, Six Nations Council of Chiefs, S. 2010 hearings.

<sup>43</sup> See ch. V.  
<sup>44</sup> See Goldberg *supra* nt. 17 at 558 for example, Nebraska saved \$90,000 in 1 year of retroceding jurisdiction over Omaha, S. 2010 at 449.

<sup>45</sup> See ch. V, section C.

Secretary of the Interior has broad discretionary power in deciding whether or not to accept retrocession from any State.

Also, retrocession can be partial. Neither all the jurisdiction assumed by a State need be offered back to the Federal Government, nor need the Federal Government accept all that is offered by a State.<sup>46</sup>

Retrocession has occurred in only five instances.

Nebraska attempted to retrocede criminal jurisdiction, (except for motor vehicle jurisdiction) by legislative resolution 37 in April 1969 over the Omahas and the Winnebagos to the Federal Government. The Secretary of the Interior, in October 1970, accepted retrocession only in relation to the Omaha Tribe. The State then attempted to withdraw its offer of retrocession by legislative Resolution No. 16 in February 1971. Litigation followed, and the Secretary's limited acceptance of retrocession was upheld, and Nebraska's attempt to withdraw its retrocession offer was invalidated.<sup>47</sup> Since that time, attempts to get the State to offer again to retrocede jurisdiction over the Winnebago Tribe have not been successful.<sup>48</sup>

In 1971, the Governor of Washington, responding to a tribal council resolution of the same year, retroceded some of the jurisdiction Washington had assumed over Port Madison to the Federal Government. The Secretary of the Interior accepted the retrocession offer in April 1972. Subsequent to the Secretary's acceptance, the Attorney General of Washington ruled that, absent legislative authorization, the Governor did not have power to retrocede. Although the State Attorney General's opinion apparently has not affected the validity of retrocession at Port Madison, no retrocession over any other tribe within Washington has since occurred. Legislative attempts to authorize retrocession have not been successful.

In Minnesota, based on a tribal request to the State, the State retroceded criminal jurisdiction over the Nett Lake Reservation.

In July 1974, by a legislatively authorized process, the Governor of Nevada offered to retrocede jurisdiction over all but one tribe in Nevada. The Secretary of the Interior accepted retrocession in July 1975.

The last instance of retrocession concerned a curious turn in the exhaustive Menominee restoration effort.<sup>49</sup> A dispute arose about whether or not restoration had voided the congressional grant under Public Law 280, over the re-created Menominee Reservation. The State of Wisconsin maintained that it had no jurisdiction over Menominee; however, the Federal Government maintained that Menominee was subject to mandatory State jurisdiction under Public Law 280. To solve the impasse, Wisconsin offered to retrocede jurisdiction over Menominee and in January 1976, the Secretary of the Interior accepted retrocession.

<sup>46</sup> *U.S. v. Brown*, 334 F. Supp. 536 (1972) and *Omaha Tribe of Nebraska v. Village of Walthill* 460 F. 2d 1327 (8th cir. 1972), cert. denied 409 U.S. 110 (1973).

<sup>47</sup> *Ibid.*

<sup>48</sup> Statement of John C. Evans, Counsel, Committee on the Judiciary, Nebraska, State Senate—S. 2010 hearings.

<sup>49</sup> Menominee termination occurred in 1961 pursuant to H. Con. Res. 108, 1st sess., 83d Cong., 1953, and the act of June 17, 1954, 25 U.S.C. § 891-902 (1970). After a long hard struggle by Menominee leaders and others, a restoration statute was passed, Public Law 93-197, codified as 25 U.S.C. § 903, effective Apr. 22, 1975.

## D. THE PUBLIC LAW 280 STATES

### 1. THE INDIAN PERSPECTIVE

#### (a) Law enforcement

"The only time the police come [to] us is when something happens."<sup>1</sup>

Of the various reasons for Public Law 280, the major acknowledged impetus for granting criminal jurisdiction to States was perceived "lawlessness" on and near Indian reservations.<sup>2</sup> In fact, those reservations specifically exempted from Public Law 280 were done so on their apparent ability to provide adequate law and order services.

The reasonable inquiry, therefore, after 20-plus years of State involvement, is: have the States and their political subdivisions which assumed criminal jurisdiction under Public Law 280 adequately provided these justice services? The almost universal Indian viewpoint is that the wisdom of Justice Miller in 1885 is applicable today:

Because of the local ill feeling of the people, states where they are found are often their [the Indian tribes'] deadliest enemies.<sup>3</sup>

Although the reasons for the lack of law enforcement services may vary, the result is viewed throughout Indian country as a very serious issue. Lack of service means that law enforcement protective or enforcement presence is not there when it is needed.

Perhaps more serious than the absence of a police officer are the allegations of discriminatory treatment of Indians by the entire panoply of law and justice agencies. This discriminatory treatment ranges from disproportionate arrest and sentencing practices to allegations of extreme brutality. This issue is, of course, not limited to Public Law 280 States. In fact, the major difference with respect to allegations of discrimination is one of situs—Public Law 280 provides increased access to Indian persons by the various components of a State's justice system. In Non-Public Law 280 States, brutality and discrimination allegations are found with alarming frequency in border towns and urban centers where, because of geography, States have criminal jurisdiction over Indians.

The views and stories from Indian country which the remainder of this section will relate, are not new. The conditions have been reported on before by official arms of the Federal Government.

Extensive field investigations and hearings were held during the 1960's by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, chaired by Senator Sam Ervin. These investigations and hearings documented abuses against Indian people by State and sometimes, by tribal governments.<sup>4</sup> Curiously, the remedy adopted

<sup>1</sup> Testimony of Hank Murphy, Degayo Tribe, Sycuan Reservation, Southern California Transcript, vol. I at 132. All transcript references contained in this report are at the hearings held by the task force in cooperation with other task forces. The transcripts are identified by the region of the country to which the hearing applied. All transcripts are in the American Indian Policy Review Commission's permanent files.

<sup>2</sup> See ch. II, sec. A, supra.

<sup>3</sup> *United States v. Kagama*, 118 U.S. 375, 383 (1886).

<sup>4</sup> For a summary of the evidence produced, see Burnett, "An Historical Analysis of the 1968 Indian Civil Rights Act," 9 Harv. J. Leg. 557.

in the 1968 Indian Civil Rights Act deals almost exclusively with tribal governments.<sup>5</sup> In addition, the U.S. Commission on Civil Rights has, on several occasions, pointed to significant problems of discriminatory treatment of Indians by State and local justice officials.<sup>6</sup>

(i) *Adequacy of law enforcement.*—One of the major problems with the adequacy of law enforcement services is the rural and isolated position of many reservations. This view was shared by a number of Indians and non-Indians. Valancia Thacker, chairwoman of the Campo Reservation, was asked to comment on the quality of law enforcement services received at Campo. Her response is instructive:

\* \* \* we don't get any great services \* \* \* but neither does the white community up there \* \* \* We're in a very isolated corner of San Diego County and what we do get out there isn't the cream of the crop, as far as the Sheriff's Department goes. That goes for the white community as well as the Indian reservations out there.<sup>7</sup>

A somewhat similar view was expressed by representatives of the Pala Reservation in rural southern California,<sup>8</sup> and the Agua Caliente Band of Mission Indians concerning more rural parts of Palm Springs.<sup>9</sup> Several non-Indian witnesses concurred in the view that the distance of State and county law enforcement services of these areas may be the casual factor. The Yakima County, Wash. prosecuting attorney indicated that whatever inadequacy existed was applicable to both Indian and non-Indians and was caused by insufficient numbers of police and the vast size of the area to be patrolled.<sup>10</sup> Mrs. Morris of the Quinault Property Owners Association, a critic of tribal jurisdiction over non-Indians, indicated that the county has failed to provide adequate law enforcement services over fee patented lands where it exercises jurisdiction.<sup>11</sup>

Others indicate that the lack of law enforcement services has different roots. The Sycuan Tribe stated that the only time law enforcement is present is after a serious incident occurs and that preventive or protective services are simply not found on the reservation.<sup>12</sup> This pattern is consistent with the view that non-Indian police are often only responsive when an incident involves non-Indians and are just not concerned with protecting Indians. One tribal official of the Minnesota Chippewas related a particularly disturbing incident:

One deputy sheriff in Itasca County told me also, he said if all those Indians would kill each other, then we wouldn't have to go up there. I think it was in response about a homicide.<sup>13</sup>

The testimony of John Johnson, a veteran law enforcement officer, now serving as the chief of the Colville Tribal Police Department, lends credence to the view that non-Indian antagonism is a basis for the lack of service. Chief Johnson stated that he could go on with felony after felony where the county was called and failed to respond

<sup>5</sup> 25 U.S.C. § 1303 (1970).

<sup>6</sup> See U.S. Commission on Civil Rights, the "Southwest Indian Report" (1973); Report of the North Dakota-Montana-South Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Indian Civil Rights Issues in Montana, North Dakota, 1974*; and Report of the New Mexico Advisory Committee to the U.S. Commission on Civil Rights, the Farmington report: "A Conflict of Cultures, July 1975."

<sup>7</sup> Testimony of Valancia Thacker, Southern California Trans., vol. II at 82.

<sup>8</sup> Testimony of King Freeman, Southern California Trans., vol. II at 92.

<sup>9</sup> Testimony of Raymond Patentio, Southern California Trans., vol. II at 74.

<sup>10</sup> Testimony of Jeff Sullivan, Northwest Trans., at 149.

<sup>11</sup> Testimony of Elizabeth Morris, Northwest Trans., at 124-125.

<sup>12</sup> Testimony of Hank Murphy, Southern California Trans., at 132.

<sup>13</sup> Marvin Sargent, White Earth Chippewa, Great Lakes Trans., vol. I at 153.

to crimes committed on the reservation.<sup>14</sup> He testified concerning the efforts of Dr. Lois Shanks of the Spokane Coroner's Office. Dr. Shanks, along with the Colville Tribe, had attempted to get several questionable deaths investigated and was reportedly told by a county law enforcement official: "What the hell \* \* \* It's just another Indian on the reservation."<sup>15</sup>

Still others take a kinder view of why the problem of law enforcement exists and maintain that the jurisdictional confusion, even after Public Law 280, precludes effective law enforcement. A tribal official of the Fond du Lac reservation responded this way:

*Question.* What is the nature of the problem that you (have) with county law enforcement?

*Answer.* Well, its kind of a lack of, simply because of the large unpopulated area that lies there \* \* \* is more of a county situation where there's very few houses, there's a large span between and the \* \* \* city saying first of all they don't have jurisdiction to respond and maybe the county saying well maybe the states or they are fighting over who should respond to the particular call.<sup>16</sup>

This view is reinforced by the testimony of Richard Balsinger, Assistant Area Director of the BIA (Portland), who stated that police services to reservations generally diminished after the assumption of jurisdiction by States. This problem was particularly complicated in States like Washington that adopted 280 in a piecemeal fashion—"police officers just about had to carry a plat book around in their pockets."<sup>17</sup>

Whatever the cause of the problem of lack of services on a particular reservation, one thing is quite clear, the pattern and practice of inadequate police protection on reservations in Public Law 280 States exists.

This pattern and practice has been in fact a major impetus for many tribes to seek retrocession of Public Law 280 jurisdiction. Harry Bonnes, chairman of the Bois Forte Reservation at Nett Lake, Minn., testified that law enforcement concerns were a major reason for seeking retrocession from the State. Retrocession, of course, has not cured all law enforcement problems, and serious issues remain for Indians in off-reservation areas where they are subject to State and county jurisdiction.<sup>18</sup> Both the retrocession in Nebraska and the retrocession now occurring in Nevada were prompted by inadequate law enforcement. In Nevada, the issue revolved around the lack of cooperation from county law enforcement officials.<sup>19</sup> In Nebraska, the issue was the same. Interestingly from the State perspective, retrocession was seen as a way of saving substantial sums of moneys.<sup>20</sup> James Peterson, tribal attorney for the Winnebago Tribe in Nebraska over which retrocession jurisdiction was not accepted by the Secretary of the Interior, testified that the Winnebagos are still actively pursuing retrocession because of continuing severe law enforcement problems.<sup>21</sup> Representatives of the Suquamish (Port Madison Reservation) stated that they were not satisfied with "the work the State did at the criminal level; therefore, we went to retrocession."<sup>22</sup>

<sup>14</sup> Testimony of John Johnson, Northwest Trans., at 588.

<sup>15</sup> *Ibid.*

<sup>16</sup> Testimony of Kent Tupper, Fond DuLac, Great Lakes Trans., vol. I, at 134.

<sup>17</sup> Testimony of Richard Balsinger, Montana Trans., at 118.

<sup>18</sup> Testimony of Harry Bonnes, Great Lakes Trans., at 141.

<sup>19</sup> Field interviews.

<sup>20</sup> Statement of Ralph H. Gillan, Asst. Atty. Gen. of Nebraska, S. 2010 hearings, at 471.

<sup>21</sup> Testimony of James Peterson, South Dakota Trans., at 9.

<sup>22</sup> Testimony of Richard Belmont, Northwest Trans., at 74.

(ii) *Discriminatory Treatment.*—Many people in Indian country believe that major discrimination in the provision of law enforcement exists. Marvin Sargent of the White Earth Chippewa Reservation related what he termed “one of the horror stories” of a youth who was accused of car theft, and was killed by a county police officer while fleeing the car unarmed. Mr. Sargent gave the following rationale as to why such things happen:

(It) is basically the community attitudes, county attorneys, sheriffs, deputy sheriffs, the attitude that they carry around on the reservation, you know, that it's open house on any Indians at any time, that Indian people walk in to the streets you might say of Menominee, Detroit Lakes, Bagley . . . We have a very difficult time getting any fair treatment in court systems.<sup>23</sup>

The Soboba Band of Mission Indians in California complained of police harassment along with their allegations of inadequate service. The situation was so bad—failure of the local police to protect reservation lands from non-Indians trespassers and subsequent loss of cattle—that the Indians took to providing armed guards to protect their lands.<sup>24</sup> The representatives from Cochella<sup>25</sup> related similar incidents of being shuttled back and forth between the sheriff, the city, and State highway patrol, with no one being willing to provide protection until they themselves threatened to enforce the law against non-Indians. Then all the non-Indian police agencies—city, county, and State—arrived to remove the non-Indians. It is a persistent complaint that even where law enforcement services are provided on the reservation, the police are less than willing to enforce the law against non-Indians.

It was, however, clear from the Indian viewpoint, that no such immunity existed for Indians in the non-Indian community:

*Question.* You mentioned that the Sheriff's Department did not arrest a non-Indian trespasser who was—stealing lumber (wood) from the reservation. Does the Sheriff take a similar position if it is an Indian member off reservation? Is there similar restraint shown in the arrest policies?

*Answer.* I'd probably still be in jail today if I did that.

*Question.* I take it that the answer is no.

*Answer.* Right.<sup>26</sup>

A representative of the Pitt River Indians of northern California related several incidents where Indians were killed and the accused non-Indian perpetrators were not prosecuted or convicted. Whatever the merits of the specific cases, the resultant anger and frustration runs deep:

I don't know too much about this Public Law 280 where we are supposed to be under the same jurisdiction as the white man, but if this is that system, we don't need Public Law 280 . . .<sup>27</sup>

Perhaps the most cogent exposition of the failure of law enforcement concerns the experience of the Colville Reservation.<sup>28</sup> The Colville Reservation consists of approximately 1.3 million acres and is located in north central Washington. Within the reservation boundaries are five distinct predominately non-Indian communities and two

<sup>23</sup> Testimony of Marvin Sargent, *Great Lakes Trans.*, vol. I at 149.

<sup>24</sup> Testimony of Adeline Rhodes, *South California Trans.*, vol. II at 156-159.

<sup>25</sup> Testimony of Wm. Callaway, *South California Trans.*, vol. I at 174-177.

<sup>26</sup> Testimony of Hank Murphy, *South California Trans.*, vol. I at 142.

<sup>27</sup> Testimony of Walter Lara, *North California Trans.*, at 114.

<sup>28</sup> The following information is based on the submission of Colville Tribal Police Chief Johnson, “History of Law and Order” Colville Confederated Tribes, Northwest Trans. Exhibit 46.

county governmental units. In 1965, the Colville Business Council requested the State of Washington to assume criminal and civil jurisdiction pursuant to Public Law 280 over the Colville Reservation. At that time, the council was under substantial termination pressure from the BIA Superintendent.<sup>29</sup> Two weeks after the council's action, the State of Washington assumed jurisdiction.

As in other states, while the assumption of jurisdiction is by the State government, implementation is often the responsibility of local political subdivisions—counties and municipalities. In the Colville situation, the law enforcement responsibilities fell to both Ferry and Okanogan Counties. Since Public Law 280 provides no financial assistance to States or their subdivisions to aid in the delivery of services, and the Colville Tribe was deeply concerned that services be adequately provided, it voluntarily donated equipment and moneys to the counties. In 1965, the tribe donated a fully equipped patrol car to each county plus a cash contribution. Payments continued for 6 years and totaled cumulatively \$680,000. It also leased its jail facility to one county for \$1.00 per year. During the period of time when the counties were providing sole law enforcement services, enforcement of law and order on the Colville Reservation had been sporadic, uncertain, and of diminishing quality and ever-increasing instances of discriminatory and prejudicial treatment of members of the Colville Confederated Tribes had been brought to light. The county law enforcement officials had been shown to be financially, socially, culturally and psychologically unprepared to deal with and recognize Indian problems and consequently were unwilling and unable to provide for adequate and equitable maintenance of law and order on the Colville Indian Reservation.<sup>30</sup>

On September 1975, the Colville Confederated Tribes asserted their jurisdiction and are now concurrently providing law enforcement services through a court system and police department to all persons within the exterior boundaries of the reservation. Colville tribal police are all trained at the BIA Police Academy in Brigham, Utah, as well as locally. They are, with one notable exception,<sup>31</sup> cross-deputized with the police in neighboring jurisdictions. The police department has investigated and brought to prosecution numerous felony offenses to which county officers had refused to respond or had done nothing. The total expense of this law enforcement operation is being borne by the tribe at an annual rate of slightly over \$300,000. The tribe's capacity to adequately provide these services and its success at doing so is evidenced by the fact that the non-Indian city of Nespelem, Washington contracts its police services with the tribe rather than the county as it had formerly done.

#### (b) *Other services*

Few services are as important as law enforcement in the context of Public Law 280, and it would not be constitutional for any state to

<sup>29</sup> The BIA Superintendent then assigned to Colville was the same one who had terminated the Klamaths.

<sup>30</sup> Chief Johnson, *supra* note 28, at 2.

<sup>31</sup> *Ibid.*, Sheriff Beck of Okanogan County in May 1976 terminated the cross-deputization agreement with the tribal police department because the tribal police made a felony investigation and arrest turning the felon over to the County Prosecutor and did not notify the sheriff until after the arrest. The tribe views this action as precipitous stating that its action was an oversight which is “certainly not an unusual occurrence when two law enforcement agencies are working together”, and something that could have worked out through discussions between the departments.

deny Indians any services that are provided to the general public.<sup>32</sup>

This does not mean, however, that tribes receive all services or are satisfied with those they receive.

Hank Murphy of Sycuan, a small reservation of some 640 acres and 51 persons in southeastern California stated that due to a lack of fire protection services, the reservation had formed its own volunteer fire department and has since been able to work out cooperative arrangements with San Diego County. Mr. Murphy explained the prior lack of services in several ways. The BIA contracts with the State for such services to the reservation; however, the contract is limited to "wild lands protection" and does not apply to residences, and the county does not provide the services on its own:

The county is not going to provide it for us. They don't have the facilities or equipment either. They are short of money. So, they are going to protect their own people outside the reservation first, before the reservation Indians come in. And, then again, the jurisdictional problem—they don't know if they can serve us or not. They're not even sure about that, so—

*Question.* So, even though 23 years after, they have assumed jurisdiction there is still some question of whether they are willing to provide the service, and some question whether they are able to provide the services?

*Answer.* Yes, that's correct.<sup>33</sup>

Other types of social services, from both the private and public sector, which most Americans take for granted have been a continuing problem in Indian country. Although the lines ran to the edge of the reservation, the chairwoman of the Campo Reservation was not able to get electricity hooked up to her home until she made a major issue of the problem in the local newspapers.<sup>34</sup>

The general view seems to be that although there may be good faith on the part of some states and counties, Indians for the most part, are not satisfied with the provision of services. A reflection of this dissatisfaction is that several tribes, the Quinaults, Colvilles, and Yakimas, have developed their own social service departments. Mary Kay Becker, a state representative from Washington, and a member of the social and health service committee of the legislature, summed up the view this way:

*Question.* . . . do you think the state has lived up . . . the responsibilities (social services) it acquired when it took on the authority under Public Law 280?

*Answer.* Well, apparently from the testimony, it has varied from area to area . . . but tribal members seem pretty dissatisfied with it.<sup>35</sup>

## 2. THE NON-INDIAN PERSPECTIVE

While there is little diversity of viewpoint among the tribes concerning Public Law 280, the divergence among the non-Indian community is extreme. On one side of the issue are some non-Indians, many of whom have economic interests on or near reservations, who are extremely vocal in opposing any removal of state jurisdiction from Indian reservations. The argument favoring the retention of Public Law 280 and perhaps extending more state control over Indian reservations is intimately intertwined, with the notion that Public Law 280 somehow

<sup>32</sup> See e.g., *Montaga v. Bolack*, 372 P.2d 387 (New Mexico 1962); and *Acosta v. San Diego Co.*, 272 P.2d 92 (California 1954).

<sup>33</sup> South California Trans., vol. I, at 133.

<sup>34</sup> Testimony of Valancia Thacker, South California Trans., vol. II, at 84-86.

<sup>35</sup> Northwest Transcript at 468.

precludes tribal jurisdiction generally and jurisdiction over non-Indians specifically. The major concern therefore appears to be "the threat" of Indians exercising some control over the behavior and economic interests of non-Indians on Indian reservations. In *extremis*, this viewpoint argues for the destruction of reservations and the total termination of tribal governmental identity. Somewhere in the middle of the spectrum of views on Public Law 280 are non-Indian persons . . . as well as some Indian persons who simply wish to see the jurisdictional confusion settled once and for all. Some of these people do not believe, as a practical matter, that Indian governments and non-Indians can concurrently operate, and government efficiency requires one or the other to have sole control, particularly in the area of land use control and planning. At the other end of the spectrum appear to be some non-Indians who, as a matter of social philosophy or practical experience, favor the total repeal of Public Law 280.

Those non-Indian persons, as well as some Indian persons who support Public Law 280 and oppose retrocession in any form, argue that retrocession:

\* \* \* will be violating our rights guaranteed by the Constitution and Bill of Rights. Specifically you (Congress) will be recognizing a sovereign Nation within the confines of the continental United States, the very heart of this great country, and in the Bicentennial year at that.<sup>36</sup>

The major constitutional right that they believe will be violated is that non-Indians are generally prohibited from participating \* \* \* through the voting franchise \* \* \* in tribal government. This situation is complicated by the demography of some Indian reservations. The strongest opposition to the exercise of tribal authority appears to come from those areas where Indians have become a minority population within the exterior boundaries of their reservations. The above quote is from a resident of Thurston County, Nebr., which is totally encompassed by either the Winnebago or Omaha Reservations. According to the 1970 census, Thurston County shows a population of 5,024 non-Indians and 1,918 Indians, with 79 percent of the land mass with an assessment value of approximately \$80 million being owned by the non-Indian population. The view of some non-Indians is that in this county under retrocession, 72 percent of the population would be disenfranchised and governed by the minority of the 23 percent.<sup>37</sup>

Similar views were expressed by representatives of an organization known as "Montanans Opposed to Discrimination"—MOD—whose stated purpose is to:

\* \* \* conduct its activities so as to enforce uniformity in the customs and uses of a nation, State, and local laws which relate to personal and property matters.

Other purposes of this organization are to prevent the unjust and unreasonable discrimination against any citizen and, in general, to enforce and defend through all legal and constitutional means the rights of all citizens regardless of race, creed or national origin.<sup>38</sup>

The apparent membership of this organization includes some 3,000 persons, predominantly non-Indian, many of whom reside on or near the Flathead Reservation located in the State of Montana. According to MOD, approximately 83 percent of the reservation population are

<sup>36</sup> Statement of Ann Flicker, editor, *Walthill Citizen*, Nebraska S. 2010, at 565.

<sup>37</sup> Statement of Alan Curtiss, city attorney, Pender, Nebr., S. 2010, at 575.

<sup>38</sup> Testimony of F. L. Ingraham, attorney for MOD, South Dakota transcript at 24.

Indians who are not enrolled members of the Flathead Tribe. These persons are reputed to have half a billion dollars invested in their land and commercial holdings.<sup>39</sup> The position expressed is similar to that of some non-Indians residing within reservation boundaries in Nebraska:

The fact that 83 percent of the population would be subject to the criminal laws of a tribal government in which 83 percent of the population did not have representation could only result in violence. People resent the fact that they are going to be subjected to those laws for which the King of England was overthrown 200 years ago.<sup>40</sup>

Another reason for some opposing retrocession is the view that reservations were to be transitional entities and that tribes should be terminated. This argument, as with many termination or assimilationist positions, is phrased as an argument for extending "full citizenship" to individual Indians:

\* \* \* the status of my people as wards of the Federal Government began over 100 years ago and may have been a necessary condition at that time. We cannot believe that this program was planned to be more than a temporary period of judgment and transition.

Gentlemen, I submit that the time for responsibility of citizenship by the Indian people as well as the enjoyment of all of the prerogatives is long past due. \* \* \* Until the Indian citizen assumes the responsibility of citizenship, until all law in any community applies to its people, the Indian citizens who are intelligent and capable cannot achieve the level of pride and dignity they deserve.<sup>41</sup>

Coupled with these arguments is the belief that being subjected to tribal jurisdiction<sup>42</sup> will both preclude fair justice and create massive Indian-non-Indian conflict.

A non-member has a distinct fear that his authority and power to impose fines and penalties upon the non-member would be used as profit raising and engendering the situation where the fine that they paid into the tribal courts would be distributed out into the pro rata annual payments. I think this fear is well founded. I don't know that that it would be applied.

But I do know this, that if S. 1328 or its companion S. 2010 or any of an allied type bill is passed, that \* \* \* it would engender a situation that would make Wounded Knee look like a baseball game.<sup>43</sup>

Mrs. Elizabeth Morris, treasurer of the Quinault Property Owners Association, most of whose members live within the boundaries of the Quinault Reservation over which partial jurisdiction has been retroceded, testified that fee patent owners on the reservation opposed retrocession because of the economic uncertainty and hardship it has caused:

We find ourselves the innocent victims in the non-man's land between government politicians and Indian militancy. Current jurisdictional abuses are breeding a hatred unrecognized by the young militant leaders, heady with their new powers.<sup>44</sup>

Mrs. Morris and others in the several Public Law 280 States placed the blame for their problems on the Federal Government. Testimony is replete with references to being misled<sup>45</sup> when they or their an-

<sup>39</sup> *Ibid.*, at 31-32.

<sup>40</sup> *Id.*, at 35.

<sup>41</sup> Testimony of R. H. Lambeth, president of MOD, South Dakota transcript at 37, 39.

<sup>42</sup> Public Law 280 or retrocession neither removes nor grants tribal jurisdiction over non-Indians.

<sup>43</sup> Testimony of F. L. Ingraham, South Dakota transcript at 36.

<sup>44</sup> Northwest transcript at 109.

<sup>45</sup> Mrs. MORRIS. "I would be less than honest if I didn't tell you I truly feel betrayed." *Ibid.*, at 113.

cestors purchased land within the boundaries of Indian reservations or reservations that would soon be terminated. Others who apparently knew that they were locating in Indian country seemingly had no factual or legal idea as to what that meant.

Now the original sales brochures posted by the Federal Government in any part of the United States clearly states that these villa sites were situated within the former Flathead Indian Reservation.

\* \* \* \* \*

Now, these are all . . . the reasons why people came on the Flathead Reservation in herds and droves was to buy villa sites, to buy homesites, townsite lots, and settle within the Flathead Reservation. Now these people thought that this had been extinguished, that they were not coming on at the reservation.<sup>46</sup>

Other persons who tend to be somewhat less vocal or emotional in their views, but who oppose retrocession or the removal of State jurisdiction, seem to focus on the jurisdictional ambiguities that they believe retrocession would cause. Fred Mutch, the mayor of Toppenish, Wash., a predominantly non-Indian community located within the exterior boundaries of the Yakima Reservation, opposed the removal of State jurisdiction, citing the developing system of concurrent tribal-state-city-county jurisdiction as not being perfect but preferable to the situation some 20 years prior:

With all its imperfections, the limited concurrent jurisdiction under Public Law 83-280, which we have lived with for the past 15 years or so, have come close to working. It is understood well by the governments involved and it has been a vast improvement over the confusing and frustrating period of exclusive jurisdiction before Public Law 83-280. What is needed now is clarification of the gray areas of concurrent jurisdiction which will enable tribal governments to live in harmony with State, county and city governments. History has shown us that given the proper framework, these governments can resolve a system which can work. Changes in Public Law 83-280 could pose a direct threat to self-determination and self-government for the non-Indians living in the incorporated cities on the reservation.<sup>47</sup>

The Mayor of Palm Springs, Calif. which has been in continual land use jurisdictional disputes with the Agua Caliente Band,<sup>48</sup> opposed removal of jurisdiction on the basis that only one government could, within the same geographic boundaries, provide the land use planning and zoning necessary to the economic vitality of the city of Palm Springs, and that should be the city of Palm Springs representing all interests and having expertise.

The notion that tribes will not respect the environment and will be irresponsible in the exercise of jurisdiction permeates the views of others:

Theoretically at least, it would be possible to have installed in the finest residential area of a city a meat packing plant, glue factory or something of this nature.<sup>49</sup>

And finally, there are those non-Indians who support retrocession unabashedly; interestingly, they cite the same adherence to basic American principles as do those persons opposing tribal jurisdiction:

It is inconceivable to me that any nation be denied the right to self-determination, and in fact, it is still being denied here. We espouse liberty, yet we deny

<sup>46</sup> Testimony of John Cochrane, past president of the Flathead Lakers, Inc., South Dakota transcript at 52-53.

<sup>47</sup> Northwest transcript at 187.

<sup>48</sup> Testimony of Bill Foster, southern California transcript, vol. I at 81-83.

<sup>49</sup> Memorandum to Ronald Shaggs, assistant to the city manager, Tacoma, Wash. from Robert Hamilton, city attorney, Northwest Trans. Exhibit 26.



liberty . . . It is imperative in this Bicentennial Year that we reaffirm the principles that have made this Nation a leader among nations.

. . . on a more practical vein it is essential that jurisdiction be returned at least to the Confederated Tribes of the Umatilla Indian Reservation. Our country consists of over 3,200 square miles and our reservation is some 285,000 acres. Within these vast areas State and county law enforcement simply cannot provide the protection it ought to be providing. This applies both to the Indian and to the non-Indian living or passing through the reservation. Every law enforcement official in Umatilla County is aware of these problems and most of them have taken the opportunity to wholeheartedly endorse a return of jurisdiction to the Confederated Tribes<sup>80</sup>

#### E. THE RETROCESSION MOVEMENT

Although there are diverse viewpoints among the tribes on the reasons why State jurisdiction assumed under Public Law 280 is inappropriate, there is overwhelming support among the tribes that at least some, if not all, State jurisdiction over Indian reservations be removed.<sup>1</sup> The questions that arise frequently are how such removal—retrocession—should be accomplished and whether particular tribes would wish to have any State involvement—jurisdiction—present on their reservations.

Norbert Hill, vice chairman of the Oneida Tribe of Wisconsin, indicated that Oneida had requested the Governor of Wisconsin to retrocede jurisdiction to the Federal Government because Public Law 280 "eroded tribal sovereignty," and law enforcement at Oneida under the State system was an "unreality."<sup>2</sup> Others also have focused on the failure of States to provide law enforcement and other services that Congress perceived to be lacking when it passed Public Law 280. Ordie Baker, chairman of Lac Courte Oreilles, stated:

After twenty-two years, this experiment (Public Law 280) has failed. The protection of persons and property is still unavailable . . .<sup>3</sup>

Many of the California tribes also focus on the failure of the State to provide adequately for Indian interests as one reason for retrocession.<sup>4</sup> The failure of law enforcement prompted the successful Nevada movement for retrocession.<sup>5</sup> The same was true for Port Madison retrocession.<sup>6</sup>

Another reason given for seeking retrocession which has significant support is the lack of initial tribal consent to State jurisdiction.<sup>7</sup> This view was given some congressional recognition when Public Law 280 was amended in 1968 to prospectively require tribal consent. Since the requirement of tribal consent in 1968, no tribe has consented to the imposition of State jurisdiction. The 1968 amendment did not, however, provide any tribal mechanism for curing previous assumptions since retrocession is dependent upon State action.

<sup>80</sup> Statement of Jack Olsen, District Attorney, Umatilla County, Oreg., S. 2010 hearings at 563-4.

<sup>1</sup> There are a few tribes that are in favor of State jurisdiction. Generally the reasons given for this review are the smallness of the tribe; its land base precludes effective trial government; and the state of acculturation or assimilation of a particular tribe to the dominant culture.

<sup>2</sup> Great Lakes Transcript, vol. 1 at 22-23.

<sup>3</sup> S. 2010 hearings at 50.

<sup>4</sup> See e.g., testimony of Vern Johnson, Intertribal Council of California, Sacramento Trans. at 275-81 and southern Calif. Trans., vol. I at 8-9 (Quechan) 59-62 (Rincon) and vol. II at 92-93 (Pala).

<sup>5</sup> Field interviews.

<sup>6</sup> *Supra*.

<sup>7</sup> See e.g., statement of Roger Jim, Yakima Nation, S. 2010 at 17-19.

The adoption by the State of Washington of a complex jurisdictional scheme based on land ownership patterns, and specific subject areas has<sup>8</sup> brought much confusion.<sup>9</sup> This development is certainly one Congress did not contemplate because one of the reasons for Public Law 280 was to reduce the patchwork of jurisdiction Congress saw before the passage of Public Law 280. A number of Indian tribes in Washington view this vastly confusing and ineffective system as a major basis for requiring retrocession.<sup>10</sup>

As noted previously,<sup>11</sup> one basis for Public Law 280 was the assimilation philosophy that periodically pervades Federal Indian policy. Tribal rejection of this philosophy is clear and forthright:

They [the State] want the control but they don't know how to handle it and they want to put all of us Indians into a category and assume that if we stick around long enough, we will soon be white, and if—they want to throw us into that melting pot and we are just basically telling them to go to hell. We don't go for that.<sup>12</sup>

Although court decisions in hunting and fishing rights, taxation, and land use controls should make clear that States and their subdivisions do not have any special jurisdiction pursuant to Public Law 280, it is not anticipated that tribes will be free from continual State attempts at regulation in these areas. Public Law 280 provides States with the appearance, although not the legal reality, of power, and this veneer of authority has been an extremely costly problem for Indian governments and non-Indian taxpayers. For example, the litigation surrounding the zoning and land use controls between the city in Palm Springs and the Agua Caliente band (membership less than 100) alone has consumed a half million dollars in legal expenses. The Colvilles expend approximately \$100,000 per annum in legal fees to protect tribal interests from State intrusion. The States show no signs of abating this behavior. Shortly after the Ninth Circuit opinion in *Santa Rosa*,<sup>13</sup> San Diego County notified all reservations in the county that since Santa Rosa was technically not a final decision, the case would be appealed to the Supreme Court—San Diego would still apply its various land use regulations to the reservations.<sup>14</sup> Testimony of an associate State Attorney General representing Departments of Fish and Game in Washington shows a clear pattern of continual litigation attempts to graft exceptions to hunting and fishing cases which have gone against the State's interests in almost all instances. The pattern was so pervasive that the concurring opinion in *U.S. v. Washington*,<sup>15</sup> in an unusual judicial step, notes the recalcitrant behavior of the State as necessitating continuing Federal court supervision.

The continual need to fight State attempts at regulation of tribal interests is seen by many tribal officials as a serious handicap in pursuing their economic and development plans. Lucy Covington, then council member of the Colville Tribe of Washington, put it this way:

<sup>8</sup> See Chapter II, Sec. B, *supra* prosecutor, Northwest Transcript 46-52.

<sup>9</sup> See e.g., testimony of Paul Majkut, Kitsap County.

<sup>10</sup> See e.g., testimony of Barry Ernstoff, counsel to Suquamish, Northwest Trans. at 101.

<sup>11</sup> Chapter II, section A, *supra*.

<sup>12</sup> Testimony of Louis LaRose, chairman, Winnebago Tribe, Midwest Transcript at 409.

<sup>13</sup> 532 F. 2d 655 (9th Circuit, 1975).

<sup>14</sup> Letter from Bo Mazzetti, community affairs officer, San Diego County to Matthew L. Calac, chairman, Ad Hoc Committee on Public Law 280, Dec. 11, 1975.

<sup>15</sup> 520 F. 2d 676 (9th Cir. 1975) at 693.

\* \* \* we cannot fulfill completely our dream of developing to the fullest extent possible as long as the cloud of Public Law 83-280 hangs over our heads.<sup>16</sup>

Nationally, the Indian position on Public Law 280 has been the subject of much discussion and significant hard work at developing solutions. The National Congress of American Indians has been consistent in its opposition to Public Law 280's unilateral transfer of jurisdiction to States. Frequent resolutions at NCAI conventions have addressed the issue.<sup>17</sup> Other national groups have almost uniformly attacked Public Law 280 and the termination philosophy underlying it. At the NCAI convention in San Diego in 1974, there began a major Indian effort to develop a unified position and a mechanism for repealing the effects of Public Law 280. Several meetings were held in Denver involving hundreds of tribal representatives which resulted in a draft retrocession bill. This bill in its current form was introduced as S. 2010 by Senator Jackson in June 1975, and since that time, major tribal support has coalesced behind the bill. Mel Tonasket, president of NCAI described the bill as reflecting:

\* \* \* a consensus of all the Indian tribes in America. That consensus is no accident. It was achieved only through great effort and expense.<sup>18</sup>

The support for retrocession as reflected in S. 2010 or as a general proposition is not limited to tribes in States where Public Law 280 has been operative. Frank Tenorio, secretary-treasurer of the All Indian Pueblo Council, expressed such support in the following manner:

Public Law 280 has no effect on any Indian tribes in New Mexico unless a tribe wishes to allow the State such jurisdiction. But even though the tribes of New Mexico enjoy all the power of self-government, it is still important to them that the strength of self-government depends in part on the exercise of governmental powers by all Indian tribes.

This insures generally applicable case law and consistent legislation. The efforts of the two national Indian organizations, in concert, along with Indian output throughout the nation has come out with legislation that is the Indian position.<sup>19</sup>

## F. SPECIAL PROBLEM AREAS

### 1. RECENT RETROCESSION EXPERIENCE: LESSONS LEARNED

Two recent experiences involving the removal of State jurisdiction and the reestablishment of Federal-tribal jurisdiction illustrate some of the problems inherent in the process as it exists.

#### (a) Nevada

In 1957, by affirmative legislative action,<sup>20</sup> Nevada provided a process for assumption of jurisdiction pursuant to Public Law 280. This process provided for State assumption on a county-by-county basis with the individual counties being provided with the option to exempt themselves, or portions thereof, for coverage. The result of this proc-

<sup>16</sup> S. 2010 hearings at 110. Mrs. Covington has since become the chairwoman of the Colville Tribe.

<sup>17</sup> See Report on National Congress of American Indians: "Historical Indian Policies and Priorities," 1900-1975, American Indian Policy Review Commission: *Declaration of Indian Purpose*, Chicago Conference, University of Chicago, June 13-20, 1961; and NAICTA, volume I, "The Impact of Public Law 280 Upon the Administration of Justice on Indian Reservations."

<sup>18</sup> S. 2010 hearings at 12.

<sup>19</sup> *Ibid.* at 140.

<sup>20</sup> Nevada Rev. Stats. 41.430.

ess was that jurisdiction was assumed over some but not all Indian reservations.<sup>21</sup>

Growing tribal dissatisfaction in the 1970's with the provision of law enforcement services and the removal of Indian children from Indian homes by State social service workers in the reservation areas where the State had assumed Public Law 280 jurisdiction led to a statewide Indian effort for redress.<sup>22</sup> This effort solidified into a retrocession movement. The Nevada Legislature passed a retrocession statute on July 1, 1974, NRS. 41-430, which provided for individual tribal referendum on whether the State should retrocede jurisdiction over its specific reservation. All previously covered reservations with the exception of Ely Colony chose retrocession. On July 1, 1975, the Secretary of the Interior accepted Nevada's retrocession proffer.

The intervening period of approximately 1 year was a period when the Nevada tribes were pretty much left to their own devices and received no meaningful Federal assistance to plan or prepare for their reassumption of jurisdiction.<sup>23</sup> Most of the Nevada tribes over whom retrocession was to occur had not been exercising concurrent jurisdiction and therefore did not have up-to-date law and order codes, tribal courts, trained tribal judges or other personnel necessary to provide full governmental services. In addition, many of the tribes do not now independently possess developed economic resources to provide for or to enable purchase of the services necessary.<sup>24</sup> The Federal Government did not provide either the funds or the personnel to assist in the redrafting of law and order codes or in designing and implementing of mechanisms for tribal exercise of jurisdiction. Although many BIA officials were not in favor of retrocession, the BIA agency in Stewart, Nev. requested that \$250,000 in planning money be made available to Nevada tribes for the transition. The request was turned down apparently for fiscal reasons at the Washington level.<sup>25</sup> Tribal application was made to LEAA for planning funds; this application was turned down because, although the tribes soon would be exercising significant law enforcement functions, they then were not, and hence were not certifiable by the Secretary of the Interior, a prerequisite that determines which tribes LEAA may fund. The only meaningful service available from the State was assistance in setting up a tribal referendum to determine positions on retrocession.

An additional problem, of much functional significance, was the uncertainty as to when State jurisdiction would cease. Rather than any negotiated or mandated timetable, both State and tribal officials could only guess when and if the Secretary of the Interior would act to accept retrocession. In the interim, State services were in some instances prematurely withdrawn, creating a vacuum. Also, once the Secretary of the Interior did act, his action was effective immediately.

<sup>21</sup> Covered were Battle Mountain Colony, Carson Colony, Dresserville Colony, Duckwater Colony, Elko County, Ely Colony, Goshute Reservation, Novelods Colony, Odgers Rankh, Reno-Sparks Colony, Ruby Valley allotment, South Fork Reservation, Washoe Pinenut allotment, Washoe Tribal Farms, Winnemucca Colony, and Yomba Reservation.

<sup>22</sup> Interviews with Harold Wyatt, director of the Nevada Inter-Tribal Council, Dec. 18, 1975.

<sup>23</sup> Interviews with Robert Frank, Chairman Wassau Nation, Mike Densay, Counsel, Wassau Nation, and Donald Pope, director, Nevada Indian Legal Services, Dec. 19, 1975.

<sup>24</sup> *Ibid.*

<sup>25</sup> Interview with Bob Hunter, director, Western Nevada Agency, BIA Dec. 19, 1975.

Therefore, on July 1, 1975, the Nevada tribes had only one option: to adopt preexisting and in the view of most observers, outdated, federally drafted systems for tribal law enforcement—25 C.F.R. law and order codes and courts. Following the Nevada "tradition" of having all judges be lawyers in a State where there are few, if any, Indian lawyers, all CFR court judges are non-Indians.<sup>26</sup>

Once retrocession did in fact technically occur, LEAA made a \$125,000 grant to Nevada Indian Legal Services to assist tribes in preparing law and order codes and constitutional revisions. The BIA has opened an additional office in Nevada—the Eastern Agency, in Elko. The rationale for two agencies is the distance between eastern Nevada and the existing Stewart Agency (Carson City) and a request from Elko area tribes for their own agency. Nine BIA police and three judges have also been added. Most of the police were obtained by transferring BIA police from other States, thereby reducing police presence in those areas.

In effect, the Nevada transition—planning, training, and the like—has occurred and is occurring after retrocession.

One prominent observer and participant in Nevada made the following recommendations with respect to any future retrocession:

(1) Strong BIA support—the Bureau cannot adopt a sit-back-and-wait attitude expecting "the experiment" to fail; (2) there needs to be a significant prior commitment of funds for planning and training; (3) the discretion of the Secretary of the Interior under 25 U.S.C. 1322: Indian Civil Rights Act, should be mandatory within a specified period of time; (4) a sufficient period of time should be made available for tribes to gear up for assumption of jurisdiction.<sup>27</sup>

(b) *Menominee*

As part of the termination, or assimilation, fever of the 1950's, the Menominee Tribe of Wisconsin was terminated.<sup>28</sup> After a long and hard-fought battle by Menominees and their allies, in December 1973, Congress reversed itself via the Menominee Restoration Act<sup>29</sup> and set up a mechanism to reestablish tribal government and the Federal trust relationship. While restoration is not legally the same as retrocession, the applicability of the restoration experience is relevant because both can involve a tribe moving from a position of minimal exercise of governmental powers, including the existence of the institutions for such exercise, to a greatly expanded exercise of governmental power.

The Restoration Act directed both the Secretary of the Interior and Menominee Enterprises, Inc., the holder of remaining tribal assets, to jointly develop a transfer plan. In addition, an election was held which in effect produced an interim tribal government to represent the Menominee people for both preparation and implementation of the transition. The parties jointly developed this plan and Congress approved it. On April 22, 1975, the Menominee Reservation was legally reestablished.

The transition process mandatorily required negotiations among the tribe, State and Federal Government.

<sup>26</sup> There is no legal or practical basis for adopting this "tradition."

<sup>27</sup> Interview with Mike Deasay, counsel to Washoe Nation, Dec. 19, 1975.

<sup>28</sup> 25 U.S.C. secs. 891-902.

<sup>29</sup> Public Law 93-197, codified as 25 U.S.C. sec. 903.

The State was required to perform its jurisdictional responsibilities until the Federal Government and the tribes were prepared to accept jurisdiction. The orderly transition was complicated by the U.S. Department of Justice which, contrary to positions taken by the Associate Solicitor for Indian Affairs, and the attorney general of Wisconsin, decided the Menominee restoration did not remove Wisconsin's mandatory exercise of jurisdiction pursuant to Public Law 280. Therefore, in order for the transfer to become effective, Wisconsin had to formally retrocede jurisdiction. Governor Lucy of Wisconsin did so on February 19, 1976, and the Secretary of the Interior accepted on February 27, 1976, to be effective March 1, 1976.<sup>30</sup>

In the two and one-third years that occurred between the signing of the Restoration Act and the ouster of State jurisdiction, much occurred. Approximately one year was spent working for and negotiating a plan for transition. A new proposed constitution and bylaws were drafted and revision and consultations with tribal members are in process. Once that constitution is adopted, courts, the law enforcement apparatus, and other Government entities needed to be established. Currently, the tribe is operating its justice pursuant to 25 C.F.R. and has contracted with Menominee County for the purchase of police services.

Other specific support services are also being purchased from Menominee County and the State of Wisconsin.

Ada Deer, the chairperson of Menominee, felt this several-year transition period was crucial but too constrictive timewise to allow for all that needed to be done:

I think that the tribes as well as the states need to understand more about the issue and what's involved. There is a very important question of funding, the question of training of personnel, the judges, the facilities, and all this, and I think it would be very important to have some understanding of what's involved and how it can be planned for and carried \* \* \*<sup>31</sup>

## 2. TECHNICAL AND LEGAL SERVICES

### (a) *Preparation*

Too frequently, Indian tribes are referred to as if all had the same traditions, populations, economic resources, and land bases. Clustering tribes into a collective entity, while useful for some legal and relationship analyses, is completely erroneous with respect to many issues. One such issue is the ability and resources necessary for retrocession. Taken one step further, it is reasonable to assume that the diversity of traditions, land base and resources will significantly affect the desired or actual exercise of tribal jurisdiction.

As indicated previously,<sup>32</sup> some tribes are effectively exercising jurisdiction in Public Law 280 states concurrent with that of the State and neighboring municipalities. These tribes, in a pragmatic sense, can make fairly quick decisions under retrocession as to how much jurisdiction they wish to exercise exclusively, or what compacts or jurisdictional agreements with non-Indian governments, or other Indian governments, they would deem appropriate.

<sup>30</sup> 41 F.R. 8516.

<sup>31</sup> Great Lakes Transcript, vol. II at 119.

<sup>32</sup> See sec. D(1) of this chapter.

Other tribes who generally, because of resources, have not exercised jurisdiction since Public Law 280 came into effect, often do not currently have viable justice and law enforcement systems. For these tribes, substantial resources may be necessary for them to make these jurisdictional decisions, and enter into the negotiations that may be required. Many older tribal members remember an oppressive BIA police system and do not want to return to that.

Still other tribes have such small population and land bases that as a practical matter they may well wish to retain State jurisdiction in at least some areas. All of these decisions, and more, would not be made precipitously by Indian governments.

It takes 20 years, fine, because it is going to take many tribes that long to gear up their administration, maybe more than that. This tribe here, I would guess, I have thought about restructuring the administration for all the things we are going to need, right from the top down. We have to get a new type of administration completely if we go into retrocession. We will definitely have to go into an administrative-manager type of administration. And then, your courts and jails, everything else that is connected with it, social services, I think, it would take at least 6 years, 6 years of working with the BIA to successfully complete retrocession.<sup>33</sup>

A very real and significant question therefore becomes: what are the resources available to the tribes and are those resources reliable?

(1) *Private Resources*.—Although there are some tribes with significant economic resources, who could purchase the lawyers, political scientists, et cetera, that they may feel are needed to plan and execute effective resumption of tribal government operations, the majority of tribes do not have these economic resources.<sup>34</sup> Even those tribes with such economic resources often would prefer to use those resources to promote the social and economic welfare of the reservation than to pay attorneys' fees.

Most tribes, therefore, rely on mixed systems of legal technical assistance: public interest lawyers, legal counsel from the Solicitor's office, and private attorneys. The public interest lawyer generally is employed by a legal service organization such as California Indian Legal Services, or is foundation-supported as is the Native American Rights Fund. As valuable as these resources are, the programs are usually significantly underfunded and understaffed to provide the full range of services requested of them. Some such as NARF are definitionally limited to major precedent establishing cases rather than on-going legal assistance of the type that a State attorney general provides to the client State. Several other factors complicate total reliance on legal services programs. The extent of their representation is restricted by Federal law to preclude political representation—lobbying—something which will be required in developing and negotiating permanent working relationships with non-Indian governments. Another potential problem is that these programs may occasionally be at political odds with tribal governments generally or via representation of individual tribal members.<sup>35</sup>

(2) *Federal Resources*.—By far the most serious problem is in the area of Federal resources. Although the services now provided vary from region to region and tribe to tribe, there is significant dissatis-

<sup>33</sup> Statement of Elmer Savilla, Chairman of the Quechan Tribe, Transcript of site visit, Quechan Tribal chambers, Yuma, Ariz., Jan. 12, 1976, at 43.

<sup>34</sup> See Report of Task Force No. 2.

<sup>35</sup> See *e.g.*, *Dodge v. Nakag*, 298 F. Supp. 17 (D. Ariz. 1968).

faction with the manner and adequacy of Federal legal assistance. The major Federal arm for legal assistance is the office of the Solicitor of the Department of the Interior.

As a practical matter, it is not possible for the Solicitor's office to fully service tribes in a retrocession setting. Elmer Nitzschke, field solicitor servicing the Great Lakes region, testified that there were four attorneys in his office who provide counsel to all of the Interior agencies:

*Question.* There are 20 small tribes in your region which are [potentially] due for retrocession; you would not, I take it, be able to provide the kinds of services needed by all of them on an immediate basis?

*Answer.* No, that's very true . . . I think what should happen is that the tribes . . . be provided with adequate funds to allow them to retain counsel to represent them in legislative or in governmental matters, tribal governmental matters and business matters . . .

\* \* \* \* \*  
This allows us [solicitor's office] to be more effective and we could assist tribes by responding to tribal attorneys . . . but we do not have a staff to serve as tribal attorneys for all the tribes in the agency or to serve as business counsels to them. It's physically impossible.<sup>36</sup>

Another potential avenue for Federal services is the Bureau of Indian Affairs. As noted, in the prior discussion of Nevada retrocession, the BIA's role in preparation, planning, and transition was at best negligible.<sup>37</sup>

Jerome Tomhave, the Superintendent of the Riverside BIA agency in southern California, has indicated almost no preparation or readiness on the part of the Bureau to assist tribes in retrocession.

*Question.* What type of legal [or] technical staff would your office through the Interior Department be able to provide in custom drafting law and order codes?

*Answer.* At the present time, we are not able to provide anything.

*Question.* Do you have any resources . . . political scientists, administrative specialists,—that would be able to provide services on the structuring of tribal government?

*Answer.* Well, we have a limited capacity.

\* \* \* \* \*  
*Question.* Do you provide training of any sort, e.g., parliamentary procedures, for tribal governments?

*A.* We contract it.

\* \* \* \* \*  
*Question.* How extensive is this training?

*A.* Very limited.<sup>38</sup>

The other major resource potential,<sup>39</sup> particularly in the area of criminal law jurisdiction, is LEAA. The restriction on LEAA funding only to tribes that are exercising jurisdiction, however, under current interpretations, precludes its usefulness as a planning resource prior to retrocession.

A major issue for tribes as well as some non-Indians is the financial resource to operate a tribal system. No one seems to know exactly what the costs will be. Superintendent Tomhave

<sup>36</sup> Testimony of Elmer Nitzschke, Great Lakes Trans. vol. II at 178-79.

<sup>37</sup> Interview with Robert Frank, Chairman Wassau Nation; Mike Deasay, counsel, Wassau Nation, and Donald Pope, Director, Nevada Indian Legal Services, Dec. 19, 1975.

<sup>38</sup> Southern Calif. Trans., vol. I at 44-45.

<sup>39</sup> Tribal Government Development Funds under sec. 108 of Public Law 683 are not addressed in this section because of their small funding level when divided up between the tribes. See Tribal Government Task Force Report for a detailed discussion.

estimated startup costs for criminal jurisdiction only would be approximately \$1 million for southern California tribes and annual expenditures thereafter of approximately \$200,000. Estimates for the Northwest are approximately \$1,500,000 per year.<sup>40</sup> LEAA funding would, of course, defray some costs but it is clear that other financial resources will be required.<sup>41</sup>

#### FINDINGS

a. The termination philosophy always opposed by tribes and now repudiated by Congress, embodied in Public Law 280, is a serious barrier to tribal self-determination.

b. The 1968 amendments to Public Law 280 have not cured its defects since tribes still have no determinative voice.

c. State assumption of jurisdiction has not resulted in integration of Indian people into dominant culture; has not provided substantial nondiscriminatory services to Indian people; and has not cured oppressive BIA involvement in the viability of Indian tribes.

#### RECOMMENDATIONS

a. Legislation should be passed providing for retrocession adhering to the following principles:

(1) Retrocession shall be at tribal option with a plan.

(2) A flexible period of time for partial or total assumption of jurisdiction, either immediate or long term, should be provided.

(3) There should be a significant preparation period available for those tribes desiring such, with a firm commitment of financial resources for planning and transition.

(4) There should be direct financial assistance to tribes or tribally designated organizations.

(5) LEAA should be amended to provide for funding prior to retrocession for planning, preparation or concurrent jurisdiction operations.

(6) Provisions should be made for federal corporate or charter status for inter-tribal organizations (permissive, not mandatory).

(7) There should be tribal consultation with state and county governments concerning transition activities (no veto role, however).

(8) The Secretary of the Interior should:

(a) Act within 60 days on a plan or it is automatically accepted;

(b) Base non-acceptance only on an inadequate plan;

(c) Delineate specific reasons for any nonacceptance;

(d) Within 60 days after passage of the act, the Secretary of the Interior shall draft detailed standards for determining the adequacy or inadequacy of a tribal plan. Such standards shall be submitted to Congress who shall have 60 days to approve or disapprove such standards.

(9) Any nonacceptance of retrocession by the Secretary of the Interior shall be directly appealable to a three judge district court in the District of Columbia; and,

The Department of the Interior should be obligated to pay all reasonable attorney fees as determined by the Federal court, except where such appeal is deemed by the court to be frivolous.

(10) Once partial or complete retrocession is accomplished, the Federal Government should be under a mandatory obligation to defend tribal jurisdiction assertions whenever any reasonable argument can be made in support of them.

<sup>40</sup> Testimony of Richard Balsinger, Montana Transcript 143-4, of cost in the Portland area office.

<sup>41</sup> This issue, of course, was not addressed by Public Law 280 when it transferred jurisdiction to States without any provision of financial assistance.

### III. THE FEDERAL ROLE IN JURISDICTION

#### A. THE DEFINED ROLE

At the time of the confederacy of the Thirteen Colonies into the United States of America, there was a controversy between the State of Georgia and the "General government." The issue was over the extent of Georgia's territorial claims and whether Georgia or the central government would control relations with the aboriginal (Indian) holders of the land.<sup>1</sup> The necessity of union during the Revolutionary War and acceptance by the Colonies of the view that the Federal Government should acquire all the territorial spoils of the war, led to the eventual unanimous agreement that the general government would have exclusive powers over foreign relations and territory not already secured by a colony.<sup>2</sup> Georgia agreed only after extracting what one author felt was payment beyond their rightful claim. Thus, the several States had unanimously agreed to delegate to the National Government the control of Indian affairs.<sup>3</sup>

Georgia's continued assertions of jurisdiction, notwithstanding its express delegation, led to the seminal case of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515,559 (1832), where Chief Justice Marshall declared:

... [The Constitution] confers on Congress the powers . . . of making treaties, and of regulating commerce with foreign nations, and among the several States and with the several Indian tribes. These powers comprehend that all is required for the regulation of our intercourse with the Indians.

This so-called plenary power emanates from the commerce clause and the treaty making provisions of the Constitution. It is not, however, an unfettered power and is subject to some constitutional limitations.<sup>4</sup> It has been argued that there is, as well, an extra constitutional obligation on the United States which gives rise to legal rights in Indian tribes. The source of this obligation comes from the concept of "high standards of fair dealings" required of the United States because of the dependency status ascribed to tribes resulting from their course of dealing with the Federal Government.<sup>5</sup>

There are at least two justifications which were used by the European nations, and later the United States, for claiming title to land held by Indians. Although "discovery" is the better known of the two, there was also the earlier policy of converting "savage heathens" to Christianity which European nations viewed as giving them superior

<sup>1</sup> See Blunt, "A Historical Sketch of the Formation of the Confederacy. Particularly with Reference to the Provincial Limits of Jurisdiction of the General Government Over Indian Tribes and the Public Territory" (1825). Library of Congress, No. E 309 B. 66.

<sup>2</sup> *Id.* at 61.

<sup>3</sup> See Cohen, "Handbook of Federal Indian Law," Chapter 5.

<sup>4</sup> Cohen, *supra*, at 89 and following.

<sup>5</sup> See *e.g.*, *Alcea Band of Tillamooks v. United States*, 329 U.S. 40, 67 S. Ct. 167, 91 L. ed. 29 (1946); and an unpublished paper by David T. LeBlond, *Compensable Rights in Original Indian Title*, June 1971, University of Washington School of Law, for Professor Ralph Johnson, for an excellently written paper putting forward the arguments for this right as a basis for Indian claims for compensation for the taking of land held by them under original Indian title.

rights to control the land and its people. This "conversion" or "missionary" theory carried with it the inherent notion of guardian-ward relationship.

Justice Miller in *United States v. Kagama*, 118 U.S. 375 (1886), described the dependency relationship in unequivocal terms, saying:

... These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and in the treaties in which it has been promised, there arises the duty of protection, and with it, the power . . . (Emphasis in original.)

The role of the Federal Government is one which requires of it, the highest standards of good faith dealings with Indian tribes as they have been placed in a dependency role. The importance of that "good faith" is significantly underscored by the decision of the United States Supreme Court, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), in which the Court refused to interfere with the actions of Congress with respect to legislation regarding the abrogation of treaty rights. Whether *Lone Wolf* is seen as an abrogation, plenary power, or separation of powers case, the practical effect on tribes is the same—Congress can abrogate and the courts will only review limited constitutional property rights considerations.<sup>7</sup>

The relative jurisdictional powers of the Federal, State, and tribal governments is well traced in an excellent article by Peter S. Taylor, "Development of Tripartite Jurisdiction in Indian Country,"<sup>8</sup> and does not bear extensive repetition here. Mr. Taylor summarizes the rule of jurisdiction as "allowing a state to extend its jurisdiction over non-Indians within Indian country to all matters which do not interfere with the Federal duty to protect Indians."

#### 1. CRIMINAL JURISDICTION<sup>9</sup>

Generally speaking, each of the three sovereigns historically exercised relatively exclusive jurisdiction within the boundaries of their own domains: the States were excluded from exercising jurisdiction in Indian country within their boundaries.<sup>10</sup> As Indians came into increasing conflict with non-Indians encroaching on their territory, Congress felt the need to exercise jurisdiction over such clashes and enacted the General Crimes Act, now codified as 18 U.S.C. § 1152. That statute, which was conceived of as the Federal Government exercising concurrent jurisdiction with tribes, specifically reserves to the tribes intra-Indian conflicts; the right to preempt Federal jurisdiction by punishing an Indian through the local law of the tribe (no matter what the offense or against whom); and any specific areas secured to the exclusive jurisdiction of the tribe by treaty.

<sup>7</sup> *Id.* at 383-84.

<sup>8</sup> Some current day Indian leaders feel that only "recourse" for justice where the United States does not act in good faith is in the International Community. Testimony of Russell Means, Mid-West Transcript at 489.

<sup>9</sup> 22 Kan. L. Rev. 351 (1974).

<sup>10</sup> Little can be added to the excellent report done by the National American Indian Court Judges Association report, "Justice and the American Indian," volume 5, "Federal Prosecution of Crimes Committed on Indian Reservations" (1974). This section will only add some recent observations, as not much has changed since that report.

<sup>11</sup> See Vollman, "Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendant's Right in Conflict," 22 Kan. L. Rev. 387 (1974) for a good discussion.

In 1871, a Sioux Indian named Crow Dog, killed a Sioux chief named Spotted Tail and was brought before a Federal court for trial where he was convicted of murder. The United States Supreme Court reversed, ruling that the Federal courts had no jurisdiction to try him in *Ex Parte Crow Dog*, 109 U.S. 556 (1883). Congress was outraged and, in 1885, passed the Major Crimes Act asserting jurisdiction over 7 enumerated crimes, which have now expanded to 14 and are found in 18 U.S.C. § 1153.<sup>11</sup> This Federal jurisdiction is exerted over any Indian in Indian country who commits one of the specific crimes against the person or property of another Indian or any other person.

Meanwhile, the Supreme Court had ruled in *United States v. McBratney*, 104 U.S. 621 (1881), that the State had jurisdiction over offenses committed by one non-Indian against another non-Indian in Indian country. *McBratney* was later followed by *Draper v. United States*, 164 U.S. 240 (1896) and *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946).

The patchwork was further added to by the adoption of the Assimilative Crimes Act which makes the laws of the State (except where there is a specific Federal statute covering the same conduct) applicable to Federal enclaves located therein.

Given the above, the following jurisdictional pattern emerges:

Except for offenses which are peculiarly Federal in nature, the general criminal jurisdiction of Federal courts in Indian country is founded upon the General Crimes Act [18 U.S.C. § 1152] and the Major Crimes Act [18 U.S.C. § 1153]. The General Crimes Act extends to the Indian country, all of the Federal criminal laws applicable in Federal enclaves, including the Assimilative Crimes Act [18 U.S.C. § 7 and 13], and under this statute, the Federal courts may exercise jurisdiction over offenses by an Indian against a non-Indian and offenses by a non-Indian against an Indian. This statute (18 U.S.C. § 1152) does not extend to offenses committed by an Indian against the person or property of another Indian nor to any Indian committing any offense in Indian country who has been punished by the local law of the tribe, and because of the exception carved out by the *McBratney* and *Draper* decisions, it does not extend to offenses by non-Indians against non-Indians.<sup>12</sup>

Although the recent passage of S. 2129 cured some constitutional infirmities and expanded major crimes jurisdiction by one more crime, S. 2129 did not resolve many issues presented by the patchwork pattern of Federal legislation. These will be discussed in the context of the (1) Major Crimes Act and separately, the (2) General and Assimilative Crimes Act.

#### (1) Major Crimes Act

Congress action in 1885 to extend Federal jurisdiction over enumerated crimes is generally interpreted to have eliminated tribal jurisdiction over those offenses. Neither a literal reading of the statute nor its legislative history support such a conclusion. Moreover, court cases dealing with Federal jurisdiction either have not had the issue of tribal jurisdiction before them, and any references to the effect that tribal jurisdiction is eliminated were *dicta* to the holdings.<sup>13</sup> Likewise, tribal courts have exercised jurisdiction over theft, although larceny is one of the proscribed crimes.

<sup>11</sup> Most recently amended by the passage of S. 2129 adding kidnapping and rectifying some constitutional infirmities.

<sup>12</sup> See Taylor, "Criminal Jurisdiction" Manual of Indian Law, AILTP, 1975.

<sup>13</sup> See Vollman, *supra*, at 390; Taylor, Criminal Jurisdiction, *supra*; Indian Law Reporter, vol. No. 3 at 53 (1974).

As pointed out in the recent hearings to amend the Major Crimes Act, the 1968 Indian Civil Rights Act limits tribal penal powers to no more than \$500 or 6 months, or both. Such penalties would be inconsistent with effective, serious crime jurisdiction.<sup>14</sup> Nonetheless, tribal courts do exercise jurisdiction over serious crimes which, until recently, included the kidnapping of one Indian by another Indian where the events are wholly contained within the reservation.

Indications are that it would be more appropriate to support the view that tribal courts do have such concurrent jurisdiction, particularly in view of the negative impact on community tranquility and security resulting from the failure of Federal authorities to prosecute major crimes. Even given the limited penal powers of tribal courts, there is some benefit in diffusing personal vendettas which grow up where offenders have gone unpunished by Federal authorities.

U.S. attorneys are responsible for prosecuting under the Major Crimes Act. There is no requirement, however, that they prosecute every case brought before them. The process by which it is decided what will be prosecuted and what will be declined is not clear. The Hopi tribe, responding to this issue, summarized the situation:

The FBI investigates some of the "Major Crimes" in this area. Prosecution of these by the U.S. attorney seems sporadic and inconsistent. Policies to determine which cases "go federal" are very unclear and often not adhered to by (sic) federal authorities. What is important to tribal people is not necessarily important to the U.S. attorney. There should be a joint agreement with the Tribe, which the Tribe should initiate, on which cases are handled by which authorities. Tribal preference should be given superior weight.<sup>15</sup>

This lack of consistency stems from many attributes of federal prosecution by U.S. attorneys.<sup>16</sup> Most offices<sup>17</sup> do not usually have a specific attorney who consistently handles Indian cases; there is therefore a consequent lack of familiarity and technical expertise. Major Crimes prosecution often involves street crimes types of cases which are equally unfamiliar. Likewise, they sometimes involve what is effectively a misdemeanor offense which is difficult to take very seriously at the Federal level. Prosecution is more difficult, as these cases often involve alcohol and/or family situations or ties which make witnesses unpredictable. In fact, the whole Federal criminal justice system is so foreign to reservation life and the very nature of the situation may intimidate or affect witness dependability. All of these factors tend to produce a reduced success rate in prosecutions, none typical of Federal prosecutions generally, and, as a result, Indian cases are shied away from.

Eighty percent of all Indian cases presented are declined by the U.S. attorney's office. Such a figure is inconsistent with the special responsibility U.S. attorneys have for Indian cases. Many U.S. attorneys and their deputies do not understand this responsibility.<sup>18</sup> Whether it can be said that tribes may have concurrent jurisdiction or not, the practical effect is that most reservations rely on Federal

<sup>14</sup> Hearings before the House Committee on the Judiciary, Subcommittee on Criminal Justice, Mar. 10, 1976, on S. 2129, Robert Pauley, deputy chief, Department of Justice.

<sup>15</sup> Southwest Hearings, Exhibit No. 8. (Question and Answer No. 6.)

<sup>16</sup> Many of the attributes of Federal prosecution described in this section are taken from an interview with Doris Melsner, Associate Director, Office of Planning and Policy, Office of the U.S. Attorney General, Dec. 12, 1975.

<sup>17</sup> One significant exception exists in the Office of Sidney I. Lezak. See NAICJA, "Justice and the American Indian," vol. 5, at p. 5, *supra*.

<sup>18</sup> *Id.*

prosecution as the primary (if not sole) source of Major Crimes law enforcement. The declining of 8 out of every 10 cases presented has a far more devastating effect in such a situation than would be the case and other geographic areas where U.S. attorneys serve limited prosecutorial functions.

In Indian communities where almost everyone is known to everyone else, and social and family factions are common bonds, failure to prosecute may create the potential for self-help, which in turn, creates further problems.<sup>19</sup> Clearly, local handling of such problems would contribute much to diffuse such situations where sensitivity to local concerns and sentencing appropriate to community and individual needs is much higher.

Investigations by FBI agents is the primary basis for U.S. attorney prosecutions. Highly trained officers can make the work of a prosecutor much easier, and consistent association develops identifiable working patterns. But FBI agents are not usually close to Indian communities, either physically or culturally, and cannot easily grasp the equities of a situation which so often have much to do with the decision to prosecute or decline. Since local BIA special officers, police or tribal police are much closer, FBI agents are not often the first officers on the scene of a crime. Thus, the scene often has to be preserved until an agent can arrive, in which case they usually end up redoing work already done by a more closely situated BIA or tribal officer. The quality of investigation may ultimately turn on the work done by local officers in any event, pointing up the desirability of having well-trained local officers for this, as well as all the other more obvious reasons.

Lack of feedback to the tribal governments and community further undercut tranquility and security. As Gila River Reservation Lieutenant Governor Antone points out:

We're getting quite a bit of concerned calls, in other words, we're getting some pressure from our community members.

The only thing that we could do is to say that we don't—we, the tribal government, at least in the executive body doesn't have anything to do with investigation of these cases, and it's to them it's kind of like a cop-out.

But the working relationship, I think, between the tribe, the Bureau (BIA) and the FBI are not that good, at this point.<sup>20</sup>

By contrast, Dennis Karnopp, tribal attorney for the Warm Springs Reservation, describes the sort of relations the Warm Springs tribes have with Federal officers:

... we have had a good relationship with the FBI ... There's an FBI agent stationed in Bend (Oregon) which is ... about 60 miles south of the reservation ... and I find when they change an FBI agent in Bend, the place I find out about it—I kind of wonder who that guy is down at Warm Springs and pretty soon he's going to the feasts and ceremonies and stuff like that. And most of the FBI men end up spending a lot of time socially and getting involved with the people and I see that happen several times; it's unique.

\* \* \* \* \*

Naturally, somebody that's down there, you know, is known other than when he's coming out to investigate some big ripoff, he's known as a person and got some relationship with the people, can function much better than somebody that's a stranger.<sup>21</sup>

<sup>19</sup> Judge William Roy Rhodes, Chief Judge, Gila River Tribal Court.

<sup>20</sup> Southwest Hearing at 12-13.

<sup>21</sup> Northwest Hearings at 274-75.

The practical impact of the role of Federal criminal prosecution presents yet another dimension. The lack of faith in the services delivered by Federal entities has occasioned the necessity for reservations to assert their own jurisdiction over non-Indians. For example, the Gila River Reservation was one of the first to pass a "consent ordinance" which notifies non-Indians entering the reservation that they are subject to tribal court jurisdiction. Conversely, Warm Springs, which has good working relations with Federal authorities, views the extension of jurisdiction over non-Indians as presently unnecessary and potentially harmful as it could undercut the effectiveness of its tribal courts in community affairs, where the 1968 Indian Civil Rights Act requirements could interfere with local justice standards.

The conclusion is that, where necessary, tribal governments must be able to provide law and order services when they are not being adequately provided by other responsible agencies. The example demonstrated by Warm Springs is a significant exception which serves to highlight the dynamics.

The role of Federal law enforcement agencies has, in some cases, been outrageous. For example, intraoffice memos of the U.S. Commission on Civil Rights dated July 9, 1975, and March 31, 1976, concerning events on Pine Ridge Reservation, S. Dak., illustrate the level to which a situation can degenerate. These reports indicate that significant portions of reservation populations were cut off from any law enforcement services. Of even more frightening consequences are the actions taken by Federal officers on the reservation against its inhabitants. These reports speak for themselves and are attached to this section in their entirety.

An area of major crimes jurisdiction presently unresolved is raised by the decision in *United States v. Antelope*, 523 F.2d 400 (9th Cir. 1975), now before the U.S. Supreme Court. The question presented is whether disparate treatment of an Indian and a non-Indian committing the same crime in Indian country against a non-Indian constitutes impermissible discrimination based on race. The circuit court struck down the conviction of the Indian defendant.<sup>22</sup>

Due to judicial interpretations, notwithstanding the language of 18 U.S.C. § 1152, non-Indian against non-Indian crimes in Indian country have been held to be State concerns.<sup>23</sup> The U.S. Department of Justice does not presently urge legislation to cure such a defect until the Supreme Court decides the *Antelope* case.<sup>24</sup> They have urged in their brief to the Supreme Court that it is not constitutionally impermissible for Congress to leave to the States a certain class of cases (i.e., non-Indian v. non-Indian) for trial and sentencing pursuant to State determinations even where that may result in the application of a more onerous standard to Indian defendants charged under the same conduct pursuant to Federal law. Alternatively, should that raise serious constitutional questions, the Department of Justice urges that the Supreme Court should overturn its previous holdings in

<sup>22</sup> The Indian person on the same facts as the alleged non-Indian cofelon was subject to Federal prosecution under felony-murder rule, while the non-Indian in a State proceeding, was not subjected to a felony-murder prosecution.

<sup>23</sup> New York ex rel *Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881).

<sup>24</sup> S. 2129 hearings, Mar. 10, 1976.



*McBratney* and *Draper*, thus obviating the disparity, as both defendants would then be subject to Federal law.<sup>25</sup>

At the very least there should be a recognition of concurrent jurisdiction under the General Crimes Act. The problems of relying solely on States to enforce jurisdiction over non-Indians within reservation boundaries presumes good faith on the part of State and local governments to expend their own law enforcement moneys to maintain the peace and dignity of a government, not their own, but that of an Indian tribe. As tribes evolve more and more into comprehensive governing units, the ability to discharge law and order functions over all of the citizens of a reservation becomes more imperative. The *McBratney* line of cases is inconsistent with both a comprehensive scheme of Federal laws and the emergence of tribal governments.

## 2. GENERAL AND ASSIMILATIVE CRIMES ACT

The General Crimes Act, now codified as 18 U.S.C. 1152, grew out of the 1834 Indian Trade and Intercourse Act. The legislative history of that act reflects an intention of concurrent jurisdiction of the tribes and the Federal Government over crimes by Indians and non-Indians in Indian country.<sup>26</sup> The act now applies laws applicable to Federal enclaves to Indian country, with the exceptions of crimes committed by one Indian against the person or property of another Indian, Indians punished by the local law of the tribe, and areas specifically preserved to tribes by treaty as being within their exclusive jurisdiction.

Prior to the enactment of the General Crimes Act, Congress had supplemented a sparse code of Federal crimes in Federal enclaves by adopting, by assimilation, the laws of the surrounding State, territory, possession or district in which the enclave was found. The purpose of this Assimilative Crimes Act [18 U.S.C. 13] was to prevent such enclaves from becoming havens from local morals laws as defined in 18 U.S.C. 7. These enclaves generally have been areas that have no local controls of their own, such as: the high seas or other waters outside of the jurisdiction of a State and within the jurisdiction of the United States; vessels belonging to the United States or anyone under its jurisdiction when in waters under U.S. jurisdiction, including the Great Lakes, et cetera; lands acquired or reserved for the United States; islands containing guano deposits and aircraft while in flight over the territorial waters of the United States.

Nonetheless, in 1946 the U.S. Supreme Court ruled that these laws were also applicable to the Indian country via 18 U.S.C. 1152.<sup>27</sup> The propriety of making applicable the full panoply of State behavioral proscriptions—where not otherwise preempted by Federal law—bears serious scrutiny when applied to Indian country where local tribal governments may have their own scheme of laws consistent with local cultural and societal norms. Moreover, where there are no identifiable standards for the application of such laws by U.S. attorneys, they have unfettered discretion as to when to apply or not apply such

<sup>25</sup> The latter argument would appear to be more consonant with the plain language of 18 U.S.C. § 1152 and an overall scheme of subjecting all persons in Indian country to a more consistent pattern of law enforcement jurisdictions.

<sup>26</sup> See e.g., pt. III, sec. 2, Brief of Appellees, *Oliphant v. Schlie*, No. 74-2154, on appeal 9th circuit, and the section on "Jurisdiction Over Non-Indians," this report chap. IV, §c.

<sup>27</sup> 636 U.S. 711 (1946).

State's laws.<sup>28</sup> This allows for significant intrusions on tribal self-government, even though such intrusions have been discredited and rejected in other situations.<sup>29</sup> The State, in concert with the U.S. attorney may accomplish by indirection that which it could not accomplish directly—that is, enforcement of State laws on an Indian reservation in the absence of compliance with public law 280.

The view that Indian reservations are potential havens from the State's morals laws carries with it an underlying attitude toward Indian people which is unwarranted and unsupported by history. One recent observation noted that:

You [non-Indians] have a very complicated legal system. It is not that way with my people. I have always thought that you had so many laws because you were a lawless people. Why else would you need so many laws? After all, Europe opened all prisons and penitentiaries and sent all their criminals to this country. Perhaps that is why you need so many laws. I hope we never have to reach such an advanced State of civilization.<sup>30</sup>

Shortly after *Williams v. United States*, *supra*, was decided, the 7th Circuit Court of Appeals reviewed the conviction of an Indian man in a Wisconsin U.S. District Court for operating a slot machine on a reservation. The decision held that the Indian defendant was punishable pursuant to State statute via 18 U.S.C. 13 applied by section 1152, and not under punishment provided by tribal law. *United States v. Sosseur*, 181 F. 2d 873 (7th cir. 1950). A contrary result was reached in *United States v. Pakootas*, No. 4777 (D. Idaho, N.D., 1963) where the court held that Indians participating in a gambling game were subject to the exception contained in section 1152 and as such, were under exclusive tribal control. Much earlier, in a Federal prosecution for adultery, an indictment against an Indian was dismissed in *United States v. Quiver*, 241 U.S. 602 (1916). That decision rejected the argument that so-called "victimless" offenders are not within the exceptions contained in section 1152; holding that such a narrow reading of intra-Indian offenses is inappropriate, that there was a victim "of sorts in the Indian woman," and that such conduct was purely an internal matter of the tribe absent clear Congressional direction otherwise.<sup>31</sup>

One commentator views *Sosseur* and *Quiver* as irreconcilable and sees *Sosseur* as no more than a "judicial aberration,"<sup>32</sup> while another sees it as merely unfortunate decision based on the weakest rationale offered in *Quiver* (i.e., that non-Indians using the machines voluntarily were "victims").<sup>33</sup> Nonetheless, the U.S. Department of Justice has adopted the *Sosseur* view and takes the position rejected in *Quiver* that "the exceptions in paragraph 2 of section 1152 to the general rule in paragraph 1 should be construed narrowly so that in appropriate cases, Indians committing such offenses against the 'community' can be prosecuted in Federal court."<sup>34</sup> It is not explained which "community" is meant, but it can be reasoned that since it is the State's laws being applied where no Federal law speaks to the situation, then it

<sup>28</sup> See Justice and the American Indian, vol. 5, 1974.

<sup>29</sup> See *Williams v. Lee*, 358 U.S. 217 (1959); *Kennerly v. District Court*, 400 U.S. 423 (1971).

<sup>30</sup> Janet McCloud, University of Washington School of Law, Law Day Ceremonies, May 1, 1969. Quoted in E. Cahn "Our Brother's Keeper: The Indian in America," at 182 (1969).

<sup>31</sup> See Vollman *supra*, at 396.

<sup>32</sup> Taylor, "Criminal Jurisdiction" *supra*.

<sup>33</sup> Vollman, *supra*, at 396.

<sup>34</sup> Paper delivered by Roger Adams, Jan. 27 to 29, 1975, Phoenix Ariz., U.S. Attorney's Conference on Indian Matters.

must be the surrounding non-Indian community which the Justice Department seeks to protect from activity on the reservation, in spite of local tribal controls to the contrary.

In any case, the facts of *Sosseur* are no longer applicable under assimilative crimes as Congress passed 15 U.S.C. 1175 the next year prohibiting the use, possession, et cetera, of gambling devices in Indian country, thus preempting the field. The anomalous result of this enactment is that unlike the States which may exempt themselves from this provision via 15 U.S.C. 1172, tribes cannot legalize the use of such devices. As a result, Nevada reservations are cut off from the prime source of revenue available to the rest of the State. Neither the research of the legislative history of 15 U.S.C. 1175 nor of 15 U.S.C. 1172 indicates why Indian country was included in the one or deleted from the other.

Moreover, a Judge Advocate General's opinion<sup>35</sup> reaches the rather questionable conclusion that 15 U.S.C. 1175 does not apply to military reservations.<sup>36</sup> Why a Federal military enclave would enjoy greater immunity from Federal moral laws than Indian tribes is unknown.

#### FINDINGS

(a) The adoption of the Major Crimes Act of 1885 and subsequent amendments places the primary responsibility for the prosecution of these enumerated crimes with the various U.S. attorneys' offices, but it is not clear that such jurisdiction is exclusive of tribal jurisdiction.

(b) U.S. attorneys' offices which have major crimes responsibility generally have no well-defined standards, of which reservation Indian tribes under that jurisdiction are aware, for defining which cases brought before them will be prosecuted and which will be declined.

(c) Many U.S. attorneys' offices do not have regularly assigned staff specifically responsible for Indian matters and major crimes prosecution on a long-term basis.

(d) Tribal courts exercise jurisdiction over serious crimes but are limited to penalties of no more than \$500 or 6 months, or both, by the 1968 Indian Civil Rights Act, which may be inadequate for even serious offenses of a misdemeanor nature.

(e) The exclusion of Federal and tribal jurisdiction over offenses between non-Indians within reservation boundaries is inconsistent with the security and tranquility of Indian communities.

(f) The application of the Assimilative Crimes Act to Indian country, as defined in 18 U.S.C. 1151, is an unwarranted application of States' moral laws on Indian reservations which may conflict with local tribal governmental scheme of laws and undercut significant tribal enterprise. There is no clear indication that the Assimilative Crimes Act was intended to apply to Indian country.

#### RECOMMENDATIONS

(a) Congress should clarify major crimes jurisdiction as being concurrent with tribal governments with primary enforcement being

<sup>35</sup> *United States v. Blackfeet Tribe of Blackfeet Indian Reservation*, 364 F. Supp. 192 (D.C. Mont. 1973).

<sup>36</sup> Interview with Peter Waldmeyer of the President's Commission on the Review of the National Policy Toward Gambling, July 14, 1976. The decision is obtainable in the blue room of the Pentagon.

with the Federal Government, unless and until a tribe demonstrates an ability and a desire to undertake such jurisdiction exclusively. Where U.S. attorneys decline prosecution, they should be immediately referred to the affected tribe for a determination of that tribe as to whether it will prosecute under tribal laws.

(b) The various offices of the U.S. attorneys should be required to coordinate with affected reservation tribes to develop standards for the decisions on which cases brought before the U.S. attorney will be prosecuted and which declined. There should be provision for meaningful tribal input and participation and all cases specifically requested by the tribe to be prosecuted should be given priority consideration.

(c) All U.S. attorneys' offices which have major crimes jurisdiction should have one or two of their staff specifically designated with responsibility for Indian matters and major crimes prosecution on a long-term basis to assure expertise and familiarity. Appropriations from Congress should designate funds for that purpose.

Criminal penalties available to tribal courts should be expanded to \$1,000 or 1 year for misdemeanor offenses and \$5,000 or 5 years for serious offenses. For tribes which show a desire and ability to exercise major crimes jurisdiction, provision should be made for their assumption of such jurisdiction with appropriate financial and technical assistance.

(e) Federal and tribal jurisdiction over offenses between non-Indians should be at least concurrent. At a minimum, the General Crimes Act should be amended to include offenses between non-Indians.

(f) The General Crimes Act should be amended to exclude Indian country, as defined in 18 U.S.C. 1151, from the application of the Assimilative Crimes Act.

U.S. COMMISSION ON CIVIL RIGHTS,  
MOUNTAIN STATES REGIONAL OFFICE,  
Denver, Colo., July 9, 1975.

Subject: Monitoring of events related to the shooting of two FBI agents on the Pine Ridge Reservation.

To: Dr. Shirley Hill Witt, regional director.

At about 1 p.m. on Thursday, June 26, two FBI agents were shot to death on the Pine Ridge Reservation near the town of Oglala, S. Dak. The FBI immediately launched a large-scale search for the suspected slayers which has involved 100 to 200 combat-clad FBI agents, BIA policemen, SWAT teams, armored cars, helicopters, fixed-wing aircraft, and tracking dogs. An increasing volume of requests for information regarding the incident and numerous reports and complaints of threats, harassment, and search procedures conducted without due process of law by the FBI prompted my visit to the reservation to gather firsthand information. MSRO was involved at Pine Ridge during the investigation of the tribal election held there in 1973. This office was also called upon to do a preliminary investigation of an incident involving the shooting of AIM leader Russell Means on the Standing Rock Sioux Reservation in North Dakota last month.

I was on the reservation from July 1 to 3, and during that time had the opportunity to talk with the acting BIA superintendent (Kendall Cuming), the president of the Tribal Council (Dick Wilson), FBI agents, BIA police officials, numerous residents of the reservation including several who lived in the vicinity of the scene of the shooting, and media correspondents from NBC, CBS, and National Public Radio. FBI officials were too busy to see me when I visited their headquarters to arrange for an appointment. Part of the time I traveled in the company of Mario Gonzales, an attorney and enrolled member of the tribe

who has been designated chairman for the South Dakota Advisory Committee.

This particular incident of violence must be seen in the context of tension, frustration, and crime which has increasingly pervaded life on the reservation during the last 3 years. Unemployment approaches 70 percent and the crime rate is four times that of Chicago. There have been eight killings on the reservation so far this year and uncounted beatings, fights, and shootings. Many of these incidents have never been explained or, in the minds of many residents, even satisfactorily investigated. The tribal government has been charged by reservation residents with corruption, nepotism, and with maintaining control through a reign of terror.

Tribal officials, including the president of the council, have been indicted in connection with such an incident (on a misdemeanor charge, although guns and knives were involved). It is widely felt that those in power profit from the largesse of Federal programs at the expense of the more traditionally oriented residents of the reservation.

Tensions are exacerbated by irresponsible statements by State officials. The Civil Liberties Organization for South Dakota Citizens, a right-wing group composed in large part of white ranchers who own or lease most of the prime land on the reservation, produces active support for Wilson's government and presses for State jurisdiction over the reservation.

During World War II, due to a shortage of law enforcement manpower, the FBI was given jurisdiction to investigate felonies on the reservation and this has never been relinquished. The number of FBI agents assigned to the reservation was recently increased in an attempt to cope with the mounting crime rate. One of the agents who was killed last week was on special assignment from Colorado.

Many of the facts surrounding the shooting are either unknown by officials or have not been made public. Media representatives felt that the FBI was unnecessarily restrictive in the kind and amount of information it provided. It is patently clear that many of the statements that have been released regarding the incident are either false, unsubstantiated, or directly misleading. Some of these statements were highly inflammatory, alleging that the agents were led into a trap and executed. As a result, feelings have run high.

The FBI had arrest warrants for four native Americans who had allegedly assaulted, kidnapped, and robbed a white man and a boy. Residents of the reservation and an attorney from the Wounded Knee Legal Offense/Defense Committee with whom I talked felt that the warrants were issued merely on the word of the white people without adequate investigation. Such a thing, they point out, would never have happened had the Indians been the accusers and typifies unequal treatment often given to Indian people.

The two agents killed in the shooting had been to several houses on the reservation looking for the wanted men. The occupants of some of these houses claimed that the agents had been abusive and threatening. Some of the native Americans that I talked with, who had been involved in the Wounded Knee incident, have a genuine fear that the FBI is out to get them. When the two agents were killed they had no warrants in their possession.

The bodies of the agents were found down in the valley several hundred yards from the houses where the shooting supposedly occurred. Bunkers described in newspaper accounts turned out to be aged root cellars. Trench fortifications were nonexistent. Persons in the houses were in the process of preparing a meal when the shooting occurred. One of the houses, owned by Mr. and Mrs. Harry Jumping Bull, contained children and several women, one of whom was pregnant. The Jumping Bulls had just celebrated their 50th wedding anniversary. As a result of the incident, Mrs. Jumping Bull had a nervous breakdown and is now in a Chadron, Nebr., hospital.

The body of Joseph Stuntz, the young native American killed in one of the houses during the shooting, was seen shortly after the shooting lying in a mud hole as though it had been dumped there on purpose. He was later given a traditional hero's burial attended by hundreds of people from the reservation.

Sixteen men were reportedly involved in the shooting though no one knows how this figure was determined. The FBI has never given any clear indication that it knows the identity of these men. Incredibly, all of them, though surrounded by State and BIA police and FBI agents, managed to escape in broad daylight during the middle of the afternoon.

In the days immediately following the incident there were numerous accounts of persons being arrested without cause for questioning, and of houses being

searched without warrants. One of these was the house of Wallace Littel, Jr., next-door neighbor to the Jumping Bulls. His house and farm were surrounded by 80 to 90 armed men. He protested and asked them to stay off his property. Eliot Daum, an attorney with the WKLOFDC who had been staying in the house with Little's family, informed the agents that they had no right to search without a warrant. They restrained him and prevented him from talking further with Little while two agents searched the house.

Daum was also present when David Sky, his client, was arrested in Pine Ridge as a material witness to the shooting. Sky was refused permission to talk with Daum before he was taken to a Rapid City jail, a 2-hour drive. Individual FBI agents with whom I talked were deeply upset over the execution of their comrades.

Most of the native Americans received me cordially and I was invited to attend the burial of Joseph Stuntz. Some expressed appreciation for my presence there as an observer and suggested that the Commission might be the only body capable of making an impartial investigation of the Pine Ridge situation. My interview with Dick Wilson was less satisfactory. He stated that he could give me no information and that he did not feel like talking about civil rights at a time like this.

Several questions and concerns arise as a result of these observations. The FBI is conducting a full-scale military operation on the reservation. Their presence there has created deep resentment on the part of many of the reservation residents who do not feel that such a procedure would be tolerated in any non-Indian community in the United States. They point out that little has been done to solve the numerous murders on the reservation, but when two white men are killed, troops are brought in from all over the country at a cost of hundreds of thousands of dollars.

No FBI agents actually live on the reservation and none of them are native American. They are a completely outside group with remarkably little understanding of Indian society. Questions are raised as to the basis for FBI jurisdiction on the reservation, the seeming conflict and overlap with the jurisdiction of the BIA police, and the propriety of the FBI, which furnished adversary witnesses for the Wounded Knee trials, acting as an investigatory body on the Pine Ridge Reservation. Many native Americans feel that the present large-scale search operation is an overreaction which takes on aspects of a vendetta.

Does the Commission have legal access to FBI and BIA investigatory reports which would enable an assessment of the scope and impartiality of their activities? Requests from this office to both of these agencies, and to the Justice Department's Office of Indian Rights, for reports of the investigation of Russell Means' shooting in June were denied.

The jurisdictional problem, like the present shooting incident, cannot be divorced from the other pressing concerns of Pine Ridge Reservation residents which relate to their basic rights as human beings and citizens of the United States. The climate of frustration, anger, and fear on the reservation, which results from poverty, ill health, injustice, and tyranny, would indicate that the latest incident of violence will not be the last.

WILLIAM F. MULDROW,  
*Equal Opportunity Specialist.*

Memorandum

MARCH 31, 1976.

Subject: Events surrounding recent murders on the Pine Ridge Reservations in South Dakota.

To: John A. Buggs, staff director, U.S. Commission on Civil Rights.

Events surrounding the murder of two Native Americans in separate incidents during the past 6 weeks on the Pine Ridge Reservation in South Dakota have again called into question the roles of FBI and BIA police in law enforcement on the reservation. Numerous complaints were received by MSPO alleging that these two agencies failed to act impartially or to respond properly in the aftermath of the two murders which are the subject of this memorandum. More seriously, the media published allegations that the FBI was perpetrating a coverup to protect guilty persons.

In view of the seriousness of these charges, Dr. Shirley Hill Witt, regional director, and William F. Muldrow, equal opportunity specialist from the Mountain States Regional Office, were asked to gather firsthand information on events which transpired. FBI and BIA police officers, attorneys, tribal officials, and other persons involved in events surrounding these two murders were inter-

viewed on March 18 and 19 in Rapid City, S. Dak., and on the Pine Ridge Reservation. Additional information was gathered through the mail and in telephone interviews.

Following is a brief summary of events which transpired according to the persons contacted.

Wanblee, a small town on the northeastern portion of the reservation, is largely populated by so-called "full blood" or traditionally oriented Native Americans. This community helped to oust incumbent Tribal President Richard Wilson by a three-to-one vote against him in the recent general election on the reservation. The chairman of Pine Ridge District, an area strongly supportive of Wilson on the reservation, was quoted on January 23 as saying that Wanblee needed "straightening out" and that people would come to do it.

On Friday evening and Saturday morning, January 30 and 31, according to Wanblee residents, several carloads of heavily armed persons reported by eyewitnesses to be Wilson supporters arrived in the town. Sometime Saturday morning, shots were fired, allegedly by this group, into the house of Guy Dull Knife. BIA police in town at the time called for reinforcements which arrived promptly but made no arrests of the persons identified by eyewitnesses as the ones who did the shooting.

Shortly following this incident that same day, Byron DeSersa, a resident of Wanblee, was shot and killed during a high-speed automobile chase, reportedly by persons recognized by passengers in DeSersa's car as being the same individuals responsible for terrorizing the town earlier. Attackers jumped out of their cars to chase those who were with DeSersa and he bled to death for lack of immediate medical attention.

Following DeSersa's death, the FBI, which has jurisdiction over felonies, was called and two agents arrived that afternoon. Sporadic shooting continued in the town through Saturday night and two houses were firebombed. Residents reported that despite their pleas, law enforcement officers who had cross-deputization powers and were present at the time, did nothing to stop the shooting. Despite the fact that one person had already been killed by gunfire an FBI spokesman told District Chairman James Red Willow that the FBI was strictly an enforcement agency and had no authority to act in a protective capacity. Saturday evening one person, Charles David Winters, was arrested for the murder of DeSersa. No attempt was made to apprehend or arrest the other passengers in Winters' car, even though persons who were with DeSersa when he was shot claimed that they were chased by Winters' companions after the shooting and could readily identify their attackers. Nor have any further arrests been made in connection with the terrorization of the town over a period of 2 days. The case is at present being investigated by a grand jury in Pierre.

The second series of events—about which Witt and Muldrow conducted an inquiry—began on February 25 when a rancher discovered the partially decomposed body of a Native American woman beside Highway No. 73 a few miles east of Wanblee. Two BIA policemen and an FBI agent responded to the rancher's report and brought the body to the Pine Ridge Hospital where an autopsy was performed on February 25 by W. O. Brown, M.D., a pathologist from Scottsbluff, Nebr. He issued a verbal report that day to the effect that she had died of exposure. He found no marks of violence on her body except evidence of a small contusion. The dead woman's hands were severed and sent to a laboratory in Washington, D.C., for fingerprint identification, both the FBI and the BIA claiming that they had no facilities to do so themselves due to the state of decomposition of the body.

On the morning of March 3, the body, still unidentified, was buried in the Holy Rosary Cemetery at Pine Ridge. The FBI reported that in the afternoon of the same day they received a report from the Washington laboratory that fingerprint tests revealed the dead woman was Anna Mae Pictou Aquash, a Canadian citizen wanted in connection with a bench warrant issued November 25 in Pierre for default of bond on a firearms charge. She also was under indictment by a Federal grand jury in connection with a shootout with Oregon police last November 14.

Relatives of Aquash in Canada were notified of her death on March 5, and news of her identification was released to the media the following day. Immediately, relatives of the dead woman and others who had known her expressed their disbelief that she had died of natural causes. On March 9, citizens of the town of Oglala, where she had lived for a time, publicly demanded a full investigation of the circumstances surrounding her death. Relatives, represented by

attorney Bruce Ellison of the Wounded Knee Legal Committee, requested that the body be exhumed for further examination.

On March 9, 6 days after the body was identified, the FBI filed an affidavit with the U.S. district court and received a court order permitting exhumation for "purposes of obtaining complete X-rays and further medical examination." X-rays had not been considered necessary during the first examination.

On March 11 the body was exhumed in the presence of FBI agents and Dr. Garry Peterson, a pathologist from Minneapolis, Minn., who had been brought in by Aquash's family to examine her body. X-rays revealed a bullet of approximately .32 caliber in her head. Peterson's examination revealed a bullet wound in the back of the head surrounded by a 5 x 5 cm. area of subgaleal reddish discoloration. Incredibly, this wound was not reported in the first autopsy and gave rise to allegations that the FBI and/or the BIA police had covered up the cause of her death. The fact that officers of both agencies examined the body *en situs*, wrapped in a blanket beside the road and far from any populated area, yet still did not suspect foul play, lends credence to these allegations in the minds of many people. Hospital personnel who received the body at the hospital reportedly suspected death by violence because of blood on her head.

Other persons are of the opinion that Anna Mae Aquash had been singled out for special attention by the FBI because of her association with AIM leader Dennis Banks and knowledge she might have had about the shooting of two FBI agents on the Pine Ridge Reservation last summer.

These two incidents have resulted in further bitterness, resentment, and suspicion toward the FBI. They follow months of turmoil on the reservation in the aftermath of the FBI shooting incident when allegations were rife that the FBI engaged in numerous improper activities including illegal search procedures and creation of a climate of intimidation and terror.

A contrast is seen between the Wanblee incident, where a person was killed and shooting was allowed to continue over a period of 2 days, and the incident in July when 2 FBI agents were shot and nearly 300 combat-clad agents, along with the trappings and armament of a modern army, were brought in "to control the situation and find the killers." Reservation residents see this as disparate treatment. This, along with what at the very least was extremely indifferent and careless investigation of the Aquash murder, many residents feel reveals an attitude of racism and antagonism on the part of the FBI toward the Indian people.

Because of the circumstances surrounding the events mentioned here, along with the record of an extraordinary number of unresolved homicides on the reservation, and incidents of terror and violence which have become almost commonplace, the sentiment prevails that life is cheap on the Pine Ridge Reservation. The more militant and traditional Native Americans have concluded that they cannot count on equal protection under the law at the hands of the FBI or the BIA police. Many feel that they are the objects of a vendetta and have a genuine fear that the FBI is "out to get them" because of their involvement at Wounded Knee and in other crisis situations.

Feelings are running high and allegations of a serious nature are being made. MSRO staff feel that there is sufficient credibility in reports reaching this office to cast doubt on the propriety of actions by the FBI, and to raise questions about their impartiality and the focus of their concern.

I. T. CRESSWELL, Jr.  
S. H. WITT.

## B. CREEPING JURISDICTION

Congress has, from time to time, passed a variety of legislation which, although not directed at affecting the Federal-State-tribal relationship, has a wide-ranging impact on that relationship. Generally, the status of Indian tribes and the applicability of these acts of general application to Indian tribes are not considered by Congress in the drafting of such legislation. These legislative acts can be roughly classified as either regulatory schemes, or general acts of financial assistance.

## 1. APPLICABILITY OF GENERAL REGULATORY STATUTES TO INDIAN COUNTRY<sup>1</sup>

Despite the frequently quoted dictum in *Elk v. Wilkins* that "General acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them,"<sup>2</sup> it has been generally held that, in the absence of conflicting treaty provisions, general Federal regulatory legislation does apply in Indian country. If, however, treaty provisions do conflict with regulatory statutes, the general rule prevails that later congressional action governs.<sup>3</sup> To mitigate the effects of this rule, courts have established a test for the abrogation of treaty rights which requires a "clear and plain"<sup>4</sup> showing of legislative intent to abrogate. Recently, an even stricter test of express abrogation is gaining favor.

The most liberal extension of the express abrogation doctrine is found in *United States v. White*.<sup>5</sup> In deciding whether a general statute applying Federal enclave laws within Indian country made a Federal statute prohibiting the taking of eagles applicable to an Indian on the Red Lake Chippewa Reservation, the seventh circuit court found that hunting and fishing rights were implicitly granted in the treaties establishing the Minnesota reservation. The treaty did not mention hunting and fishing rights, and the statute is silent on its application to Indians on reservations, but the statute does exempt the taking of eagles "for the religious purposes of Indian tribes."<sup>6</sup> Thus, it could have been argued that the exemption implied that Congress intended to prohibit Indians from taking eagles for other than religious purposes. Nevertheless, the court vindicated the treaty rights and further stated that:

To affect those rights then by 16 U.S.C. § 668, it was incumbent upon Congress to expressly abrogate or modify the *spirit* of the relationship between the United States and Red Lake Chippewa Indians on their native reservation. We do not believe it has done so.<sup>7</sup>

Yet, not all the courts agree with the Seventh Circuit—One line of cases has allowed the expropriation of Indian treaty land on the authority of general statutes that are silent on the treaties. In a particularly destructive case, *Seneca Nation of Indians v. Brucker*, the court, relying on legislative history indicating that Congress was aware Indian lands would be inundated, held that it was not unlawful for the Army Corps of Engineers to build a dam that would flood almost the entire Seneca Reservation because Congress had manifested its intent sufficiently by appropriating money for the dam.<sup>8</sup> Years later, the Corps moved to condemn a part of the remaining land for a highway as part of the project. The court allowed treaty rights to

<sup>1</sup> Much of the first three parts of this section is based on a paper submitted to the American Indian Policy Review Commission, prepared by Joseph J. Brecher, "The Effect of Regulating Statutes on Indian Reservations; Some Problems and Proposed Legislative Solutions," 1976 [hereinafter cited as Brecher].

<sup>2</sup> 112 U.S. 94, 100 (1884).

<sup>3</sup> See *Reed v. Covert*, 354 U.S. 1, 18 (1956).

<sup>4</sup> *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 353 (1941).

<sup>5</sup> 508 F.2d 453 (8th Cir. 1974).

<sup>6</sup> 16 U.S.C. § 668(a).

<sup>7</sup> 508 F.2d at 457 (emphasis added).

<sup>8</sup> 162 F. Supp. 580, 582 (D.D.C. 1955), *aff'd* 262 F.2d 27 (D.C. Cir. 1958), *certifcate denied*, 360 U.S. 909.

be ignored without any showing of congressional intent on the theory that the Corps exercised "delegated administrative discretion."<sup>9</sup>

In two other cases with similar facts, the courts have split. The court in *United States v. 687.30 Acres of Land*, relied on five acts approving a series of Missouri Basin dams to show congressional intent to delegate power to the Corps to condemn Winnebago treaty lands.<sup>10</sup> However, in *United States v. 2,005.32 Acres of Land*, the court construed many of the same statutory provisions and found that although Congress might have been aware that land of the Standing Rock Sioux might have to be taken, that knowledge alone was not sufficient to defeat a treaty right.<sup>11</sup> The court held that the terms of a treaty:

stand as the highest expression of the law regarding Indian land until congress states to the contrary. The Indians are entitled to depend on the fulfillment of the terms of the treaty until the Congress clearly indicates otherwise by legislation.<sup>12</sup>

As these decisions illustrate, reliance on a case-by-case judicial application of abstract principles in the area of treaty rights is confusing, expensive and can be dangerous, because it also exposes Indians to possible criminal penalties in order to assert these rights.<sup>13</sup>

## 2. APPLICABILITY OF STATUTES REGULATING FEDERAL AGENCIES TO INDIANS

Congress has begun to exercise close scrutiny over Federal agencies. The effect on Indian self-determination has been great because the role of Federal agencies in Indian affairs is pervasive. Further, these statutes have provided a means for outside groups to challenge Indian projects.

One law with significant potential effect on the operation of Indian entities is the Administrative Procedure Act (APA).<sup>14</sup> It may impinge on tribal sovereignty in two ways: it is sometimes, and for some purposes, asserted that the tribes are Federal agencies and thus subject to procedural requirements for adjudications and rulemaking; and, secondly, it can be invoked by others against Federal agencies who are required under their supervisory, fiduciary authority, to approve Indian projects.

The Freedom of Information Act (FOIA) provisions of the Administrative Procedure Act require "each agency" on receipt of a proper request for "records" to make the records—except for certain specific exemptions—promptly available to any person.<sup>15</sup> If the agency declines to turn over requested records, it must notify the applicant within 10 days of this request, stating the reasons for the refusal and must determine any administrative appeal of the decision within 20 days.<sup>16</sup> Thereafter, the applicant may seek a *de novo* determination in

<sup>9</sup> *Seneca Nation of Indians v. Brucker* ("Seneca II"), 338 F.2d 55, 56 (2d Cir. 1964), *certifcate denied*, 380 U.S. 952 (1965).

<sup>10</sup> 319 F. Supp. 128 (D.Neb. 1970) appeals dismissed, 451 F.2d 667 (8th Cir. 1971) *certifcate denied*, 405 U.S. 1026 (1972).

<sup>11</sup> 160 F. Supp. 193 (D.S.D.) vacated as moot *sub.nom.*

<sup>12</sup> *Id.* at 196-97.

<sup>13</sup> *United States v. White*, *supra*, No. 5.

<sup>14</sup> 5 U.S.C. § 551, *et seq.*

<sup>15</sup> 5 U.S.C. § 552(a) (3).

<sup>16</sup> 5 U.S.C. § 552(a) (6) (A).

a district court.<sup>17</sup> Liberal application of the FOIA to Indian records can be adverse. For example, potential competitors to Indian tribal enterprises could learn about Indian plans and ideas, while keeping their own secret, or internal tribal matters can be spread on the record.

Several examples of the way the FOIA provisions have affected Indians are: a legal services attorney representing persons claiming eligibility for Colville tribal membership was given access to the membership roll which contained highly personal data on thousands of reservation residents, such as parental identity, legitimacy of birth, financial information, and criminal and mental health records;<sup>18</sup> the BIA released its files on a Navajo Reservation gravel mining operation;<sup>19</sup> an attorney representation contract of the Agua Caliente band was ordered disclosed to a news service;<sup>20</sup> however, the New Mexico State engineer was refused technical information on water resources on three New Mexico reservations.<sup>21</sup> BIA has been construed as an "agency" for FOIA purposes in all of the above instances and would appear to be covered under the definition in 5 U.S.C. § 551(1): "each authority of the Government of the United States whether or not it is within or subject to review by another agency . . ." Thus, it appears that the presumption in favor of disclosure under the act would include BIA under this definition.<sup>22</sup> This, of course, creates a significant problem where the BIA is acting in its trustee relationship to tribes, for normally a trustee should not release data detrimental to the beneficiary of the trust.

Courts have come to contrary results in answering the question whether an Indian tribe itself would be subject to the disclosure requirements. It has been reported that the Interior Department has taken the position that the tribes are subject to disclosure. The Department's Solicitor has demanded that the Colville Tribe turn over to him evidence gathered by the tribe for a water rights suit in which the Department had taken a position adverse to the tribe.<sup>23</sup> Ironically, the trustee is asking his beneficiary to aid the trustee in an action against the Indian interests.

Since it is questionable that tribal or Government trustee records are per se outside the act's scope, decisions on disclosure have turned on whether the particular documents to be disclosed are within a statutory exemption. The agency relying on an exemption has the heavy burden of showing that the exemption applies,<sup>24</sup> and the courts have narrowly construed these exemptions.<sup>25</sup>

Detailed requirements of APA rulemaking if made applicable to Indian tribes would cripple most reservation governments. Tribal councils may often consist of people with little formal education living in remote areas and operating under a tradition of oral deci-

sionmaking. Under present systems and funding, they would find it virtually impossible to comply with the law or to acquire the necessary legal assistance to do so. Outsiders could then challenge these procedural requirements and thereby overturn tribal council actions, as sovereign immunity is waived in APA actions.<sup>26</sup>

The National Environmental Policy Act (NEPA)<sup>27</sup> also has had a great effect on the way Federal agencies decide to implement or approve projects in order to achieve the goals of environmental quality. It has engendered much litigation, most of it on the requirements of the environmental impact statements which have been stringently interpreted by the courts: "They must be complied with to the fullest extent unless there is a clear conflict of statutory authority."<sup>28</sup>

Case law has made it clear that NEPA applies to projects constructed and funded by the Federal Government as well as projects simply requiring Federal licensing or approval.<sup>29</sup> Thus, virtually all Indian projects would be included. The disadvantages of inclusion are that a new element is added to the decisionmaking process, and the Federal duty to promote the best interests of the tribes may be subjugated to the competing interests of the general population—a clear conflict of interest. The will of the tribe can be thwarted in its efforts at self-determination in use of its resources. Also, outsiders can use the act to veto Indian projects.

Increasing the obstacles to self-determination, the act also requires preparation of the environmental impact statement<sup>30</sup> which must be sufficient to pass judicial scrutiny. This statement takes a considerable amount of time and money. In addition, the courts have sometimes required "programmatic" impact statements in which a single project statement must be integrated and approved within an entire regional plan. Indian tribes can be caught between the regional plan and those who oppose comprehensive development. For example, in *Sierra Club v. Morton*,<sup>31</sup> the court held that a programmatic impact statement for the northern Great Plains was required before further Federal action could be taken on coal development since the Government had treated the individual permits and approvals as part of an overall development by preparing regional reports, studies and task forces. The Crow Tribe was caught between white ranchers and environmentalists and Government and industry. The Crow Tribe had negotiated favorable coal leases and additional Federal approval was required by regulations before mining could begin. The Crow Tribe, along with the Government, lost.

#### APPLICABILITY TO INDIANS OF FEDERAL STATUTES DELEGATING AUTHORITY TO THE STATES

Congress has begun in recent years to share enforcement authority with the States on regulatory statutes. For example, the Clean Air

<sup>17</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>18</sup> Washington Post, May 20, 1976, p. A7.

<sup>19</sup> Letter from Stanley E. Doremus, deputy assistant secretary for Program Development and Budget, Department of the Interior to Tim Vollman, Oct. 17, 1975.

<sup>20</sup> Letter from Royston C. Hughes, assistant secretary for Program Development and Budget, Department of the Interior, to Will Thorne, Mar. 18, 1975.

<sup>21</sup> Letter from Mitchell Melich, Solicitor, Department of the Interior to Hogan and Hartson, Sept. 24, 1971.

<sup>22</sup> See *Consumers Union of U.S., Inc. v. Veterans' Administration*, 301 F.Supp. 796, 806 (S.D.N.Y. 1969). See also *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 (1973).

<sup>23</sup> Paper submitted to the task force on Reservation and Resource Development and Protection No. 7, Summary Discussion on Water Rights of Affiliated Tribes of Northwest Indians, 1976.

<sup>24</sup> *Washington Research Project, Inc. v. Department of HEW*, 504 F.2d 238, 244 (D.C. Cir. 1974) certiorari denied, 421 U.S. 963 (1975).

<sup>25</sup> See *Montrose Chemical Corp. v. Train*, 492 F.2d 63, 66 (D.C. Cir. 1974).

<sup>26</sup> *Estrada v. Ahrens*, 296 F.2d 690, 698 (5th Cir. 1961), quoted w/approval in *Scamcell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 873 (D.C. Cir. 1970).

<sup>27</sup> 42 U.S.C. § 4321, et seq.

<sup>28</sup> *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109, 1115 n. 12 (D.C. Cir. 1971).

<sup>29</sup> See e.g., *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972); *McLean Gardens Residents Association v. National Capital Planning Commission*, 390 F. Supp. 165 (D.D.C. 1974).

<sup>30</sup> 42 U.S.C. § 4332.

<sup>31</sup> 514 F.2d 856 (D.C. Cir. 1975).

Act mandates the Environmental Protection Agency to set ambient air quality standards to protect public health and safety.<sup>32</sup> The States may assume enforcement jurisdiction by submitting a plan which includes the statutory requirements: Measures as may be necessary to insure attainment and maintenance of the standards including land use and transportation controls;<sup>33</sup> measures to prevent certain construction of new pollution sources;<sup>34</sup> and, evidence that the State has the authority needed to enforce the standards.<sup>35</sup> EPA must then approve a State plan that meets these statutory prerequisites.<sup>36</sup>

Although the Clean Air Act does not define the applicability of State regulatory plans to Indian tribes, EPA has taken the position that the act neither grants any State jurisdiction over Indian country, nor does it take it away.<sup>37</sup> The threat to Indian sovereignty of potential assertion is, however, obvious. States through such regulation, could achieve, by a roundabout means, direct control of Indian land use. This area of control is central to Indian self-government; as courts have noted, they have consistently resisted State attempts at usurpation of this function.<sup>38</sup>

Another regulatory act allowing the States to implement a plan assuming civil and criminal jurisdiction for enforcement is the Occupational Safety and Health Act.<sup>39</sup> Designed to maintain standards for a safe, healthful work environment, the act allows the States under a federally approved plan<sup>40</sup> to make unannounced inspections of the workplace,<sup>41</sup> issue citations for standards violations,<sup>42</sup> and assess civil and criminal penalties.<sup>43</sup> The Act is silent on its application to Indian country, but Dennis Karnopp, attorney for the Warm Springs Tribe, Oregon, said:

We had the state occupational safety and health inspector come and give some citations to the tribe on the mill, and we went to the state agency that administers that and suggested to them that they didn't have any jurisdiction. Even though they had generally assumed what jurisdiction the federal government has, they didn't have any jurisdiction over the tribe to cite us, that we were happy to have them come and inspect our mill and help us keep it a safe place but we weren't going to pay them any fines. And the State Attorney General issued an opinion saying, yes, that's right, they can't do that . . . had the Attorney General not come down with that opinion, we were prepared to file a suit in federal court over that.<sup>44</sup>

Conceivably, then, there could be many different interpretations of the OSHA inspector's authority if left to the decision of each State's attorney general or costly litigation.

#### 4. APPLICABILITY TO INDIANS OF DOMESTIC ASSISTANCE STATUTES GIVING STATES AUTHORITY TO PARTICIPATE IN PROGRAM DELIVERY

The need for wide ranging domestic assistance benefits means that these programs impinge directly on the day to day lives of most In-

<sup>32</sup> 42 U.S.C. §§ 1857, *et seq.*

<sup>33</sup> 42 U.S.C. § 1857 c-5(a)(2)(B).

<sup>34</sup> 42 U.S.C. § 1857 C-5(a)(4).

<sup>35</sup> 42 U.S.C. § 1857 C-5(a)(2)(F)(i); see also 40 CFR § 51.11.

<sup>36</sup> 42 U.S.C. § 1857 C-5(a)(2).

<sup>37</sup> Brecher, at 42, n. 145.

<sup>38</sup> See e.g., *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425, P.2d 22 (1967), *cert. denied*, 389 U.S. 1016; *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371 (S.D. Cal. 1971); *Agua Caliente Band v. City of Palm Springs*, 347 F. Supp. 42 (C.D. Cal. 1972).

<sup>39</sup> 29 U.S.C. § 651, *et seq.*

<sup>40</sup> 29 U.S.C. § 667.

<sup>41</sup> 29 U.S.C. § 657.

<sup>42</sup> 29 U.S.C. § 658.

<sup>43</sup> 18 U.S.C. § 1114; 29 U.S.C. § 666.

<sup>44</sup> Northwest transcript at 257-59.

dians. Federal statutes creating assistance programs frequently utilize State agencies as a key part of a program delivery system. Grant funds may be funneled through a State agency and/or a sign-off by the State governor may be necessary for tribes to receive grant funds. The State, in its turn, may attach regulations, conditions and requirements of its own to participate in a Federal program. Indian tribes thus become subject to State jurisdiction, and it is often by legislative oversight of the special relationship between the Federal Government and the tribes. Many Indians view this as a direct infringement on their sovereignty.

State administration of title XX programs of the Social Security Act is such an example. Buck Kitcheyan, chairman of the San Carlos Apache Tribe, Arizona, testified that:

In Title XX, and related Social Security Act amendments, the Department of Health, Education and Welfare has consistently attempted to force the non-Public Law 280 tribes to consent to State jurisdiction for all social service programs including foster care, adoption, institutional and other custodial care. Enforcement of child support. All within the reservation and all within the power of the sovereign jurisdictional power of the San Carlos Apache Tribe.<sup>45</sup>

The resulting conflict of tribal sovereignty and State jurisdiction creates confusion in the delivery of services and program operation. Beyond the possible feud with tribal sovereignty, the use of the States to administer programs brings with it unresolved jurisdictional questions, confusion in program operations, and a general lack of efficient delivery of services. Lieutenant Governor Antone of the Gila River Reservation expressed the problems with Arizona's administration of title XX:

Under this Title XX, the State was asked by the Federal Government, to provide services to the reservations, something that the State has not been familiar with for the past years. As a result, a lot of the reservations . . . are faced with some real jurisdictional problems. For instance, if a child was to be placed in a foster home whose courts would the State recognize? . . . would they recognize the tribal court or would they have to be referred to a State court system? The Inter-Tribal Council has done an in-depth study and has come up with at least four volumes that would take a person approximately a day to read all of them, they expressed a lot of the problems that we see as Indian people . . . it lists a number of questions that we asked of the State, which the State could not answer, saying that the Federal Government would have to be the one to answer these questions. And the Federal Government, in turn, are saying that the States have been given the direction . . . Well, you can see this leaves the tribes in a very peculiar situation, not knowing whether their jurisdiction or sovereignty will be jeopardized if they chose to go to the State to obtain moneys for the programs . . .<sup>46</sup>

Important assistance to reservations is also provided by the Law Enforcement Assistance Act (LEAA).<sup>47</sup> The law mandates State planning units as administering agencies which approve grants for the major portion of Federal moneys.<sup>48</sup> In most States, Indian applications (re block grants), are considered along with those of all other cities, counties and other eligible participants. Thus, Indians are forced to compete for their funds with other, perhaps larger, entities. Arizona has a State regulation that at least one Indian must be in the planning group which approves or disapproves applications.<sup>49</sup>

<sup>45</sup> Southwest transcript at 293.

<sup>46</sup> Southwest transcript at 7-8.

<sup>47</sup> 42 U.S.C. § 3711, *et seq.*

<sup>48</sup> 32 U.S.C. § 3733.

<sup>49</sup> Southwest transcript at 201-02.

Yet, Evans Navamsa, an Indian justice specialist for Arizona, testified that, despite Arizona's taking Indian money out of competition with the cities at the State planning level in a block set-aside, he still recommended that the Governor's office be approached to set up a separate Indian task force for approval of applications by Indians to insure their needs were met and their sovereignty respected.<sup>50</sup> He said that:

. . . the problem is now whenever I present an Indian application before the police and sheriff's task force, there are some others that have totally no knowledge about the conditions and the needs of Indian tribes and they challenge these Indian applications.<sup>51</sup>

Mr. Navamsa suggested that, ideally, a member of the tribe should be present when its grant came up for approval, but that this was far too costly for the tribes to do.<sup>52</sup>

In addition to State regional approval processes, the State's add-on conditions that must be met before the State, not necessarily Federal, approval is granted. Examples of these conditions and their effect on the tribes were noted by Evans Navamsa:

On top of what is already stated in the application (you need) a position description . . . they don't have these kind of personnel to . . . do classification, position classification; "in the case of tribes requesting waiver of matching requirements and then have to attach their operating budgets to it, if the resolution states that they're not financially able to provide matching contribution . . . (they) have to go through the expense of seeking rows and rows of operating budgets . . . And it takes more money for, you know you're imposing more money through these special conditions on a tribe . . . that's asking a little too much."<sup>53</sup>

#### FINDINGS

1. The passage of Federal regulatory statutes that are unclear on their applicability to Indian country has, in effect, abrogated many Indian treaty rights.

2. Courts have attempted to mitigate the effects of apparent abrogation of treaty rights by the strict construction of legislative language. However, judicial construction is inconsistent, and the extensive litigation that results is costly and exposes Indians who assert these rights to possible criminal penalties.

3. By passing statutes regulating Federal agencies that are unclear on their applicability to Indian governments, Congress has created a potential threat to the operation and very existence of tribal government and to self-determination in the use of Indian land and resources, all in conflict with announced Federal policy encouraging tribal integrity and self-sufficiency.

4. By passing statutes delegating regulatory authority to the States that are unclear on their applicability to Indian tribes, Congress has subjected Indian governments to State jurisdiction—in direct conflict with tribal sovereignty—without going on record as intending to do so.

5. By passing domestic assistance statutes giving States authority to participate in program delivery, Congress has subjected Indian entities to State jurisdiction that jeopardizes tribal sovereignty.

6. Thus, Indian eligibility for assistance programs becomes conditioned on both Federal and State regulations which can be an intolerable

burden on tribes and, consequently, a frustration of the special Federal trust responsibility to the tribes.

7. Federal statutes which are vague in their effects on Indian sovereignty and jurisdiction pose expensive and extensive litigation as the only current alternative for concrete resolution of jurisdiction problems.

#### RECOMMENDATIONS

Recommended language to clarify the applicability to Indians of various Federal statutes is aimed at requiring a recognition of the statute's effect on Indian country when the legislation is drafted. The following suggested sections are also directed at preserving the sovereignty of tribal governments:

1. Suggested language to amend current statutes to assure fuller congressional consideration of treaty rights before intentional or unintentional abrogation might read:

a. No rights reserved to any individual Indian or any Indian tribe, group, band, or community, by any treaty, Executive order, or congressionally ratified agreement shall be deemed to be abridged, abrogated, modified, amended, or repealed by any subsequent act of Congress unless such act refers specifically to such treaty, Executive order, or agreement.

b. No Federal statute shall be construed so as to imply a delegation of congressional authority to abridge, abrogate, modify, amend, or repeal any right reserved to an individual Indian or any Indian tribe, group, band, or community by a treaty, Executive order, or congressionally ratified agreement unless such statute refers specifically to such treaty, Executive order, or agreement.

2. To allow tribal governments to exercise the essential function of determining their own land development and use, the Federal authorities excluded from coverage of 5 U.S.C. § 551(1) APA should be amended by adding subsection (I) and (J):

a. Federally-recognized Indian tribes, band, groups or communities.

b. Agencies acting in a trusteeship capacity concerning the person or property of any Indian individual, tribe, band, group, or community.

3. To insure that Federal regulatory statutes conferring rule-making or enforcement authority on states are not used as an implied means of extending state jurisdiction over Indians, language adding the following new subparagraph should be adopted to 25 U.S.C. § 1321 on State assumption of criminal jurisdiction:

No statute of the United States which authorizes or directs States to adopt regulatory standards or means to enforce such standards pursuant to guidelines set down by Congress or any Federal agency shall be deemed to extend the force and effect of any state criminal laws to Indian country unless said statute of the United States specifically authorizes such an extension of State criminal jurisdiction to Indian country.

4. A parallel subsection should be added for civil jurisdiction to 25 U.S.C. § 1322:

No statute of the United States which authorizes or directs States to adopt regulatory standards or means to enforce such standards pursuant to guidelines set down by Congress or any Federal agency shall be deemed to extend the force and effect of any State criminal laws to

<sup>50</sup> Southwest transcript at 208

<sup>51</sup> *Ibid* at 202-03

<sup>52</sup> *Ibid* at 209

<sup>53</sup> *Ibid* at 191-93.



Indian country unless said statute of the United States specifically authorizes such an extension of State civil jurisdiction to Indian country.

5. Statutes authorizing Federal assistance programs should expressly delineate tribal participation:

a. A special definition of Indian tribes should be legislated. This definition could then be incorporated into assistance statutes for use in defining what units are eligible applicants for programs. This definition should contain a recognition of tribal sovereignty and the Federal trust responsibility toward Indian country.

b. Tribes should, therefore, be equivalent in status to the States in their eligibility to receive funds directly from the Federal Government or chartered organizations comparable to the eligibility of similar State organizations.

c. The effect of this definition should be to eliminate tribal subjection to State regulations and agencies that exclude or inhibit tribal participation.

d. Participation by the tribes in regional government planning or program delivery should be at the option of each tribe. Where law or agency regulations now use State and local governments as channels for tribal funding, the administering agencies should be encouraged to seek legislative changes in harmony with the above recommendations.

## IV. SPECIAL PROBLEM AREAS

### A. HUNTING AND FISHING RIGHTS<sup>1</sup>

Pursuant to the evolution of relations between the expanding nation of the United States and the various Indian nations encountered in the path of that expansion, various agreements were entered into by way of treaty which provided for the continued existence of the aboriginal occupants of this continent. An integral part of most of these agreements was the continuation of the basic food sources known to these people which were often also an important part of their religious and cultural heritage. Moreover, the practices of hunting, fishing, trapping and gathering served as the foundation of the trade and commerce carried on by the various Indian nations, tribes and bands.<sup>2</sup>

This was widely recognized in almost all treaty negotiations and as lands were reserved and set aside to be held by Indian people, or to be occupied and used by them as Indian lands are occupied and used; also included were the unfettered rights to hunt, fish and trap game, and, in some cases, to gather wood, wild rice and other food and herbs. Such rights were also reserved on lands off-reservation and have been long enjoyed by aboriginal claims of use.

Some of these rights were specifically designated to be exercised "in common with" non-Indian users; other such rights survived the loss of the land by cession<sup>3</sup> or termination.<sup>4</sup>

As the non-Indian population grew and industry and development proceeded apace, demands on these resources increased while the resources diminished. Competing interests such as hydroelectric facilities, poor logging practices, and international fishery of migratory species intensified the competition for fewer and fewer available game and fish.<sup>5</sup>

Powerful interest groups representing commercial and sports interests began to apply increasing pressure on State and Federal agencies to be more aggressive in exercising jurisdiction over Indian rights. Attempts by Indian people to exercise various on- and off-reservation rights, and to control the access of others to the resources so central to their survival and economy, have been curtailed by ongoing interference from various State and Federal agencies and officials. Long and extremely expensive litigation has been undertaken and continues today over the perimeters of tribal, State and Federal

<sup>1</sup> Much of the legal analysis for this section is taken from or based upon a paper prepared for the task force by David H. Gretches, "Jurisdiction Over Indian Hunting and Fishing Activity," May 1976.

<sup>2</sup> Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth—How Long a Time Is That—"* 63 Calif. L. Rev. 601 (1975).

<sup>3</sup> *Antoine v. Washington*, 420 U.S. 194 (1975).

<sup>4</sup> *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Accord, Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), cert. denied, 419 U.S. 1019 (1974).

<sup>5</sup> Northwest Transcript at 338-39 and 343-45.

jurisdiction in this important area. Despite numerous decisions, conflicts continue and in many places, emotions run high.

The extent and nature of the exercise of Indian rights to hunt and fish must be approached with the full awareness that such rights are defined by specific treaty or situational terms under which they arose or were preserved. Generalizations, therefore, must be viewed carefully. This section will discuss the impact of State, Federal and tribal jurisdiction on these rights exercised on-reservation and off-reservation. Aboriginal use is treated separately.

## 1. ON-RESERVATION HUNTING AND FISHING RIGHTS

### (a) State regulation

(i) *Present Status of the Law.*—A tribe exercises exclusive dominion within the exterior boundaries of its reservation, and State laws generally have no application to Indians. This principle is deeply rooted in the nation's history<sup>6</sup> and Congress has acted consistently upon this assumption.<sup>7</sup> This sovereign status of the tribes was first articulated in *Worcester v. Georgia*,<sup>8</sup> derives from the treaty<sup>9</sup> relationship, and is protected by the supremacy clause contained in article VI of the U.S. Constitution.

Once a reservation has been set apart for Indian use, hunting and fishing rights exist whether or not specifically referred to; the extent of the rights is defined by the purpose for which the land was set aside—an Indian reservation.<sup>10</sup> The absence of any provision concerning State jurisdiction cannot be construed as creating any state jurisdiction. Recent case law has analyzed the creation of reservations as Federal pre-emption of state law supported by the doctrine of Indian sovereignty.<sup>11</sup> The absence of any treaty provision on hunting and fishing rights nonetheless reserves such rights—rights not specifically given up are retained:

[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.<sup>12</sup>

Land, water, timber, minerals, hunting, and fishing rights, et cetera, are property rights of the particular tribe. Any destruction or diminishing of those rights would be a compensable taking within the meaning of the fifth amendment to the Constitution and would entitle the tribe to compensation.<sup>13</sup>

The United States, by reason of the relationship created in its dealings with Indians, has an obligation to protect property rights secured to the tribes. That relationship is one of trusteeship or guardianship

<sup>6</sup> *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1972); *Rice v. Olson*, 324 U.S. 786 (1945); *Bryan v. Itasca Co.*, — U.S. — 96 SC+2102 (June 14, 1976) (No. 74-5027).

<sup>7</sup> *Williams v. Lee* 358 U.S. 217 (1959).

<sup>8</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>9</sup> For the purposes of this section, treaty rights are those established by treaty, Act of Congress, agreement, or Executive order. The validity and the force of method of creating reservations and preserving other rights is well established. See Wilkinson and Volkman.

<sup>10</sup> *Menominee Tribe v. United States*, 319 U.S. 404 (1968); See also *Cappaert v. U.S.*, — U.S. — 48 L Ed 2d 523 (June 7, 1976) (No. 74-1107) (Decided June 7, 1976) for a discussion of the effect of reservation by the Federal Government and its impact on water rights).

<sup>11</sup> *McClanahan v. Arizona State Tax Commission*, *supra*; *Moe v. Confederated Salish and Kootenai Tribes*, — U.S. — 48 L Ed 2d 96 (April 27, 1976), (1976).

<sup>12</sup> *United States v. Winans*, 198 U.S. 370, 381 (1905).

<sup>13</sup> E.g., *Menominee Tribe v. United States*, 318 F.2d 998 (Ct. Cl. 1967), aff'd 391 U.S. 404 (1968); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 105 (1949); See, *Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).

which binds the United States to deal fairly and protectively with all Indian rights. Subjection of those rights to State regulation or qualification decreases their value and effectively is a taking.<sup>14</sup>

The courts will not imply such takings but insist upon a clear congressional statement before finding that hunting and fishing rights have been extinguished or diminished. Even termination legislation designed to extinguish Federal supervision of the Federal trust relationship with an Indian tribe has been held not to destroy treaty hunting and fishing rights absent an express statement to that effect. The Supreme Court stated in *Menominee Tribe v. United States*, *supra*:<sup>15</sup>

We find it difficult to believe that Congress, without explicit statement, would subject the United States to claim for compensation by destroying property rights conferred by treaty.

Indian hunting and fishing rights, then, are shielded from State control or regulation by the status of the reservation and, in addition, the right, when embodied in a treaty, act or agreement, either expressly or by implication, provides a further ground for excluding State jurisdiction in that the right and its exemption from State control constitute a property right which cannot be taken away without express congressional act and appropriate compensation. Likewise, an exclusive right to hunt and fish embodies a jurisdictional pre-emption of State regulation where the tribe has implemented a comprehensive regulatory scheme.<sup>16</sup>

The conclusion which can be summarized from the foregoing discussion and authorities is that whenever an Indian reservation is created, hunting and fishing rights attach within reservation boundaries and, unless specifically limited by the treaty, they belong exclusively to the tribe and they may be exercised free of the application of State law. The courts have considered this right in many contexts and universally have held that on-reservation hunting and fishing activity is exempt from any State regulation.<sup>17</sup>

It is immaterial that some of the land in an Indian reservation has passed out of Indian title and into non-Indian ownership. The principle that Indian hunting and fishing rights may be exercised free from State regulation still obtains. Thus in *Leech Lake Band of Chippewa Indians v. Herbst*, *supra*, an act of Congress which was by its terms "a complete extinguishment of the Indian title" based upon an agreement between the United States and the Indians in which the Indians agreed to "grant, cede, and relinquish and convey \* \* \* all our rights, title and interest in and to the land" did not abrogate the Indians' unrestricted hunting and fishing rights on the reservation.<sup>18</sup> This holding is consistent with the definition of "Indian country" for jurisdiction purposes found in the Federal criminal statutes which extend to all land within reservations and allotments

<sup>14</sup> Cf. *Choate v. Trapp*, 224 U.S. 665 (1912).

<sup>15</sup> 391 U.S. at 413. *Accord*, *Kimball v. Callahan*, *supra*.

<sup>16</sup> *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 412 F. Supp. 651 (E.D. Wash., April 14, 1976), C-75-146.

<sup>17</sup> E.g., *Moore v. United States*, 157 F.2d 760 (9th cir. 1946), *cert. denied*, 330 U.S. 827 (1946); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971); *Klamath and Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore. 1956); *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 pp. 557 (1930); *State v. Edwards*, 188 Wash. 467, 62 pp. 2d 1904 (1936); *Arnett v. Five Gill Nets*, 48 Cal. App. 3d, 121 Cal. Rptr. 906 (1975), *cert. denied*, 44 USLW 3545 (Mar. 29, 1976); *Elser v. Gill Net No. 1*, 245 Cal. App. 2d 30, 54 Cal. Rptr. 568 (1966).

<sup>18</sup> 334 F. Supp. at 1003.

"notwithstanding the issuance of any patent, and, including rights-of-way \* \* \*"<sup>19</sup>

Enactment of Public Law 280 and its application in several States has had no impact upon the ability of Indians to exercise their fishing and hunting rights free of State regulation within their reservations. Title 18, U.S.C. 1162 codifies the criminal sections of Public Law 280. Subsection (b) is a saving clause in which it is stated that:

[n]othing in this section \* \* \* shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

The courts have held that Public Law 280 States have no jurisdiction to regulate on-reservation hunting and fishing rights.<sup>20</sup>

(ii) *States*.—Although the law has been excessively litigated and many decisions rendered on the nature and extent of the rights of Indian people to exercise hunting and fishing rights on reservation, beyond the reach of the State, testimony and research discloses continued efforts by various State agencies to exercise control.

Mr. James Johnson of the Washington State attorney general's office, representing the Fisheries and Game Departments on the question of jurisdiction over non-Indians on reservations, takes the position that the State has concurrent jurisdiction in fish and game matters.<sup>21</sup> At the time of Mr. Johnson's testimony that issue was in litigation in *Confederated Tribes of the Colville Indian Reservation v. State of Washington*; U.S. district court subsequently decided that the State did not have such jurisdiction.

The evolution of this particular litigation is instructive. The Twin Lakes are found within the exterior boundaries of the Colville Reservation. Based on a tribal request, the State of Washington was exercising jurisdiction over non-Indian hunting and fishing at the Twin Lakes. The State was also contributing to stocking the lakes pursuant to an agreement with the tribe; the tribe would provide eggs in exchange for hatched fish. The agreement was terminated in 1965, at the tribe's request, because of dissatisfaction with the State program. Approximately 2 years ago, 1974, the tribe notified the State that the tribe felt it had exclusive jurisdiction over non-Indian hunting and fishing and that the tribe would henceforth issue tribal permits and would therefore no longer require State permits.<sup>22</sup> Although the record is not clear, the State apparently refrained from exercising jurisdiction while taking the position that it retained jurisdiction over non-Indian, on-reservation hunting and fishing.

During negotiations between the tribe and the State over implementation of hunting and fishing regulations pursuant to the *Antoine* decision<sup>23</sup> concerning ceded lands no longer within the external boundaries of the reservation, the assistant director of the State game department assured tribal officials that the State would take no actions against non-Indians fishing without State permits on the reserva-

<sup>19</sup> 18 U.S.C. sec. 1141.

<sup>20</sup> E.g., *Klamath and Modoc Tribes v. Maison*, *supra*; *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. Feb. 2, 1976), No. 72-3199 (9th Cir. Feb. 2, 1976); *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, *supra*.

<sup>21</sup> Northwest transcript at 342-43.

<sup>22</sup> *Ibid.*, at 591-92, 348, 372.

<sup>23</sup> *Antoine v. Washington*, 420 U.S. 194 (1975).

tion as the State did not wish to jeopardize the atmosphere of mutual cooperation, although the State felt it had such jurisdiction.

Two weeks later, four State game wardens came on to the reservation and issued citations to four non-Indians for fishing without State permits. Litigation followed in which the tribe prevailed.<sup>24</sup>

When addressing this case, Mr. Johnson testified that the position of the State was not over Twin Lakes but rather involved the larger issue of State jurisdiction over non-Indians within the reservation boundaries, and was not an issue of management.<sup>25</sup> He contended that the State was not responsible for the conflict or the litigation since the issue was raised by the tribe when it chose to alter the previous jurisdiction relationship. The State was involved in litigation only because "someone has chosen to sue us to challenge our authority in some area,"<sup>26</sup> and the State agencies involved had no intention of being involved in protracted litigation.<sup>27</sup>

This is in contrast to his statement made in the same testimony that the most significant problem is one of uniform management and that the multiple litigations in which the State is involved have resulted in a division of management and that fragmented management results too often in no management or mismanagement of the resource. The view of the State agencies, as expressed by Mr. Johnson, is that jurisdiction of non-Indians on reservations is essential to a uniform management plan.<sup>28</sup>

It is not in the least inconsistent to assert that uniform management throughout the State might most efficiently be effectuated where all of the jurisdiction resides within one agency. This, of course, is not the same as saying multiple management means disaster to the resource. It is difficult to ascertain, however, how jurisdiction by the State over an area where no State resources are devoted, nor any kind of management practiced, could be justified on a uniform management rationale.

More particulars are helpful for a complete understanding of the relationship between this tribe, the Colvilles, and the State of Washington. The State and the tribe have a written agreement under which the State stocks salmon in the Sanpoil River on the reservation but has expressly agreed not to use such stocking as a justification in any case or testimony concerning the State's right to exercise jurisdiction.<sup>29</sup> Mr. Johnson did, however, offer such testimony to this task force, twice referring to the fish stocking agreement before being asked to identify the reservation area.

Perhaps the agreement entered into between the State and the tribe has been interpreted by the State to contemplate only judicial forums and does not cover testimony to a congressional task force. One tribal representative did, however, disagree and felt betrayed.<sup>30</sup>

This context of good faith dealings between the tribes of the State of Washington and the State was characterized by a number of witnesses. Mr. Ernstoff detailed the reasons for this viewpoint as an at-

<sup>24</sup> Northwest transcript, at 591-592.

<sup>25</sup> *Ibid.*, at 359.

<sup>26</sup> *Id.*, at 548.

<sup>27</sup> *Id.*, at 347.

<sup>28</sup> *Id.*, at 340-43.

<sup>29</sup> *Id.*, at 592.

<sup>30</sup> *Id.*, at 592.

torney who is involved in frequent and ongoing litigation with the State over Indian rights, saying:

One of the problems in the pre-Boldt case [*U.S. v. Washington*] days, as all of us know, was a series of raids over periods of years and harassment on Indian fishermen attempting to exercise treaty fishing rights. And the State felt that the best way—and despite what they may say, this has been a traditional pattern of operation—the best way to deal with Indian assertions of jurisdiction and treaty rights is not to litigate it in a manner such as the Boldt case which is all comprehensive, extensive, and as political and legal analysis of treaty and treaty rights, but instead to engage in a series of one-shot arrests and thereby have the law made in district court and superior court litigations on a case-by-case method. And we all followed, I think, newspaper and television reports on Indians being arrested and fishing gear being confiscated over a period of years. Well, don't let anyone think that the Boldt case has stopped that kind of activity.<sup>31</sup>

Mr. Ernstoff concludes that the State consistently engaged in this sort of "confrontation politics."<sup>32</sup>

Other States take similar positions with respect to jurisdiction over non-Indians hunting and fishing within reservation boundaries. The Quechan Tribe recently escaped a confrontation with the State of California when the U.S. Court of Appeals for the Ninth Circuit handed down *Quechan Tribe of Indians v. Rowe*,<sup>33</sup> 11 days before the date on which California had served notice that it would enforce jurisdiction on the Quechan Reservation over non-Indians.

Arizona presently continues to enforce State game and fish laws on Indian reservations over non-Indians despite the absence of congressional consent to do so and over strong Indian protest. Moreover, the State officials in Arizona are attempting to recruit similar action from the State of New Mexico.<sup>34</sup>

The police chief of the Warm Spring Reservation related in a phone conversation on June 20, 1976, that the Oregon State officials have begun to interfere with non-Indian fishing on that reservation. The Warm Spring tribes have long enjoyed a particularly good relationship over jurisdictional issues with the State of Oregon. This recent development has potential for upsetting that particularly successful balance so long enjoyed by all concerned.

Given the approach of the various States, it is inconceivable that any alternative to litigation is available unless the tribes concerned simply cave in over this issue. That is, however, very unlikely, as jurisdictional issues over the control of on-reservation hunting and fishing are of singular importance to the tribes involved. Beyond the compelling cultural and psychological importance to Indian people is the ever-increasing economic value of these resources which have always been an integral part of their trade and commerce. It is a deadly serious matter that involves multimillion dollar sport and commercial interests of the States and many of its citizens. Ultimate determinations by Federal courts will not necessarily resolve the issues, as some State authorities have not shown a willingness, or capacity, to comply with these rulings.

<sup>31</sup> *Id.*, at 443-4. Mr. Ernstoff is with Zientz, Pirtle, Moissett & Ernstoff, a Seattle law firm that represents a number of tribes.

<sup>32</sup> *Id.*, at 446. See also Mr. Pirtle's testimony at 574 reporting that the State related to him and his law partner in 1964 that "the State is going to wipe out Indian treaty fishing. We're going to destroy it . . . by picking on little tribes who have no lawyers, set our precedents . . . and then coming after the big boys."

<sup>33</sup> 521 F.2d 408 (Feb. 2, 1976).

<sup>34</sup> Southwest Transcript, at 289, Article "The Phoenix Gazette", May 24, 1976. Game wardens do not go on the reservation when excluded by the tribe, but wait at the reservation entrances and cite non-Indians for illegal possession or transportation of game.

In June 1976, the Federal attorneys representing the Indian tribes in *United States v. Washington*, were forced to seek contempt citations before Washington State officials finally agreed to enforce regulations against non-Indian commercial fishermen fishing in violation of federally court-ordered cessation. Even so, the non-Indian fishermen were allowed to sell whatever they had caught. Although this particular incident involved off-reservation fishing rights, it is a further indication of the manner in which State officials approach this sensitive area.

Numerous fears have been expressed regarding the present tenor of the political and emotional context surrounding controversies of hunting and fishing rights and jurisdiction. There is a general consensus that any legislation concerning those rights be left to a time when a more rational atmosphere will attend deliberations. The problems do not seem to be jurisdictional in their ultimate analysis, although often cast in that context. The more pressing problem is how the tribes will protect the rights so essential to their lifestyle and so clearly guaranteed to them. If anything could be of assistance, it is a clear and unequivocal reaffirmation from Congress that these rights will not be abrogated, thus clearing up any misapprehensions of non-Indians and laying a firm foundation for future cooperative agreements. Any retreat from such a position at this juncture will throw the entire controversy into chaos and further posturing.

(b) *Federal regulation*

The few courts to consider the question have indicated that regulations by the Federal Government of on-reservation hunting and fishing will not be permitted. In *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925), the court held that regulations promulgated by the Commissioner of Indian Affairs and the Secretary of the Interior concerning on-reservation fishing were beyond the Federal Government's authority because such regulations were not authorized under the treaty. A Federal tax on the exercise of the treaty fishing right within the waters of a reservation was struck down in *Strom v. Commissioner*, 6 Tax Ct. 621 (1946).

It has been held that even where a treaty subsequent to the Indian treaty outlaws hunting of migratory birds, it does not alter the Indians' right to hunt on the reservation. *United States v. Cutler*, 37 F. Supp. 724 (D. Ida. 1941).

Similarly, in *United States v. White*, 508 F.2d 453 (8th Cir. 1947), it was held that the Bald Eagle Protection Act was inapplicable to an Indian hunter within the boundaries of a reservation who took an eagle in violation of the act. The court found that the statute did not adequately express an intention to abrogate Indian hunting rights and that this intention could not be implied into a general congressional enactment because the subject of Indian property interests is traditionally left to tribal self-government.

It has been held that Congress has the power to abrogate Indian treaties all or in part.<sup>35</sup> An abrogation of hunting and fishing rights will not be found absent a clear indication of congressional intent, however.<sup>36</sup> A proper exercise of congressional power can, however,

<sup>35</sup> E.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

<sup>36</sup> *Menominee Tribe v. United States*, *supra*.

provide the necessary authority for the executive to promulgate regulations governing Indian on-reservation fishing.<sup>37</sup>

The practical impact of Federal regulation is more serious in its indirect impact than in its direct regulation. To the extent that migratory fish are taken before they reach reservation waters, there is a reduction of the available on-reservation catch. Any conservation interest the State may legitimately assert is then raised.<sup>38</sup> The Corps of Engineers takes the position that the establishment of a flood control dam within the Fort Berthold Reservation was a taking of land that diminished that reservation to that extent and thereby terminated hunting and fishing rights.<sup>39</sup> The refusal of or withholding of certification of law enforcement responsibility<sup>40</sup> by the Secretary of the Interior for LEAA discretionary funds hampers on-reservation regulation by tribes and undercuts their ability to resist State regulation.

The practical effect of Indian tribes and individuals being subjected to State regulation while Federal agencies charged most directly with protecting Indian rights sit idly by is viewed by some Indian people as an inverse Federal regulation by collusion or conspiracy with State officials. When the Cheyenne-Arapahoe Council of Oklahoma requested the local field solicitor's view on the tribal rights, the council discovered that the field solicitor had come to no independent conclusion of his own, but had simply called the attorney representing the tribe in its suit to enjoin State regulation of tribal rights.<sup>41</sup>

If one of the attributes of jurisdiction is the ability to resist interference with the exercise of a right from another entity, then that jurisdiction is meaningless if not enforceable. And that holds as true for a right which has no meaningful remedy. It is not enough to claim the right to resort to the courts, when the resources and the wherewithal to resist entities the magnitude of a State are unavailable. This becomes more frustrating when tribes find the Bureau of Indian Affairs and the Department of the Interior Solicitor's Office unresponsive, despite the much discussed trust responsibility. Many tribes are simply too poor to hire private counsel and, as a result, are left unable to exercise their rights against an inappropriate assertion of State jurisdiction.

An attorney in Minnesota, Kent Tupper, outlined the history of one case which bears repeating here:

First, we have the White Earth Reservation where in 1971, I believe, one Angus Parker, an enrollee of White Earth, wrote President Nixon and asked what his rights were to hunt and fish on the White Earth Reservation. He received a letter from the Solicitor's Office of the Department of Interior (sic) advising that President Nixon had instructed them to answer the letter and in the letter, it stated that you have the rights to hunt on trust land within the reservation and depending on what happens in the Leech Lake case, you may well have a right to hunt on public lands and waters and fish and rice between the reservation. During the *Leech Lake* case, the (State) Attorney General's staff told the judge whatever decision he rendered, it certainly would affect the other reservations. After the case was decided, Angus Parker's father, knowing he had written the President, was arrested for having deer on his assigned land, private trust

<sup>37</sup> *Melakatl Indian Community v. Egan*, 369 U.S. 45 (1962).

<sup>38</sup> *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) (Puyallup I); and *Department of Game v. Puyallup Tribe*, 441 U.S. 44 (1973) (Puyallup II) discussed *infra*.

<sup>39</sup> Midwest Transcript at 67-70.

<sup>40</sup> In order to be eligible for LEAA funding, the tribe must be certified as having LEAA responsibilities by the Secretary of the Interior.

<sup>41</sup> Site visit to Cheyenne-Arapahoe, May, 1976.

land within the reservation. Because the Solicitor's Office had written him indicating he could hunt, they felt it an obligation to represent him, you know, since it was a county court criminal matter. They did represent him in county court and lost. The judge found that he had no rights. He appealed to the District Court, I believe in 1972, and Judge Swenson dismissed the charges on the ground that the State had no jurisdiction, he did have hunting and fishing rights, so subsequent to that we had a letter directed to a member of the band from the President or his functionary, saying that he could hunt and fish. You got a court case in other words, establishing rights and you have a district judge saying you got rights. Now in my estimation, a reasonable man would think he had some rights so a number of White Earth enrollees then proceeded to hunt and fish without State licenses and they were all arrested.<sup>42</sup>

The controversy in Minnesota goes on. The point of the matter is, as Mr. Tupper went on to point out, "the tribe does not have the financial wherewithal to continually litigate these issues and it takes many years in court and the costs would be very high." But, "U.S. attorney offices feel they are overburdened with litigation" and feel that Indian rights cases are complex and time-consuming and it takes "an inordinate length of time for (the U.S. Department of Justice) to make a decision whether they are going to participate in a lawsuit." In the *Leech Lake* case referred to above, it "took well over, I think, 2 years before they (Justice) could make a firm commitment."<sup>43</sup>

So, although direct Federal regulation is generally very limited, the indirect impact on the protection of rights has significant jurisdictional impacts.

#### (c) Tribal regulation

It is beyond doubt that tribes have the sovereign authority to regulate, restrict, and license hunting and fishing within their reservations. The exclusivity of a tribe's jurisdiction over members within the reservation has only been diminished insofar as a treaty or a Federal statute explicitly provides. Most, if not all, tribes with substantial fish and game resources regulate the exercise of such rights.<sup>44</sup> On a number of occasions, the Department of the Interior's Solicitor has concluded that a tribe may adopt ordinances to preserve and protect its reservation hunting and fishing rights.<sup>45</sup> Typically, these ordinances are enforced through a system of tribal enforcement officers and courts. These are the exclusive entities having any jurisdiction over purported violations.<sup>46</sup>

Consistent with a tribe's sovereignty over its own territory, it can enforce its regulations relating to hunting and fishing against non-members of the tribe as well as members.<sup>47</sup> Similarly, some tribes possess exclusive authority to license non-Indians to hunt and fish within the reservation.<sup>48</sup>

Some State courts have reached the questionable conclusion that tribes lack jurisdiction over non-Indians hunting and fishing on the reservation.<sup>49</sup> A California court has taken a middle ground, holding that where a nonmember goes on a reservation to hunt and fish, State

<sup>42</sup> *Ibid.* at 150-7.

<sup>43</sup> Great Lakes Transcript, at 109-10.

<sup>44</sup> See e.g., Hobbs, "Indian Hunting and Fishing Rights," 32 Geo. Wash. L. Rev. 504, 523 nn 100-101.

<sup>45</sup> See e.g., Sol. Op. M 36638 (May 16 1962).

<sup>46</sup> See *State v. McClure*, 127 Mont. 534, 268 P. 2d 629 (1954).

<sup>47</sup> See *Onechan Tribe of Indians v. Rowe*, *supra*.

<sup>48</sup> *Colville Tribe v. State of Washington*, No. C-75-146 (E.D. Wash. 1976).

<sup>49</sup> E.g., *State v. Danielson*, 427 P. 2d 689 (Mont., 1967); see also, *In re Crosby*, 149 P. 989 (Nev. 1915).

game laws apply to him but that permission to fish on the reservation given by authorities of the tribe on whose reservation he is fishing is a complete defense.<sup>50</sup> It has suggested in the *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1006 (D. Minn. 1971) that exclusivity of an Indian tribe's right to regulate fishing of Indians and non-Indians within the reservation depends upon the congressional acts which manifest the relationships between the tribe and the United States. In that case, virtually all of the Federal legislation had allowed most of the reservation to pass into non-Indian ownership.

As indicated in the section on State regulation of on-reservation hunting and fishing, there is some question as to the State's authority to regulate non-Indians within reservation boundaries.<sup>51</sup> Although there is a paucity of cases, some judicial determinations have been made.

Tribes may be limited as to how far their fish and game ordinances apply because of provisions in their own constitutions which limit their jurisdiction to members or to Indians, and there may be treaties or legislation which limit their powers or allow the importation of State laws. The trend, and certainly a better view, is that tribal laws apply to Indians and non-Indians alike who are hunting and fishing within the boundaries of an Indian reservation. This application would lead to the exclusion of State laws except where the tribe itself requires that non-Indians comply with state regulations, as they have in some situations.

That Congress contemplated non-Indian hunting and fishing activities within reservation boundaries only upon the condition that tribal consent has been obtained is evidenced by 18 U.S.C. 1165. This law makes it illegal for a non-Indian to go within the boundaries of an Indian reservation for the purpose of hunting or fishing without consent of the tribe. While the provision does not seek to bring non-Indians under the aegis of any Federal regulatory scheme, it puts muscle in the requirement that non-Indians comply with tribal requirements of licensing or other regulations upon which consent to hunting and fishing might be conditioned.

It is clear that various States intend to push the resolution of the matter of on-reservation, non-Indian jurisdiction through the courts by confronting the tribes over enforcement as Washington and California have already done, and as Arizona and other States presently seek to do. Again, the States will be cast as defendants when the tribes are forced to sue over the assertion of the State's police power. Predictably, the case law will emanate from areas where tribes have the resources to resist the State through costly litigation while the less affluent Indian communities will be forced to endure this affront to their sovereign jurisdiction and drain on their fish and game resources until legal assistance can be obtained by some means other than private counsel.<sup>52</sup>

<sup>50</sup> *Donahue v. Justice Court*, 15 Cal. App. 2d 557, 93 Cal. Rptr. 310 (1971).

<sup>51</sup> See e.g., *Quechan Tribe v. Rowe*, *supra*.

<sup>52</sup> In some cases, private counsel have donated their services. Great Lakes Transcript at 102-10 and *infra*. Those tribes left to depend on Federal agencies charged with defending their rights have little hope of receiving such protection soon. Legal services are either unsophisticated in such areas or must wait for the exact fact situation which will allow their involvement under their rather strict guidelines. These avenues, however, seldom lead to a definite conclusion since the case cannot be fashioned to ultimately resolve the matter of jurisdiction.

William Wildcat of the Lac du Flambeau Reservation outlined the situation on his reservation in Wisconsin:

We own and operate our own fish hatchery in Lac du Flambeau. A problem in this area is the Department of Natural Resources. . . . we get the fish, take the eggs, hatch 'em, rear 'em and then put 'em back into our reservation with no financial assistance from the DNR. Maybe in 1974, I made a survey. I found that the amount of licenses sold within our reservation by the various big shots and so forth, that produce about \$40,000 and that \$40,000 was directed only at fishing licenses. The \$40,000 then evidently went into Madison, [from] which our Lac du Flambeau effort has no assistance. We are continuing to stock these lakes on the reservation, trying to keep the tourism effort alive, which really produces summer jobs for our people, but we're really concerned that there is no financial assistance from the people who have the financial assistance in the State, which is the DNR.<sup>53</sup>

Mr. Wildcat went on to explain that the Lac du Flambeau have amended their constitution and bylaws to extend jurisdiction over *all land and waters (some 126 lakes)* within the reservation. They do not know, however, what will happen when they instigate a major licensing program so important to the support of their hatcheries and ultimately their economy. Again, it becomes a jurisdictional issue when the potential conflict with the State arises, as past incidents and present policy indicate it most surely will. A recent article in the *Milwaukee Sentinel*, May 26, 1976, reported that the State Attorney General's Office would sue to restrain the Lac Courte Oreilles from enforcing the hunting and fishing provisions of their conservation code on waters not completely surrounded by the reservation. Again, the State chose the litigation route instead of responding to a proposal by the tribe to the State Department of Natural Resources for reciprocal honoring of tribal and State licenses on and off the reservation.

## 2. OFF-RESERVATION HUNTING AND FISHING

Relative to the attention and energy devoted to on-reservation jurisdictional disputes, jurisdiction over Indians exercising hunting and fishing rights off-reservation secured by Federal treaty or agreement has been an area of intensive and prolonged litigation. States have inherent authority to regulate the taking of fish and game within their boundaries. *Geer v. Connecticut*, 161 U.S. 519 (1896). Usually State law can be applied to Indians who are outside the reservation, but there can be no such application if it would "impair a right granted or reserved by Federal law."<sup>54</sup> Accordingly, a Federal treaty may override State power to regulate the taking of game.<sup>55</sup>

To determine when and to what extent State regulatory power over off-reservation Indian hunting and fishing is preempted by treaties it is, of course, essential to examine the specific terms of the particular treaty or other Federal law. Typically, a treaty cedes a land area to the United States, retaining a defined parcel for a reservation. Also reserved in many treaties is a right to continue hunting or fishing on lands other than those retained.

Some of the most commonly reserved off-reservation rights are found in treaties with Indians of the Northwest. Those treaties often reserve a right to fish "at usual and accustomed places" which is "in common

<sup>53</sup> Great Lakes hearing transcript, vol. II, at page 66.

<sup>54</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

<sup>55</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

with the citizens of the territory.”<sup>56</sup> Hunting rights have been referred to as “the privilege of hunting . . . on open and unclaimed lands”.<sup>57</sup> Or the right may be “on unclaimed lands in common with citizens”.<sup>58</sup> Other treaties have acknowledged that Indians have “the right to hunt on the unoccupied lands of the United States so long as the game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts”.<sup>59</sup>

Off-reservation hunting and fishing rights have also been an important subject of litigation in the Great Lakes region. Treaties there have been less explicit. One treaty provides that Indians residing in the territory ceded by the treaty “shall have the right to hunt and fish therein until otherwise ordered by the President.”<sup>60</sup> Because of the great importance of fishing to Indians of the Great Lakes, it has been held that a treaty which says merely that certain lands adjacent to a lake will be set aside “for the use of the Chippewas of Lake Superior” includes fishing rights of the lake even though it is outside reservation boundaries.<sup>61</sup>

How a court will construe an off-reservation treaty hunting or fishing right with respect to the extent of that right or jurisdiction of a State to regulate it, necessarily turns on the construction of the language used. The rules of treaty construction are especially important in dealing with off-reservation rights.<sup>62</sup> Proper construction often demands extensive reference to historical and anthropological evidence to determine the intent and understanding of the Indians at the time of the treaty.<sup>63</sup>

Analysis of established regulatory jurisdiction over off-reservation hunting and fishing rights relates to particular circumstances and causes. The principles of any particular case must be understood and applied in light of the language and context of the particular treaty or agreement. Moreover, this area is particularly affected by political and emotional concerns and pressures which color and affect considerations of jurisdiction.

#### (a) *The States*

By far the most extensively litigated off-reservation rights have been fishing rights at “usual and accustomed places” secured to Indians “in common with the citizens of the territory.” It has been held by the U.S. Supreme Court that *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) (*Puyallup I*) permits the right of the Indians to be regulated by the State where such regulation is reasonable, necessary for conservation and does not discriminate against Indians. In subsequent proceedings in the same case, the court made it clear that only State regulations which have been shown to be necessary to prevent destruction of the fish resource fit the “necessary

for conservation” standard. *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*).<sup>64</sup>

The *Puyallup* cases reaffirm an earlier decision of the Court based on the same treaty language which indicated that Indian rights were more extensive than those of the average citizen and any holding to the contrary would create “an impotent outcome to negotiations and the convention, which seem to promise more and give the word of the Nation for more.”<sup>65</sup> The Court had also recognized that the right of the Indians to fish could not be conditioned upon the purchase of a State license.<sup>66</sup> While allowing State regulation of “the manner of fishing, the size of the take, the restriction of commercial fishing, and the like,” the Supreme Court restricts the type of regulations to which Indians may be subjected to those which are required to conserve the resource. Thus, regulations applicable to Indians are not judged by the normal standards which govern applicability of State laws to citizens without treaty rights. Instead, they are held to the higher, “necessary for conservation” standard.<sup>67</sup> And consequently, regulations which are applicable to both Indians and non-Indians, such as those restricting all net fishing for steelhead, are discriminatory against Indians.<sup>68</sup>

Other recent cases<sup>69</sup> have applied the *Puyallup* rules, refining the concepts to give the states and tribes guidance in their application. The *Sohappy* Case indicated that in order for a state regulation to be necessary for conservation, it must be the least restrictive which can be imposed consistent with assuring that enough fish escape harvest in order to spawn, that State regulatory agencies must deal with Indian treaty fishing as a separate and distinct subject from fishing by others, and that Indian interests must be considered just as the interests of sport and commercial fishermen are considered. The court rejected the notion that “conservation” includes State goals beyond assuring that the continued existence of the fish resource would not be imperiled. Regulations based on State policies concerned with allocation and use of the fish resource, not merely its perpetuation, are therefore inapplicable to Indian treaty fishermen.

<sup>64</sup> Whatever apparent practical wisdom may have motivated the decisions in the *Puyallup* cases, allowing the exercise of State police power over a federally reserved right seems inconsistent with the principle that Indian rights stemming from Federal treaties are immune from State regulation because of the supremacy clause. Further, the holding is difficult to reconcile with axioms of treaty construction, as Indians hardly could understand that their treaty rights would be subjected to control by some non-Indian entity, indeed one that was not then even in existence at the time. It also seems inconsistent with the court's own requirement in *Puyallup I* that the treaty right cannot be “qualified or conditioned by the State”, 391 U.S. at 399. Remarkably, the Supreme Court in *Puyallup I* cited no case or other authority specifically holding that Indian treaty rights can be regulated by the State. Instead, a few cases in which dicta to that effect appeared were cited. The court simply reached the conclusion based on its inability to find any reason that the rights could not be regulated, stating: “And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise to the police power of the State”, 391 U.S. 398. The lack of foundation for the Supreme Court's extension of State power over federally secured rights has been strongly criticized. See *U.S. v. Washington Fishing: United States Supreme Court Error*, 47 Wash. L. Rev. 212 (1972). It would appear that the Court was heavily influenced by an imprecise stipulation in the case that Indian fishing “would virtually exterminate the salmon and steelhead fish runs” if it were allowed to continue free of state regulation. 391 U.S. at 403 n.15. Whatever questions might be raised as to the correctness of the *Puyallup* decisions allowing State regulation, it is the law of the land.

<sup>65</sup> *United States v. Winans*, *supra*, 198 U.S. at 380.

<sup>66</sup> *Tulee v. Washington* 315 U.S. 681 (1942).

<sup>67</sup> *Puyallup I*, 391 U.S. 392, 401 n. 14.

<sup>68</sup> *Puyallup II*, *supra*.

<sup>69</sup> *Sohappy v. Smith*, *supra*; *United States v. Washington*, *supra*.

<sup>56</sup> See e.g., Treaty with the Yakimas, 12 Stat. 951.  
<sup>57</sup> E.g., Treaty of Medicine Creek, 10 Stat. 1132.  
<sup>58</sup> E.g., Treaty with the Walla Wallas, 12 Stat. 945.  
<sup>59</sup> E.g., Treaty with the Eastern Band Shoshone and Bannock, 15 Stat. 673.  
<sup>60</sup> Chippewa Treaty of 1854, 10 Stat. 1109.  
<sup>61</sup> *State v. Gurnoe*, 53 Wis. 2d 390, 192 N.W. 2d 892 (1972).  
<sup>62</sup> Treaties must be interpreted as Indians would have understood them, doubtful expressions must be resolved in favor of Indian parties, and the treaties must be construed liberally in favor of the Indians. See: generally Wilkinson and Volkman, *supra*.  
<sup>63</sup> See, e.g., *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F. 2d 676 (9th Cir. 1975), *cert. denied* \_\_\_ U.S. \_\_\_ (1976); *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969); *State v. Gurnoe*, *supra*; *State v. Tinno*, 94 Ida. 759, 397 P. 2d 1386 (1972). Cf. *United States v. Winans*, *supra*.

In *United States v. Washington*, the district court followed *Sohappy* and went farther in delineating the circumstances under which the States might regulate the Indian treaty fishing right off the reservation. Conservation was defined as allowing State regulation only where State measures are required for the perpetuation of a particular species of fish which cannot be achieved by restricting non-Indian fishing. In addition, the court found that the tribes themselves have the power to regulate their members' treaty fishing. If tribes meet certain conditions and qualifications designed to demonstrate capability to promulgate and enforce fishing regulations, the State may not regulate their treaty rights at all, although the tribe must adopt and enforce any State conservation measure which has been shown to the court to be necessary for conservation. The State may regulate the fishing of all other tribes any time that it demonstrates to the court in advance that such a regulation is necessary for conservation. The advance is not necessary in cases of emergency.

It has been held by one court that Indian fishing inconsistent with tribal regulations is outside the protection of the "in common" treaty right and thus is subject to State law.<sup>70</sup>

The Ninth Circuit Court of Appeals in affirming the district court decision in *United States v. Washington* provided a cogent, after-the-fact explanation of why State conservation regulations should be applicable to Indians exercising an "in common" treaty right. The court analogized the relationship of treaty Indians and other fishermen to a cotenancy. Neither party can destroy the subject matter of the treaty, and the State cannot interfere with the Indians' right to fish when it is necessary to prevent destruction of a particular species.

Unless and until the Supreme Court modifies the *Puyallup* rule allowing State regulation of Indian treaty rights which may be exercised "in common with" non-Indians, the rule undoubtedly will be applicable to off-reservation rights to hunt and fish which are couched in that language or other language nearly identical to it. The Supreme Court has recently shown its intent to apply the rule to an agreement providing for an Indian hunting right on lands given up by the Indians "in common with all other persons."<sup>71</sup>

*Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967) utilized the "necessary for conservation" standard as a measure of permissible State regulation of an off-reservation "privilege of hunting . . . on unclaimed lands in common with citizens." Another pre-*Puyallup* case required that State regulation of Indian treaty fishing under the "in common with" language was indispensable to accomplishing the conservation objective.<sup>72</sup>

Where the off-reservation right is not qualified by language indicating that Indians intend to share it with non-Indians, the allowance of State regulation loses its rationale. Thus, in *State v. Arthur*, 74 Ida. 251, 261 P. 2d 135 (1953), the Idaho Supreme Court held that a treaty with the Nez Perce Indians reserving the right to hunt upon "open and unclaimed land" entitled them to hunt on land owned by the Fed-

eral Government and other land not settled and occupied by whites under possessory rights or patent "without limitation, restriction or burden" imposed by State regulations.

More recently, and after the *Puyallup* decisions, the same court construing a Shoshone-Bannock treaty "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the white and Indians on the borders of the hunting districts," found that, like the right in the Nez Perce treaty, it was "unequivocal" and "unqualified."<sup>73</sup> Based on the Indians' understanding at the time of the treaty, the court found that the hunting right expressed in the treaty included fishing activity. The court, however, seemed to soften the earlier decision in *Arthur* by suggesting that State regulation of the fishing right might be possible upon a showing of necessity for conservation. The court neither expressly overruled *Arthur*, nor stated that had the State shown necessity for conservation, it would have upheld the regulation. The court said:

It would appear that if qualified treaty fishing rights received this kind of special protection . . . the exercise of an unqualified treaty right to fish . . . certainly cannot be regulated by the state unless it clearly proves regulation of the treaty Indians fishing in question to be necessary for preservation of the fishery. 497 P.2d at 1393.

The *Tinno* court did not really have to reach the question of whether the *Puyallup* rule must be applied but rather seems to be reasoning a fortiori. The concurring opinion of Justice McQuade criticizes this aspect of the decision, insisting that "[n]othing in *Puyallup* requires deviation from *Arthur* in deciding this case."<sup>74</sup>

The Supreme Court of Michigan also has recognized the distinction between the off-reservation rights considered in *Puyallup* and its progeny and other rights, not subject to the same qualification. A Chippewa treaty provided that the Indians who "reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President." The court found that this off-reservation right rendered invalid the game regulations of the State as to Indians covered by the treaty.<sup>75</sup> A Michigan lower court has ruled that "the right of hunting on the land ceded" found in an 1835 Chippewa and Ottawa treaty subjected the Indians to State regulations which are "unnecessary to prevent a substantial depletion of the fish supply."<sup>76</sup> On appeal, the Indian defendant has argued that the site of his arrest was not in the ceded area but it is within the Bay Mills Indian Reservation, but that if the court finds it to be off the reservation, that the *Puyallup* rule ought not to be applied to this unqualified treaty right. The case awaits decision.

Because of the savings clause in Public Law 280, the conclusions as to the limits of State jurisdiction over off-reservation rights are the same in both Public Law 280 and non-Public Law 280 States.<sup>77</sup>

The difficulties experienced by Indian people in exercising their off-reservation rights and their conflicts with the States is well known. The history of this conflict is long and well recognized. Justice Miller in

<sup>70</sup> *State v. Gowdy*, 462 P.2d 461 (Or. App. 1969).

<sup>71</sup> *Antoine v. Washington*, 420 U.S. 194, 207 (1975).

<sup>72</sup> *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963).

<sup>73</sup> *State v. Tinno*, 94 Ida. 759, 597 P.2d 1386 (1972).

<sup>74</sup> 497 P.2d at 1396.

<sup>75</sup> *People v. Jondreau*, 384 Mich. 539, 185 N.W. 2d 375 (1971).

<sup>76</sup> *People v. LeBlanc*, 55 Mich. App. 684, 223 N.W. 2d 305 (1974).

<sup>77</sup> E.g., *State v. Gurnoe*, *supra*.



*United States v. Miller*, 18 U.S. 375, 383-84 (1886) delivered the most famous language, saying:

They (the Indians) owe no allegiance to the States and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies.

Although some relationships have changed, the underlying conflict remains. Judge Burns delivered the following language nearly 100 years later concerning off-reservation fishing rights:

\* \* \* I deplore situations that make it necessary for us [District Court judges] to become enduring managers of the fisheries, forests and highways, to say nothing of school districts, police departments, and so on. The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their local non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the District Court. This responsibility should neither escape notice nor be forgotten.<sup>78</sup>

The State of Washington has not relented.

They [the State] have done everything possible to throw obstacles in front of the tribes in their efforts towards implementing the decision . . . They [non-Indians] fished last year with complete disregard for their own regulations, the State's regulations that is. The State attempted in some instances to arrest these people but the courts refused to prosecute them.<sup>79</sup>

The Washington Post reported on June 28, 1976, that non-Indian commercial fishermen continued to defy a Federal court order banning fishing and only when faced with possible contempt citations did the State officials relent and agree to enforcement. This came 6 months after Gov. Dan Evans offered testimony in Yakima, Wash., that issues were settled and only cooperation over management need be worried over.<sup>80</sup> Further examples serve no purpose. It is summed up concisely by Peter R. Taft in recent congressional testimony.

I think we have a situation which is developing similarly day by day now in the State of Washington where in effect, the State courts and the State administration both have totally abandoned the protection of Indian treaty rights in fishing and have thrown the total burden of enforcement of fishing rights not only for Indians, but in effect, for commercial and sports fishermen as well into federal court.

They have thrown up their hands. They have abandoned any semblance of recognition of obligations to the tribes in that instance.<sup>81</sup>

Reid P. Chambers, Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior, concurred in testimony at those same hearings.

\* \* \* [T]he situation out in the State of Washington which is virtually one of lawlessness in terms of what the State courts are doing in that State. The State Supreme Court within the last two weeks, has come down with a decision that is grossly violative of the Supreme Court of the United States decisions.

Local State courts have issued injunctions against the enforcement of federal court decrees in the State of Washington.<sup>82</sup>

What is needed most desperately is firm congressional commitment to protection of these rights so vital to the integrity of the Indians

of the Northwest and elsewhere. To succumb to the lawlessness of some segments of the society in order to quell the controversy is repugnant to the most fundamental notions upon which any society is based, particularly one that has taken so much in exchange for the few guarantees extended.

(b) *Federal regulation*

The Federal Government has acted in at least one instance to provide regulations for off-reservation treaty fishing. In 1967, the Secretary of the Interior promulgated regulations that appear at 25 CFR Part 256. Those regulations twice have been reformulated but never have been fully implemented. The regulations provide merely for identification cards for Indians, identification of fishing equipment and a framework for later issuance of substantive regulations to govern the exercise of treaty fishing rights.

It has been indicated above that the Secretary has been held to lack power to regulate treaty rights on the reservation. It would seem to follow that he could not regulate them outside the reservation without enabling legislation.<sup>83</sup> The authority of the Secretary to enact off-reservation treaty fishing regulations in absence of legislation has not been tested. It is unreasonable to predict that if there were such a test, the result would track decisions regarding a State's power to regulate the same rights. Thus, where a right is specifically to be shared between Indians and non-Indians, as is the case with the "in common with" rights, Federal regulations may be upheld, while rights not subject to such qualification will not be. Congress has given the President power to prescribe regulations to carry out provisions of acts and treaties relating to Indian affairs.<sup>84</sup> Under this authority, the Secretary could make any regulations which fulfill treaty purposes. Under the *Puyallup* reasoning as expanded by the *United States v. Washington* cotenancy analogy, it would appear that the Secretary can promulgate regulations necessary to preserve the resource which is to be shared as between Indians and non-Indians according to treaty terms.<sup>85</sup>

Some treaties by their terms may furnish a basis for the Executive to promulgate regulations. For instance, it has been suggested that the phrase "until otherwise ordered by the President" following definition of the hunting and fishing right in the Chippewa Treaty of 1854 would empower the President to "issue an order limiting or extinguishing the hunting and fishing rights of the Indian." *People v. Jondreau*, *supra*, 185 N.W. 2d at 381. It certainly would seem that any such order would have to be consistent with the purpose of the treaty as understood by the Indians at the time they entered into it. The conclusion of the Michigan court is probably correct but should be limited to situations in which regulations can be demonstrated to fulfill treaty purposes.<sup>86</sup>

As in other areas, indirect impact is felt from congressional and other Federal actions. A recent report of the Senate Committee on Appropriations for fiscal year 1977 is pertinent. While appropriating funds to implement *United States v. Washington*, the committee

<sup>78</sup> *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975) (concurring opinion).

<sup>79</sup> Charlie Peterson. Makah Indian Tribe, N.W. Hearings at 438-39.

<sup>80</sup> Northwest Transcript at 674, exhibit 23.

<sup>81</sup> Hearings before the Subcommittee on Administrative Practices and Procedures, Senate Committee on the Judiciary, June 22, 1976. Testimony of Peter R. Taft, Assistant Attorney General, Land and Natural Resources Division, Department of Justice.

<sup>82</sup> *Ibid.*, testimony of Reid P. Chambers. See *Northwest Trollers Association et al. v. Moos, et al.*, Me. Op. 5321 (Superior Court of Washington, Thurston County, June 1, 1976).

<sup>83</sup> See Hobbs, "Indian Hunting and Fishing Rights II," *George Washington Law Review* 1251, 1266 note 87.

<sup>84</sup> 25 U.S.C. § 9. *United States v. Clapox*, 35 F. 575 (D. Ore. 1888).

<sup>85</sup> Compare, "The James G. Swan," 50 F. 108 (D. Wash. 1892).

<sup>86</sup> Compare, *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971).

directs the establishment of a high ranking advisory group to design a long-range management and enforcement mechanism. Such group would be under the Secretary of the Interior and would include fishery enhancement in its considerations, and shall have fair representation from all major parties involved in *United States v. Washington*. The report then goes on to require that the plan will be forwarded to appropriate State and Federal agencies for implementation, while the Secretary of the Interior is to analyze how that Department might assist the tribes and States in complying. The notion that tribes be excluded from implementation while being subject to compliance is inappropriate.

In a recent report to Congress from the Comptroller General on protection of fishery resources<sup>87</sup> Indian rights are not mentioned. The report suggested that Congress consider imposing management measures on U.S. fisheries where States fail to do so. How any such plan could be designed or implemented without contemplating Indian treaty rights is incomprehensible.

### (c) Tribal regulation

The discussion of the limits on State regulation carries the clear implication that the appropriate regulator of fish and game taken pursuant to treaty rights is the Indian tribe which holds the right. In *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974), it was decided that Indian off-reservation treaty fishing rights include a right to regulate. It was specifically held that a tribe with an off-reservation right "in common with the citizens of the territory" has authority to arrest and prosecute tribal members outside the reservation for violation of tribal fishing regulations. The holding was supported by evidence as to the Indians' understanding and customary practices concerning control of members at the time of the treaty. The fact that continued Indian self-regulation was comprehended by the treaty enables the tribe today to exercise its regulatory power at "usual and accustomed places" outside reservation boundaries. This does not infringe on the State's sovereignty because the tribe's regulatory power is protected by the supremacy clause of the Constitution.

As indicated previously, in the section concerning State regulation of off-reservation rights, the Federal circuit court in *United States v. Washington* also validated the power of the tribes to regulate their members' treaty fishing outside the reservation at usual and accustomed fishing sites. If tribes meet certain qualifications and conditions fashioned by the court, the State is enjoined from any regulation whatsoever. While as a matter of law under *Puyallup* the State possesses limited jurisdiction to prevent destruction to the resources, a remedy was developed which assured that with responsible tribal management, State control could be precluded.<sup>88</sup> The injunction also required that a qualified tribe must adopt and enforce as its own any State regulation shown to the court to be necessary for conservation. Failure to do so could be a ground for stripping the tribe of its self-regulating status.

The sphere of permissible State regulatory power over Indian treaty fishing probably is greatest in the case of the "in common with"

<sup>87</sup> See, Comptroller General's report to Congress, "Action is Needed Now To Protect Our Fishery Resources," GGD-76-34, February 18, 1976.

<sup>88</sup> See *United States v. Washington*, supra, 520 F.2d at 686.

treaty language. The exact limits of State vis-a-vis tribal rights must be determined by reference to the treaty language; evidence concerning treaty purposes; and the understanding of the parties. Accordingly, the question of whether there is any State regulatory power and the extent of it would depend on these factors.

Although the conclusion in *State v. Gowdy*, supra, that Indian fishing in violation of tribal regulations subjects that fishing to State regulation, appears to be basically correct, it should be pointed out that Indian regulation, like non-Indian regulation, takes account of many goals which are not strictly related to conservation (e.g., allocation of fishing opportunity and fishing sites).<sup>89</sup> Any violation of a tribal regulation which is not necessary for conservation should not subject an Indian guilty of such an infraction to the full range of State regulatory power.

### 3. ABORIGINAL FISHING RIGHTS

An area which has received almost no consideration by the courts is Indian hunting and fishing outside Indian reservation boundaries not embodied in any treaty. Most Indian rights which are found in treaties are aboriginal rights that have been preserved by mention of the rights in the treaty, with language preserving them all or in part, or by absence of any language giving up the rights. Because any analysis of Indian treaties is necessarily based upon the notion of reserved rights—that anything not given up is retained, the total absence of a treaty would argue for a continuation of aboriginal rights as they always were.

The relationship of the United States to Indians—one of having an exclusive right to deal with the Indians and to extinguish their rights—was first articulated in the case of *Johnson v. McIntosh*.<sup>90</sup> That case makes it clear that the United States succeeded to the sovereign rights of the "discovering" nations who first came to the New World, but that sovereignty was subject to a right of occupancy, or aboriginal title, of the Indians.<sup>91</sup> The Supreme Court has recently said of these principles of aboriginal title:

It very early became accepted doctrine in this Court that although fee title to the lands occupied by the Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the Federal law. Indian title recognized to be only a right of occupancy was extinguished only by the United States.<sup>92</sup>

The exclusive right of extinguishing aboriginal property rights of Indians was reflected in the Indian Non-Intercourse Act, now codified in the current form at 25 U.S.C. § 177. It would appear, then, that the supremacy clause to the U.S. Constitution, operating via 25 U.S.C. § 177, which embodies the preemptive right of the United States to deal with Indians, would preclude the exercise of any State authority over presently existing aboriginal rights.

<sup>89</sup> See *Settler v. Lameer*, supra, 507 F.2d at 237.

<sup>90</sup> 2 U.S. (8 Wheat.) 543 (1823).

<sup>91</sup> 21 U.S. at 596.

<sup>92</sup> *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974).

In *State v. Quigley*, 52 Wash. 2d 234, 324 P. 2d 827 (1959), the Washington Supreme Court held that an Indian did not possess aboriginal rights which prevented the exercise of State power to regulate his hunting. In that case, the Indian failed to show that his aboriginal right continued unextinguished. He had been arrested on lands he had purchased from a non-Indian. The *Quigley* panel was of the view that Indian title had been extinguished, although there was no express statutory or other clear manifestation of extinguishment. The case is questionable for this reason. Further, the court failed to distinguish between an extinguishment of title as to land and the right to hunt on such land. Court of Claims cases have made clear that the two rights are severable and distinct.

Even though aboriginal title to land may have been extinguished by a tribe's acceptance of compensation for the Government's unauthorized taking of lands, that would not necessarily extinguish aboriginal hunting and fishing rights unless they were specifically dealt with in resolving the Indians' claim against the Government.

The Interior Department Solicitor is of the opinion that this is the case with the Kootenai Tribe of Idaho which received compensation for lands taken mistakenly from the tribe which never participated in a treaty with the United States.<sup>93</sup> The same opinion deals with the question of to what extent a State might regulate the exercise of their aboriginal rights. It points out that there is no sound authority permitting State jurisdiction over the rights, as they would appear to be protected by the supremacy clause. But in the case of *Kake v. Egan*,<sup>94</sup> the Court held that the aboriginal fishing rights of Alaska Natives were not exclusive, and certain Federal regulations could not exempt them from Alaska's antifish trap law without appropriate legislation. The Court acknowledged that the aboriginal fishing rights of the Indians are property over which Alaska had disclaimed jurisdiction in its Statehood Enabling Act, but that the Enabling Act did not mandate exclusive Federal jurisdiction over such matters. It seems to allow State regulation based on the "migratory habits of salmon" which would make the presence of fishing traps "no merely local matter."

*Kake* was actually concerned with the extent of permissible Federal power to regulate and permit Indian fishing. It does not appear that the basis for the preemptive impact of aboriginal rights over the exercise of State regulatory power was fully considered. Furthermore, the anomalous situation of Alaska Natives was in a state of considerable uncertainty at the time of the *Kake* decision; it has now been resolved by the Alaska Native Claims Settlement Act, 43 U.S.C., sec. 1601, *et seq.* The Supreme Court of Idaho will soon be deciding the question of whether and to what extent a State may regulate the exercise of aboriginal hunting rights of the Kootenai Tribe. *State v. Coffee*.

#### FINDINGS

(a) Indian tribes and individuals have been, and continue to be, subjected to continuous challenges by States and local non-Indians

<sup>93</sup> Memorandum from Associate Solicitor to Commissioner of Indian Affairs, dated Oct. 29, 1975.

<sup>94</sup> 369 U.S. 60 (1962).

over exercise of treaty and aboriginal hunting, fishing, trapping, and gathering rights.

(b) States have failed and/or refused to implement Federal court determinations as to the nature and scope of these important rights, thereby denying Indian tribes and people the effective exercise of these rights.

(c) Indian hunting, fishing, trapping, and gathering rights are an integral part of their culture, trade, and commerce, and are important to their continued survival and economic viability.

(d) State refusal to recognize and assist in the protection of these rights has promoted lawlessness and the effect of such State action is manifest of racial distinction which denies Indian people the equal protection of the laws in the exercise of their treaty rights.

(e) Failure to understand and appreciate the historical and legal foundation of Indian hunting, fishing, trapping, and gathering rights, coupled with growing competition for a diminishing resource, leads to non-Indian proposals for abrogations of these Indian rights; is inconsistent with the moral and legal foundations upon which they rest; and contributes to an atmosphere of disregard for Federal court determinations concerning such rights.

(f) Extensive and costly litigation has gone far to define the extent of these rights, and legislatively changing existing relationships will occasion renewed and extensive lawsuits to the economic detriment of all concerned.

(g) Federal actions which do not contemplate the integral role of Indian tribes in future management and planning for the protection of their resources is inconsistent with the viability of their rights and the importance to the resource.

#### RECOMMENDATIONS

(a) Congress should adopt a joint resolution which clearly supports Indian hunting, fishing, trapping, and gathering rights free from State regulation which unequivocally states that it shall not be the policy of Congress to abrogate these rights.

(b) Congress should make specific legislative provision for the recovery of attorney fees and expenses against any litigant adverse to the vindication of a treaty right brought by or against an Indian tribe or individual where the Indian litigant prevails in such a suit. Of particular importance are situations where the exercise of rights is frustrated by the acts or omissions of the various States in the exercise of their police power.

Provision should be made in the immediate future for funds to Indian tribes to obtain legal counsel to vindicate rights presently being challenged by the States. Where successful litigation generates attorney fees, that money may either be returned to the Treasury or be used in other areas where legal expertise is needed by tribes to clarify or implement jurisdictional provisions: for example amendments to tribal constitutions or bylaws; development of tribal law and order codes; or negotiation of mutual management compacts, *et cetera*.

(c) In recognition that Congress often passes laws which have impact on Indian rights by indirection, such as authorizations for

the building of a dam, there should be provision which will contemplate such impact. Ad hoc compensation is simply not appropriate or sufficient where such impact may totally wipe out an economic base or cultural structure when prior review could obviate such a result. Provisions for review such as are found in section 102(C) of the National Environmental Policy Act [43 U.S.C. 4332] would require investigation and research into possible infringements with notice and opportunity to the potentially affected tribe for input.

As a corollary to the above provisions, enactments by the various States which directly or indirectly impact on the exercise of Indian rights should be subjected to similar review provisions. Such enactments by States are forbidden when they interfere with Indian rights. Emergency provision should be made for those situations which present exigent circumstances with additional provision for speedy review.

(d) In recognition of the significant impact which international considerations have on Indian rights, specific provision should be made for Indian representation on such bodies: for example, International Pacific Salmon Fisheries Commission and the National Marine Fisheries Services of the United States.

Of significant importance is congressional cognizance and recognition of the importance of equal participation by Indian tribes in implementing plans for enforcement, management, and enhancement of fisheries. It is appropriate and consistent with Indian needs and their relative role in this area that they be an integral part of the management and enforcement implementation. Congressional action should so reflect.

#### B. CHILD CUSTODY

\* \* \* I can remember [the welfare worker] coming and taking some of my cousins and friends. I didn't know why and I didn't question it. It was just done and it had always been done \* \* \*<sup>1</sup>

It is still being done, but now it is being aggressively questioned and fought, and hopefully in some places, the frequency of removing Indian children from their homes to non-Indian adoptive or foster care homes has lessened.

The issue is a crucial one in Indian country, and its ramifications are many. Removal of Indians from Indian society has serious long- and short-term effects, both for the tribe and for the individual child removed from his/her home environment who may suffer untold social and psychological consequences. Louis La Rose, chairman of the Winnebago Tribe, expressed the anger of many when commenting on the debacle of the Indian child placement situation:

I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A-1 in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think . . . they destroy him. And if you have ever talked to an individual like that when he comes to a reservation . . . I get depressed.<sup>2</sup>

One of the most pervasive components of the various assimilation or termination phases of American policy has been the notion that the

<sup>1</sup> Testimony of Valencia Thacker, southern California transcript at 88.

<sup>2</sup> Midwest transcript at 424-25.

way to destroy Indian tribal integrity and culture, usually justified as "civilizing Indians," is to remove Indian children from their homes and tribal settings. This effort began in earnest in the 1880's when Indian children were removed from their homes and sent to distant boarding schools. The Indian people fought this removal with whatever means were at their disposal. It is not necessary here to recount the horror stories, reams of which are well documented—suffice to say that the resultant mortalities were incredible and the brutality against Indian students belies any notion of civilization. Many current tribal leaders still bitterly remember their own experiences. Peter MacDonald, Chairman of the Navajo Nation, related tales of corporal punishment administered for speaking Navajo in school.<sup>3</sup> Although boarding schools still are in existence and still present major problems, many of the more perverse practices, fortunately, appear to have receded.

Current issues focus more on the problems of the adoption of Indian children by non-Indian families and the temporary and permanent placement of Indian children in non-Indian foster care homes and institutions. It is a curious paradox that many early, non-Indian commentators, observing Indian culture, praised familial and tribal devotion to their children, yet now, after generations of contact and conflict with Western civilization, so many Indian families are perceived as or found to be incapable of child rearing. The practices of assimilation and removal have had their impact.

The jurisdictional questions are fairly simple: who decides whether an Indian child needs to be removed from his or her home, and who decides where and how that child is to be raised? In America today, these decisions are made by a combination of public and private social service agencies and court systems. The question further refined becomes: Do tribal authorities make these decisions for dependent Indian children, or do non-Indian authorities make these decisions? In this century, most decisions have been made by non-Indian authorities. The pattern, however, is beginning to shift, as tribes, through their court systems, and developing tribal social service agencies, reassert their historical role in the care and protection of Indian children.

One might ask, since both Indian and non-Indian systems should act in the best interests of the child, what difference it makes which court has jurisdiction. The difference is that these decisions are inherently biased by the cultural setting of the decisionmaker and the history as to what has happened to Indian children when decisions are made by non-Indian authorities. Several years ago, it was estimated on the best available data that 25 to 35 percent of all Indian children are being raised by non-Indians in homes and institutions.<sup>4</sup>

An Indian family's initial contact with these non-Indian institutions is usually the "welfare worker." Given the destitute and impoverished conditions extant on many reservations and in the urban areas to which Indians were relocated, public assistance is a painful but necessary reality. The social workers, who are usually untrained<sup>5</sup> and have little or no understanding of Indian lifestyle or culture, make judgments concerning the adequacy of the Indian child's upbringing.

<sup>3</sup> Transcript of hearings before the U.S. Commission on Civil Rights, Window Rock, Ariz., Oct. 22-24, 1973, at 18.

<sup>4</sup> Indian Family Defense, Winter, 1974.

<sup>5</sup> Untrained is defined as lacking an M.S.W. Unfortunately, most M.S.W. programs do not include any training with respect to Indians.

Even assuming that the judgment is correct and that the welfare worker has not imposed inapplicable social-cultural values, if the judgment is negative, then the social worker should attempt to provide counsel to the family. The effort should be made to maintain an intact family unit while problems are being resolved. Unfortunately, given cultural barriers, this effort is often not possible.

The next step is frequently termination of parental rights. Economically dependent parents are often urged to consent to the removal of their child. The termination of parental rights is done through a court proceeding. Once parental rights are terminated, the court, again relying on the poorly trained, often biased or judgmental social worker, then decides the question of the custody [placement] of the child. If custody is given to public or private social service agencies, they then decide the actual placement of the child. In adoption proceedings, the court will rule on the actual adoptive family.

Within these systems, two levels of abuse can and do occur. In the initial determination of parental neglect<sup>6</sup> the conceptual basis for removing a child from the custody of his/her parents is widely discretionary and the evaluation process involves the imposition of cultural and familial values which are often opposed to values held by the Indian family. Second, assuming that there is a real need to remove the child from its natural parents, children are all too frequently placed in non-Indian homes, thereby depriving the child of his or her tribal and cultural heritage. Non-Indian institutions apparently have a very difficult time finding Indian foster homes and adoptive parents. In recent years, some States are making concentrated efforts to improve;<sup>7</sup> however, many of the home approval criteria are rigid and inappropriate for the economy and lifestyle of many Indian families. Because of this, many fine potential Indian adoptive and foster care families are rejected or, fearing rejection, do not apply. This process can eliminate blood relatives of the child.

Unless a tribe is actively involved with child welfare issues through its court system and its social service agencies, it has almost no way of knowing what is occurring with respect to its minor tribal members.<sup>8</sup> Even where a tribe is actively involved with these issues, there are substantial difficulties, particularly when events occur outside of its territorial jurisdiction. There is no existing requirement that public or private social service agencies, whether they are close by or in distant cities, have to notify a tribe when they take action with respect to any tribal member.<sup>9</sup> Even when a tribe seeks to aggressively assert its interests in child custody proceedings in non-Indian forums, it cannot do so as a matter of right.<sup>10</sup>

A particular problem also exists where the child is entitled to moneys based on tribal membership—either on a yearly per capita basis or

<sup>6</sup> Few Indian children are brought to court based on "abuse".

<sup>7</sup> Testimony of Gerald Thomas, Director of Social Services, Washington State, Northwest transcript at 409.

<sup>8</sup> Because of the lack of any systematic and comprehensive recordkeeping, even the non-Indian agencies which are removing Indian children on a daily basis do not know the full dimensions of the problem. Several State social service agency officials who were contacted as part of the data collection process (presented in the following section) expressed surprise at the statistics they gathered.

<sup>9</sup> Although the Washington State social service agency stated that it was their practice to notify tribal officials whenever it took any action involving tribal members this policy is, however, not codified. Northwest transcript at 501. Tribal frustration with the general pattern of nonnotice is reflected by a Gila River ordinance which makes it a criminal offense to remove an Indian child from the reservation without the consent of the tribal court.

<sup>10</sup> Matter of Greybull, 543 P. 2d 1079 (1975).

otherwise—and the tribe is required to turn these moneys over to agencies and placement families.

#### 1. THE DEMOGRAPHY OF THE PROBLEM<sup>11</sup>

Because of the various recordkeeping systems of States and counties, it is difficult to obtain a picture of the full dimensions of this problem. Data is often grossly incomplete, omitting crucial information such as whether placements are made to Indian or non-Indian homes. Information is often not available on all the factors which affect the placement issue, such as private agencies.

The data in this section has been calculated on the most conservative basis possible; the figures presented therefore reflect the most minimal statement of the problem. Adoption statistics are calculated by using the child's age at adoption and projecting pattern based on available yearly placement patterns. Foster care figures are derived from the most recent yearly statistics available. All statistics are from 1973-1976 unless otherwise indicated.

Statistics are presented for those States where a significant Indian population resides.

##### *Alaska*

There are 28,334 Alaskan Natives under 21. Of these, 957 (or 1 out of every 29.6) Alaskan Native children has been adopted; 93 percent of these were adopted by non-Native families. The adoption rate for non-Native children is 1 out of 134.7. By proportion, there are 4.6 times (460 percent) as many Native children in adoptive homes as there are non-Native children.

There are 393 (or 1 out of every 72) Alaskan Native children in foster care. The foster care rate for non-Natives is 1 out of every 219. There are, therefore, by proportion, 3 times (300 percent) as many Native children in foster care as non-Native children. No data was available on how many children are placed in non-Native homes or institutions.

##### *Arizona*

There are 54,709 Indian children under 21 in Arizona. Of these, 1,039 (or 1 out of every 52.7) Indian children has been adopted. The adoption rate for non-Indian children is 1 out of every 220.4. There are therefore, by proportion, 4.2 times (420 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 558 (or 1 out of every 98) Indian children in foster care.<sup>11a</sup> The foster care rate for non-Indians is 1 out of every 263.6. There are therefore, by proportion, 2.7 times (270 percent) as many Indian children in foster care as there are non-Indian children.

##### *California*

There are 39,579 Indian children under 21 in California. Of these, 1,507 (or 1 out of every 26.3) Indian children has been adopted; 92.5 percent of these were adopted by non-Indian families. The adoption

<sup>11</sup> Much of this section is based on Indian Child Welfare Statistical Survey, July 1976, prepared for the Task Force by the Association on American Indian Affairs, Inc.; all data unless otherwise indicated is from this survey.

<sup>11a</sup> Absolute minimal estimate.

rate for non-Indian children is 1 out of every 219.8. There are therefore, by proportion, 8.4 times (840 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 319 (or 1 out of every 124) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 366.6. There are therefore by proportion 2.7 times (270 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.

#### *Idaho*

There are 3,808 Indian children under 21 in Idaho. The figures on adoptions are too small to be statistically significant.

There are 296 (or 1 out of every 12.9) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 82.7. There are therefore by proportion, 6.4 times (640 percent) as many Indian children in foster care as there are non-Indian children.

#### *Maine*

There are 1,084 Indian children under 21 in Maine. Of these, 0.4% were placed for adoption during 1974-75.

There are 82 (or 1 out of every 13.2) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 251.9. There are therefore by proportion, 19.1 times (1,910 percent) as many Indian children in foster care as there are non-Indian children; 64 percent of the Indian children are in non-Indian foster care homes.

#### *Michigan*

There are 7,404 Indian children under 21 in Michigan. Of these, 912 (or 1 out of every 8.1) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 30.3. There are therefore by proportion, 3.7 times (370 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 82 (or 1 out of every 90) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 641. There are therefore by proportion, 7.1 times (710 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

#### *Minnesota*

There are 12,672 Indian children under 21 in Minnesota. Of these, 1,594 (or 1 out of every 7.9) Indian children has been adopted; 97.5 percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 31.1. There are therefore by proportion, 3.9 times (390 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 737 (or 1 out of every 17.2) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 283.8. There are therefore by proportion, 16.5 times (1,650 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.

#### *Montana*

There are 13,124 Indian children under 21 in Montana. Of these, 541 (or 1 out of every 30) Indian children has been adopted; 87 percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 144.6. There are therefore by proportion, 4.8 times (480 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 534 (or 1 out of every 28.3) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 363.5. There are therefore by proportion, 12.8 times (1,280 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.

#### *Nevada*

There are 3,739 Indian children under 21 in Nevada. The figures on adoptions are too small to be statistically significant.

There are 79 (or 1 out of every 47.3) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 333.8. There are therefore by proportion, 7.0 times (710 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

#### *New Mexico*

There are 41,315 Indian children under 21 in New Mexico. The figures on adoptions are too small to be statistically significant.

There are 287 (or 1 out of every 147) Indian children in foster care. The rate for non-Indians is 1 out of every 343. There are therefore by proportion, 2.4 (240 percent) as many Indian children in foster care as there are non-Indian children. No data is available on how many Indian children are placed in non-Indian homes and institutions.

#### *New York*

There are 10,627 Indian children under 21 in New York. The figures on adoptions are too small to be statistically significant.

There are 142 (or 1 out of every 74.8) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 222.6. There are therefore by proportion, 3 times (300 percent) as many Indian children in foster care as there are non-Indian children. An estimated 96.5 percent are placed in non-Indian foster homes.

#### *North Dakota*

There are 8,126 Indian children under 21 in North Dakota. Of these, 269 (or 1 out of every 30.4) Indian children has been adopted. Seventy-five percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 86.2. There are therefore by proportion, 2.8 times (280 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 296 (or 1 out of every 27.7) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 553.8. There are therefore by proportion, 20.1 times (2,010 percent) as many Indian children in foster care as there are non-Indian children. No data was

available on how many Indian children are placed in non-Indian homes and institutions.

#### Oregon

There are 6,839 Indian children under 21 in Oregon. Of these 402 (or 1 out of every 17) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 19.2. There are therefore by proportion, 1.1 times (110 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 247 (or 1 out of every 27.7) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 228.5. There are therefore by proportion, 8.2 times (820 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

#### Oklahoma

There are 45,511 Indian children under 21 in Oklahoma. Of these, 1,116 (or 1 out of every 40.8) Indian children has been adopted. No data was available on adoption by non-Indians. The adoption rate for non-Indian children is 1 out of every 188.1. There are therefore by proportion 4.4 times (460 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 337 (or 1 out of every 135) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 551. There are therefore by proportion 3.9 times (410 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

#### South Dakota

There are 18,322 Indian children under 21 in South Dakota. Of these, 1,019 (or 1 out of every 18) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 32.4. There are therefore by proportion, 1.6 times (180 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 832 (or 1 out of every 22) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 492.1. There are therefore by proportion 22.4 times (2,040 percent) as many Indian children in foster care as there are non-Indians. No data was available on how many Indian children are placed in non-Indian homes.

#### Washington

There are 15,980 Indian children under 21 in Washington. Of these, 740 (or 1 out of every 21.6) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 407. There are therefore by proportion, 18.8 times (1,900 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 559, or 1 out of every 28.9 Indian children in foster care. The foster care rate for non-Indians is 1 out of every 275. There are therefore by proportion, 9.6 times (960 percent) as many Indian

children in foster care as there are non-Indian children. Eighty percent of these were placed in non-Indian homes.<sup>12</sup>

#### Wisconsin

There are 10,456 Indian children under 21 in Wisconsin. Of these, 733 (or 1 out of every 14.3) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 251.5. There are therefore by proportion, 17.9 times (1,760 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 545 (or 1 out of every 19) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 252. There are therefore by proportion, 13.4 times (1,330 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

#### Wyoming

There are 2,832 Indian children under 21 in Wyoming. The figures on adoptions are too small to be statistically significant.

There are 98 (or 1 out of every 28.9) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 301.6. There are therefore by proportion, 10.4 times (1,040 percent) as many Indian children in foster care as there are non-Indian children. Fifty-seven percent of the Indian children in State foster care are in non-Indian homes; and 51 percent of the children in BIA foster care are in non-Indian homes.

#### Utah

There are 6,690 Indian children under 21 in Utah. Of these, 328, (or 1 out of every 20.4) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 68.5. There are therefore by proportion 3.4 times (340 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 249 (or 1 out of every 26.4) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 402.9. There are therefore by proportion, 15 times (1,500 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

## 2. LEGAL STATUS—WHO DECIDES?

The Federal courts, as well as some State courts, have generally recognized the crucial place which the issue of child custody holds in the framework of tribal self-determination.

If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right within its own boundaries and membership to provide for its young, a *sine qua non* to the preservation of its identity.<sup>13</sup>

The most recent Supreme Court case on the subject, *Fisher v. District Court*,<sup>14</sup> affirmed the jurisdiction of the Northern Cheyenne

<sup>12</sup> Northwest transcript, exhibit 14.

<sup>13</sup> *Wisconsin Potawatomies of Hannahville Indiana Community v. Houston*, 396 F. Supp. 719, 730 (W.D. Mich., 1973).

<sup>14</sup> 47 L. Ed. 2d 106 (1976).

Tribal Court to make custody determinations in the face of a challenge to have such jurisdiction taken by Montana State courts. Since Montana had not acquired any jurisdiction over Indian country pursuant to Public Law 280, and the action arose on the reservation, the Supreme Court characterized the tribal court's jurisdiction as exclusive.

Many Indian child placement issues do not necessarily arise in such clean-cut fashion. Frequently, the physical location of the child affects whether the tribal court has jurisdiction. *Decoteau v. The District Court*,<sup>15</sup> is a case involving a conflict between State and tribal jurisdiction, where the pertinent acts occurred on both trust land and non-trust land. The Supreme Court upheld State jurisdiction based on a finding that the non-trust portion of the "former" reservation had been terminated. In that case, the tribal interest in the welfare of its minor member, however, cannot be as a practical matter any less than where geography assures jurisdiction.

Although *Decoteau* did not deal with the issue of "domicile," it is pertinent to child welfare jurisdiction. "Domicile" is a legal concept that does not depend exclusively on one's physical location at any one given moment in time, rather it is based on the apparent intention of permanent residency. Many Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on employment and educational opportunities. The domicile of a child is often viewed as a basis for a court's jurisdiction to determine his/her custody. In these situations where family ties to the reservation are strong, but the child is temporarily off the reservation, a fairly strong legal argument can be made for tribal court jurisdiction. In a recent New Mexico case involving a Navaho child situated off reservation in Gallup, N. Mex., it was argued that the Navajo tribal court is the appropriate forum to determine custody.<sup>16</sup>

Child rearing and the maintenance of tribal identity are "essential tribal relations" [citation omitted]. By paralyzing the ability of the tribe to perpetuate itself, the intrusion of a State in family relationships within the Navaho Nation and interference with a child's ethnic identity with the tribe of his birth are ultimately the most severe methods of undermining retained tribal sovereignty and autonomy.<sup>17</sup>

This concept of court jurisdiction is based on the tribal status of the individual rather than the mere geography of the child and recognizes that the tribal relationship is one of *parens patriae* to all its minor tribal members. It is an attractive formulation, considering that in reality, Indian children are usually culturally and tribally terminated by placements to non-Indian homes when they are subject to State court systems.<sup>18</sup> This has not been given substantial recognition by the courts.<sup>19</sup> As a practical matter, this construction seems limited to situations where the Indian child is in reasonable proximity to the tribal court, such as in a border town. Applying this construction to an Indian child living in Chicago who is an enrolled

<sup>15</sup> 420 U.S. 323 (1975).

<sup>16</sup> See *cf.* *Wisconsin Potowatomies of the Hannahville Indian Community v. Houston, supra*; and *Shaving Bear v. Pearson, et al.*, S.D. Cir. Ct., 6th Jurisdiction Cir. June 21, 1974 (unreported).

<sup>17</sup> In the matter of the Adoption of Randall Nathan Swanson, Amicus Curiae Brief, No. 2407.

<sup>18</sup> *Ibid* at 8.

<sup>19</sup> See, *Matter of Greybull*, 543 P.2d 1070 (1975).

member of the Yakima Nation would create major practical difficulties without a well-defined operating system for effectuating tribal jurisdiction.

Just as mobility will frequently remove Indian children from reservation systems and bring them into initial contact with non-Indian systems, so mobility will also remove a child subject to a tribal court's jurisdiction into another geographic jurisdiction. This can create the following problem: After a tribal court determines child custody, the child leaves the reservation, and the issue of custody is relitigated in a non-Indian court. Generally, between the States, the constitutional standard of "full faith and credit" governs the way one court will treat the decisions of another. This standard is not constitutionally required of State courts with respect to the judgments of tribal courts. State courts can (and some do)—under the principle of comity—respect between sovereigns—recognize the determinations of tribal courts. Recently the Maryland Court of Appeals refused to allow Maryland courts to determine the custody of a Crow child where that determination had been made by the Crow Tribal Court.<sup>20</sup>

#### FINDINGS

1. The removal of Indian children from their natural homes and tribal setting has been and continues to be a national crisis.
2. Removal of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.
3. Non-Indian public and private agencies, with some exceptions, show almost no sensitivity to Indian culture and society.
4. Recent litigation in attempting to cure the problem of the removal of Indian children, although valuable, cannot affect a total solution.
5. The current systems of data collection concerning the removal and placement of Indian children are woefully inadequate and "hide" the full dimension of the problems.
6. The U.S. Government, pursuant to its trust responsibility to Indian tribes, has failed to protect the most valuable resource of any tribe—its children.
7. The policy of the United States should be to do all within its power to insure that Indian children remain in Indian homes.

#### RECOMMENDATIONS

1. Congress should, by comprehensive legislation, directly address the problems of Indian child placement. The legislation should adhere to the following principles:
  - a. The issue of custody of an Indian child domiciled on a reservation shall be subject to the exclusive jurisdiction of the tribal court where such exists.
  - b. Where an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child shall be given reasonable notice before any action affecting his/her custody is taken.

<sup>20</sup> *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975).



c. The tribe of origin shall have the right to intervene as a party in interest in child placement proceedings.

d. Non-Indian social service agencies, as a condition to the Federal funding they receive, shall have an affirmative obligation—by specific programs—to:

(i) provide training concerning Indian culture and traditions to all its staff;

(ii) establish a preference for placement of Indian children in Indian homes;

(iii) evaluate and change all economically and culturally inappropriate placement criteria;

(iv) consult with Indian tribes in establishing (i), (ii), and (iii).

e. Significant Federal financial resources should be appropriated for development and maintenance of Indian operated foster care homes and institutions:

(i) in reservation areas such resources should be made directly available to the tribe;

(ii) in off-reservation areas, such resources should be available to appropriate local Indian organizations.

f. The Secretary of the Interior should be authorized to:

(i) undertake a detailed study of the manner and form of child placement records;

(ii) to definitely determine the full statistical picture of child placement as it currently exists;

(iii) to require standardized child placement recordkeeping systems from all agencies receiving Federal moneys;

(iv) to require annual reports from such agencies pursuant to the mandatory recordkeeping system;

(v) to review all rules and regulations of the Federal Government with respect to child placement, and revise such, in consultation with Indian tribes and child placement agencies to reflect Federal policy of retaining Indian children in Indian homes.

### C. JURISDICTION OVER NON-INDIANS

This area must be approached on several levels. There is widespread apprehension in the non-Indian community residing on or near Indian reservations concerning the exercise or potential exercise of tribal jurisdiction over non-Indians. This feeling appears to be, at least in part, based on a major nonunderstanding in the non-Indian community about the legal status of Indian tribes and their historical-constitutional relationship with the Federal Government. Complicating this vacuum of knowledge is an implicit, and sometimes explicit, viewpoint that while it might be permissible for Indian tribes to have power over Indians, it is somehow morally inappropriate to have such power over non-Indians within their territories. In this furor over the exercise of power, Indian governments are, in the political arena, being held to higher standards of performance than Americans generally expect from their public institutions—it is as if competence of non-Indian governments is assumed and that of Indian governments must be demonstrated.

On the technical-legal side of the issue, there is no question that the case for Indian jurisdiction—be it exclusive in some components and concurrent in other components—over non-Indians is rooted in fundamental, long established principles of international law and domestic constitutional law. The case is persuasive, although it is not as yet subject in every instance to definitive Supreme Court decisions.

As persuasive as the legal case for tribal jurisdiction over non-Indians is, the actual exercise of this jurisdiction has been relatively limited. Many tribes, while affirming that they retain jurisdiction, have not yet sought to exercise jurisdiction over non-Indians. This tribal decision has been based, and probably will continue to be based, on several practical realities: (1) the size and economic ability of a particular tribe; (2) the tribal relationship with neighboring counties and the State within which it is located; (3) demonstrated willingness or lack thereof of non-Indian governments to provide fair and impartial treatment of the Indian community; and (4) the physical proximity or isolation of the tribe to other government services. In a sense, the performance by non-Indian governments of the responsibilities they have assumed in exercising jurisdiction over any matter on an Indian reservation will play a strong role in any tribal decision as to whether to exercise jurisdiction over non-Indians.

#### 1. THE LEGAL CASE FOR JURISDICTION OVER NON-INDIANS

To trace what jurisdiction is retained by Indian tribes today, it is necessary to start with the concept that sovereign tribes have full jurisdictional powers, except to the extent that specific components may have been limited by the United States. The loss of jurisdiction is not to be inferred. It must be specifically found in acts of Congress or treaties. Chief Justice John Marshall in 1832 stated the classic formulation of domestic constitutional law, upon which Federal Indian law has been based:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors to the soil, from time immemorial, with the single exception of that imposed by the irresistible power. \* \* \*<sup>1</sup>

At that time the only powers that had been removed from tribes generally were related to international jurisdiction—the rights to go to war and enter into compacts and treaties with nations other than the United States. Chief Justice Marshall characterized this condition as “domestic, dependent nations. \* \* \*”<sup>2</sup>

Treaties are, of course, one mechanism whereby jurisdiction could have been ceded from the tribe to the Federal Government. While there may be an individual tribe that by treaty divested itself of jurisdiction, the general construction of early treaty language does not lead to that conclusion. There is much language in the early treaties pertaining to the trial and prosecution of offenses committed within the Indian territories. The phrase most frequently found is for tribes to “deliver up” persons who committed offenses in the territory of the

<sup>1</sup> *Worcester v. Georgia* 31 U.S. 515, 559 (1832); although the concept has undergone modification, it is still viable, as a basis for the current Federal preemption test of identifying jurisdiction. *McClanahan v. Arizona State Tax Comm.*, 411 U.S. 164 (1973).

<sup>2</sup> *The Cherokee Nation v. State of Georgia* 30 U.S. 1, 16 “they may, more correctly, perhaps, be denominated domestic dependent nations.”

tribes.<sup>3</sup> This phrase must be construed in its historical context as well as in its plain treaty language. Many of these same treaties required the "delivery up" of both non-Indians and Indians who committed serious offenses. No one has seriously maintained that Indians divested themselves of jurisdiction over tribal members by treaty. At best, these provisions should be read to extend concurrent jurisdiction over tribal members. The same construction is logically applicable to non-Indians. It is instructive to indicate how Congress perceived the jurisdictional relationship in the treaties it approved and the legislation it adopted pursuant to those treaties:

It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens.<sup>4</sup>

The courtesy referred to by the House committee in its report on what would become the General Crimes Act underscores a fundamental Federal policy in the early years of the Republic—to be a buffer between the Indian tribes and the non-Indian citizens who were frequently perceived as being a threat to the tribes. This buffer function was designed to try to keep conflicts from developing. It clearly was not based on any congressional notion that tribes lacked power to punish violators of their domestic peace.

The views of the Commissioners of Indian Affairs in 1834, which in large measure resulted in the Trade and Intercourse Act, section 25 of which became known as the General Crimes Act (codified as 18 U.S.C. sec. 1152), give credence to the view that Congress recognized Indian jurisdiction and was not acting to abrogate such power, but rather to insure harmony:

If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men.

\* \* \* while Government has reserved a constitutional supervision over all her red children. She has solemnly guaranteed protection of life and property to every tribe who removes here, and given assurance that no state or territory shall exercise jurisdiction over them. Hence intercourse laws are necessary; they may be made so energetic, too, as to defer offender, be they citizens of the United States or individuals of another tribe. All this may be done without impairing in the least the independence of the tribe within its own limits.

Within the limits of the municipal laws of the tribes as may be in force; and should the laws of the tribes and the laws of the United States given concurrent jurisdiction, this would create no difficulty. It is, indeed, desirable to encourage the several tribes to adopt salutary laws, as far as possible, and render less frequent the intervention of Government.<sup>5</sup>

It is a curious twist of revisionist history that two lower Federal courts, *Ex parte Morgan*, 20 F. 298, 308 (W.D. Ark 1883), and *Ex parte Kenyon*, 14 F. Cas. 353 (No. 7720) (W.D. Ark. 1878), would cite section 25 of the Trade and Intercourse Act as prohibiting tribal jurisdiction with respect to non-Indians. These cases, which did

<sup>3</sup> See e.g. treaty dated Jan. 21, 1785 with the Wyandot, Delaware, Chippewa, and Ottawa Tribes, art. 5, p. 1; treaty concluded Jan. 9, 1789 with the Wyandot, Delaware, Ottawa, Chippewa, Pottowatomie, and Sac Tribes, art. 9, p. 2; treaty with the Chippewa of the Mississippi tribe concluded Mar. 19, 1867; agreement with the Red Lake Band of Chippewa, concluded Aug. 23, 1886; treaty with the Sioux Brule, Oglala, Miniconjou, Yanktonai, Hunkpada, Blackfeet, Cuthhead, Two Kettle, San Arcs and Santee, and the Arapahoe tribes, concluded Feb. 24, 1869 art. 1.

<sup>4</sup> H. R. Rep. No. 474, 23d Congress, 1st session 13 (1834).

<sup>5</sup> *Ibid.*, Report to the Secretary of War, Document S, appendix.

not provide any reasoning in support of their conclusions, are, as will be shown, erroneous.<sup>6</sup>

The General Crimes Act, then known as section 25 of the Trade and Intercourse Act, was one section of a three-part comprehensive effort to deal with the subject of Federal-Indian relations. The three bills reported from the House Committee on Indian Affairs were for: the regulation of trade and intercourse with the various Indian tribes, the organization of the Department of Indian Affairs and a bill to establish a western Indian territory. Only the first two were enacted into law. The committee report, however, was a combined one:

These relations, though subjects of different bills, are intimately connected. They are parts of a system; and of a system which is, itself, also intimately acquainted with the general legislation of the Country. They have, therefore, deemed it proper to present, in the same report, their views on the subject embraced in the several bills.<sup>7</sup>

This view of the committee is extremely pertinent to provisions of the western Indian territory bill. Although not passed, it sheds significant light on the congressional intention with respect to Indian jurisdiction.

The pertinent provision of the General Crimes Act reads:

Sec. 25. *And be it further enacted*, that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian Country: "Provided, the same shall not extend to crimes committed by one Indian against the person or property of another Indian.

When this provision is read in concert with the bill establishing the western territories, it is clear that Congress understood and intended that the Federal Government would exercise concurrent jurisdiction with the tribes:

Sec. 9. *And be it further enacted*, that and in all cases when a person not a member of any tribe shall be convicted to an offense, the punishment whereof by the laws of the tribe shall be death, the judgment shall be forthwith reported to the Governor, who may, for good reasons, suspend the execution thereof until the pleasure of the President shall be known.<sup>8</sup>

The clear language, "a person not a member of any tribe," leaves no room to deduce any other congressional intention than that tribes retain concurrent jurisdiction over non-Indians within their territories. Assuming arguendo that the language could be construed as ambiguous, the dominant rules of statutory construction pertaining to Federal-Indian relations, that ambiguities be resolved in favor of the tribes and that jurisdiction will not be lost by inference,<sup>9</sup> buttress the conclusion that the General Crimes Act did not terminate such tribal jurisdiction.

One other major Federal statute has caused some conflict about the extent of tribal jurisdiction with respect to non-Indians. It is known as the Major Crimes Act.<sup>10</sup> In a major decision on the Federal jurisdiction in Indian country, the U.S. Supreme Court held in *ex parte*

<sup>6</sup> One noted commentator has observed that at no time has Congress ever explicitly acted to deprive Indian tribes of jurisdiction concerning non-Indians. Monroe E. Price, "Law and the American Indian," (1973), at 173. The opinion of the Solicitor of the Department of the Interior, 77 I.D. 113 (1970) taking a position opposing jurisdiction over non-Indians, has been officially withdrawn.

<sup>7</sup> H. Rept. 474, 23d Cong., 1st sess., at 1.

<sup>8</sup> *Ibid.*, at 36-37.

<sup>9</sup> See, *Crow v. Oglala Sioux*, 231 F.2d 89, 94 (8th Cir. 1956), and Cohen, *Handbook of Federal Indian Law* (1942) at 123.

<sup>10</sup> Modified and codified in 18 U.S.C. 1153.

*Crow Dog* that the Federal district court did not have jurisdiction to try a Sioux tribal member for the murder of another tribal member occurring in Indian country. *Crow Dog* had been tried and convicted by tribal authorities. The traditional penalty of support of the decedent's family caused an uproar in the non-Indian community, prompting the extension of Federal jurisdiction with respect to enumerated felonies over Indians within Indian territories.

As originally proposed the bill read in part:

Indians \* \* \* shall therefore in the same courts and the same manner *and not otherwise* and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively.<sup>11</sup>

The italicized language could have been read to strip tribal courts of their existing jurisdiction; however, this language was deliberately and specifically struck by Congress for just that reason:

Congressman BUDD. I desire to suggest another modification of the amendment—to strike out the words “and not otherwise.” The effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country. I think it sufficient that the courts of the United States should have concurrent jurisdiction in these cases \* \* \*.

The amendment as proposed by Congressman Budd was adopted without debate.

There are two other pieces of congressional legislation that need to be noted. The first is Public Law 280, which provides for both permissive and mandatory transfer of jurisdiction to the States. Public Law 280 must be interpreted to transfer jurisdiction to the States that is at least in part concurrent with that of the tribes. This conclusion is necessitated by the view that the Federal Government has for the most part only assumed jurisdiction concurrent to that of the tribes and, therefore, that is what it transfers.

An important piece of legislation, both as a limitation on jurisdiction and an affirmation of its existence, is the Indian Civil Rights Act of 1968. This legislation, among other things, makes applicable to the operation of tribal governments and courts many of the bill of rights type protections that are not constitutionally applicable to tribes. In the early Department of the Interior draft of the bill, the phrase “American Indian” was used throughout to define the class of persons to whom the rights were being extended. This phrase was deliberately changed to read “any persons”—a phrase clearly including non-Indians—in the legislation as finally passed.<sup>12</sup> This evidences a clear expression on the part of Congress that tribes continue to possess jurisdiction over non-Indians within their boundaries.

The further importance of the 1968 Indian Civil Rights Act is that it mitigates against any colorable argument that non-Indians be in any respect denied basic rights by being subject to the jurisdiction of tribal governments.

It should be clear, therefore, that Congress, at least in the area of criminal jurisdiction, has not affirmatively acted to terminate jurisdiction over non-Indians. In the civil area, there are numerous court

decisions upholding tribal power; there are, however, several specific instances where Congress has granted certain States power in delineated areas. The general proposition is, however, the same. Tribal authorities have jurisdiction over non-Indians in civil areas generally and, even where Congress has legislated in the field, and/or allowed the State to exercise jurisdiction, absent a specific termination of tribal powers, such jurisdiction is deemed to run concurrently with tribal jurisdiction.<sup>13</sup>

In *Morris v. Hitchcock*, 194 U.S. 384 (1904), the U.S. Supreme Court upheld the authority of the Chickasaw Nation to levy a tax on the cattle of non-Indian lessees of tribal land. The court in that case relied upon the power of the tribe to control the presence within the territory assigned to persons who might otherwise be regarded as intruders \* \* \* as sanctioned and recognized by the United States in treaties. The notion that the allotment acts and the resultant sanction for non-Indians to enter and reside in Indian country, including the establishment of towns and cities, somehow divested tribes of their sovereign powers, was laid to rest by the Eighth Circuit Court of Appeals 1 year later in *Buster v. Wright*.<sup>14</sup> This case involved the authority of the Creeks to tax non-Indians conducting business within their borders. The court stated:

This power to govern the people within its territories was repeatedly guaranteed to the Creek tribe by the United States.

\* \* \* \* \*  
But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, not by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners. The establishment of town sites and the organization of towns and cities within the limits of this Indian nation present no persuasive reason why any other rule should prevail in the measurement of its power to fix the terms upon which non-citizens may conduct business within its borders. The theory that the consent of a government to the incorporation and existence of cities upon its territory or to the conveyance of the title to lots or lands within it to private individuals exempts the inhabitants of such cities and the owners or occupants of such lots from the exercise of all its governmental powers, while it leaves the inhabitants of other portions of its country subject to them, is too unique and anomalous to invoke assent.<sup>15</sup>

The most recent litigation, and the one case clearly addressing the issue of jurisdiction over non-Indians in a clear and concise manner, is *Olyphant v. Schlie*,<sup>16</sup> a case arising on the Port Madison Indian Reservation in the State of Washington. In this case, a non-Indian was arrested by the tribal police for assaulting a tribal police officer. The incident occurred on the reservation on trust land. The Federal district court upheld the challenge to the tribe's jurisdiction on the following basis: Congress had neither terminated nor diminished the

<sup>13</sup> See *Williams v. Lee*, 350 U.S. 127 (1959); *United States v. Mazurie*, 419 U.S. 544 (1975); and *In the Matter of the Last Will of Jameson* 328 N.Y. Supp. 2d 466, 68 Misc. 2d 945 (1972), holding that the congressional grant of civil jurisdiction (25 U.S.C. 233) to New York State is concurrent with that of tribal authorities.

<sup>14</sup> 135 F. 947 (8th Cir. 1905).

<sup>15</sup> *Ibid.* at 951-952. This taxing authority was also upheld against due process challenges in *Barta v. Oglala Sioux Tribe*, 259 F. 2d 553 (8th Cir. 1952).

<sup>16</sup> Cir. No. 74-2154 (9th Cir. Aug. 24, 1976). (W.D. Wash. 1974) appeal docketed No. 74-2154 9th Cir. April 30, 1974. *Contra* *Dodge v. Nakai* 298 F. Supp. 17 (D. Ariz. 1968) and *United States v. Pollman*, 364 F. Supp. 995 (D. Mont. 1973).

<sup>11</sup> Congressional Record, vol. 16, pt. II, at 934 (1885).

<sup>12</sup> Summary report of the constitutional rights of American Indians of the Senate Subcommittee on Constitutional Rights, of the Senate Judiciary Committee, 89th Cong., 2d sess., at 9-10.

reservation and Congress had not limited the tribe's sovereign powers to exercise such jurisdiction.<sup>17</sup> Although the court limited its holding to the particular fact pattern of this case, there is nothing in the reasoning of the court that would preclude the same holding regardless of the technical status—either trust or fee simple—of the land so long as it was within reservation boundaries. Specifically, the court found that the reservation had not been diminished,<sup>18</sup> and hence the principles of *United States v. Celestine*, 25 U.S. 278 (1909), that all tracts in a reservation once established remain part thereof until specifically separated therefrom by Congress were applicable.

## 2. INDIAN COUNTRY

Resolving the legal issue of whether tribes have the authority to exercise jurisdiction over non-Indians within their territory leaves a major question unanswered: For jurisdictional purposes, what is a tribe's territory? "Indian Country" is the phrase that has been developed historically to define the geographic area in which Federal and tribal jurisdiction resides. The statutory definition of Indian Country technically is for criminal jurisdiction purposes; however, it has been utilized by the courts in both the civil and criminal areas.<sup>19</sup> 18 U.S.C. Section 1151 defines "Indian Country" thusly:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country" as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The crucial part of the definition here is "all land within the limits of any Indian reservation. \* \* \*" When most of the foundations and principles of Federal Indian law were being developed, Indian reservations were almost exclusively occupied by Indians. Few land parcels had been legally conveyed within reservations to non-Indians. Today, the picture is demographically different. Those reservations which have had the misfortune to have been subject to the allotment acts, frequently have "a crazy patchwork quilt or checkerboard" pattern of land ownership: non-Indian lands held in fee patent, individual Indian allotments held in trust, and tribal lands held in trust. Often in these situations the majority of the land ownership and population within the reservation boundaries is non-Indian. The land owned by non-Indians is also frequently the most fertile or commercially valuable land.

These patterns of land ownership are most prevalent in the Midwest area and occasionally in the West.<sup>19a</sup> For example, the Omaha Reser-

<sup>17</sup> See Appellees' brief for an excellent exposition of the theory and law of tribal jurisdiction over non-Indians.

<sup>18</sup> *Decoteau*, discussed *infra*, is not applicable to this section, as it concerns what lands are Indian Country and not the jurisdiction of the tribe within Indian Country.

<sup>19</sup> See e.g., *U.S. v. Mazurie*, 419 U.S. 544 (1975).

<sup>19a</sup> The statistics in this section are from an undated internal memorandum from P. Savad, attorney to the Associate Solicitor, Indian Affairs, Department of the Interior, entitled "Indian and Non-Indian Owned Land on Specific Reservations," and a telephone survey of the pertinent BIA agency offices. The statistics were also cross-checked against data collected by Task Force No. 7. There is often conflict between the data sources as to specific acreage; where significant conflict exists, telephone survey results were utilized. These results tend to reflect somewhat higher levels of Indian ownership than do the Department of the Interior figures.

vation (Nebraska) is 90 percent non-Indian owned; Devils Lake (North Dakota) is 79-80 percent non-Indian owned; Turtle Mountain (North Dakota) is 93 percent non-Indian owned; Standing Rock (North and South Dakota) is 64 percent non-Indian owned; Crow Creek (South Dakota) is 57 percent non-Indian owned; Rosebud (South Dakota) is 71 percent non-Indian owned; Sisseton (South Dakota) is 89 percent non-Indian owned; Yankton (South Dakota) is 92 percent non-Indian owned; Flathead (Montana) is 51 percent non-Indian owned; Fort Peck (Montana) is 56 percent non-Indian owned; Coeur d'Alene (Idaho) is 77 percent non-Indian owned; Nez Perce (Idaho) is 88 percent non-Indian owned; and Umatilla (Oregon) is 56 percent non-Indian owned.

The pattern is not, however, even consistent within individual States. Fort Berthold (North Dakota) is 42 percent Indian owned; Cheyenne River in South Dakota is 47 percent Indian owned; and Flandreau (South Dakota) is 70.6 percent Indian owned.

Indian reservations in the Southwest, however, contain very little non-Indian land ownership: Southern Ute (Colorado) is 99 percent Indian owned; and in Arizona and New Mexico, most of the land within the various reservations and pueblos is Indian owned, usually at a rate of 90 percent or more.

This pattern is a pattern of divergency. Indian-owned land is interspersed with non-Indian land where such ownership exists. The mere fact that land is owned by non-Indians<sup>20</sup> through allotment of a reservation<sup>21</sup> or the establishment of non-Indian communities<sup>22</sup> does not oust Federal-tribal jurisdiction over criminal and civil events occurring on that land.<sup>23</sup>

The courts have devised another test for delineating the perimeters of Indian Country, and this test requires a reservation-by-reservation analysis. Known as the *Celestine* doctrine, the test is that when:

Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.

Courts, then, inquire whether a treaty, a particular allotment act, or another congressional enactment has terminated or "diminished" any portion of the established reservation. Although specifically affirmed by *Celestine* and the line of cases following it,<sup>24</sup> the Supreme Court recently, in a case involving an assertion of jurisdiction by South Dakota over an Indian on non-trust land, "diminished" the Lake Traverse Reservation<sup>25</sup> (Sisseton-Wahpeton Sioux Tribe), on the basis of its reading of an 1889 agreement between the tribe and the United States, and the subsequent congressional enactment of the agreement.<sup>26</sup> The Supreme Court distinguished *Decoteau* from other factual situations because it determined that the tribe intended to cede all unallotted lands to the United States for a sum certain, re-

<sup>20</sup> *Kennerly v. District Court of Montana* 400 U.S. 423 (1971).

<sup>21</sup> *Ruster v. Wright*, 135 F.947 (8th Cir. Ct. 1905).

<sup>22</sup> *City of New Town, N. Dak. v. U.S.*, 454 F.2d 121 (9th Cir. 1972).

<sup>23</sup> The State, however, may also have concurrent jurisdiction pertaining to non-Indians in these areas.

<sup>24</sup> See e.g. *Matt v. Arnett*, 412 U.S. 481 (1973); and *Seymour v. Supt.*

<sup>25</sup> *Decoteau v. The District Court* 420 U.S. 425 (1975).

<sup>26</sup> Act of March 3, 1891, 26 Stat. 1039.

linquishing "all" of the tribe's "claim, right, title, and interest" in the unallotted lands. This was interpreted as a clear intention of the tribe and Congress to terminate the unallotted portion of the Lake Traverse Reservation. The Court came to its conclusion, even though the litigation concerned the crucial issue of child custody where it has repeatedly recognized tribal jurisdiction and where a tribal court and justice system had been recently reinstated. Although not explicit in the reasoning of the decision was the fact that 89 percent of the land located within the original boundaries of the reservation were now owned by non-Indians. The dissent criticized the reasoning and the result of the majority opinion:

If this were a case where a Mason-Dixon type of line had been drawn separating the land opened for homesteading, from that retained by the Indians, it might well be argued that the reservation had been diminished; but that is not the pattern. . . .

\* \* \* \* \*

The "crazy quilt" or "checkerboard" jurisdiction defeats the right of self-government guaranteed by Article 10 of the 1867 Treaty (cite omitted) and never abrogated.

\* \* \* \* \*

If South Dakota has her way, and the Federal Government and the tribal government have no jurisdiction when an act takes place in homesteaded spot in the checkerboard, and South Dakota has no say over acts committed on "trust" lands. But where in fact did the jurisdictional act occur? Jurisdiction dependent on the "tract book" promised to be uncertain and hectic.<sup>27</sup>

"Indian Country" is therefore an ambiguous concept under Court interpretation and not dependent on the ownership of any particular tract of land. Rather, it depends on "language" in treaties, agreements and statutes of ancient vintage which opened up reservations to non-Indian settlement. These documents were generally part of the land hunger prevalent in the latter half of the 19th Century and which rarely, if ever, considered jurisdiction repercussions. They were economic real estate transactions, usually imposed upon weak and dependent Indian tribes by their trustee, who curiously was the purchaser of their property.

The question, then, of over what territory the tribe retains jurisdiction—regardless of over whom—is left in these checkerboarded areas to a case-by-case determination, and since the "facts" will differ the courts probably will reach divergent results.

### 3. VIEWPOINTS

#### (a) *Non-Indians*

Perhaps no other issue in Indian law raises the emotional response from the non-Indian community as does the actuality of or the prospect of Indian tribes exercising jurisdiction over non-Indians. The issue, however, regardless of the terminology utilized, is not a strict legal issue but often a political one. As noted previously, most of the vocal opponents of tribal jurisdiction are persons residing on or near an Indian reservation who are or may become the recipients of tribal jurisdiction.

A major argument against tribal jurisdiction couched in legal-constitutional rhetoric is that non-Indians would be deprived of their

<sup>27</sup> *De Coteau v. District Court*, 420 U.S. 425, Justice Douglas.

constitutional rights as American citizens to be subject to "foreign and alien" tribal jurisdiction.

Legal arguments focusing on what actual constitutional rights are, and to whom they apply, although pertinent, would not necessarily reduce any opposition of these individuals. For the "constitutional" argument, although capable of legal presentation, is a minor part of the concept. For it is not the reality of legal rights,<sup>27a</sup> but the perception of what rights "should be" that permeates the discussions:

We are specifically opposed to jurisdiction over nonmembers because this country was founded on the principle of participating in a government. . . .<sup>28</sup>

Similar expressions, focusing on the fact that non-Indians cannot vote in tribal elections, and violations thereof are expressed by most vocal opponents of tribal jurisdiction.<sup>29</sup> Other points, not necessarily legalistic in nature, are also made in opposition to tribal jurisdiction over non-Indians. There is a strong feeling among some that if in fact they are *subject to tribal jurisdiction*, they have been had by a mistaken Federal Government. Ki Dewar of the Suquamish community club argues that treaties between Federal Government and the tribal governments were mistakes of an inexperienced Federal Government, and are mistakes that should not be perpetuated.<sup>30</sup> John Cochran, past president of Flathead Lakers, Inc., felt that Federal Government sold land to non-Indians on Flathead "under false pretenses," leading them to believe it was no longer an Indian Reservation.<sup>31</sup>

Going further, some indicate that Federal policy, or at least the perception of Federal policy at the local level, has caused polarization between the non-Indian community and the Indian community—that discrimination against Indians in these communities has increased to the point that the attorney for MOD—a group opposing retrocession generally and jurisdiction over non-Indians particularly—seeks a change of venue when he has an Indian client who is to be in a predominantly non-Indian community on or near the Flathead reservation.<sup>32</sup>

Other arguments against tribal jurisdiction focus on a perception that tribal governments either are not or cannot fairly administer justice.

I am sure you are not aware of the farce which is "tribal court" . . . Now the non-Indians are expected to sit back and accept jurisdiction of such an inadequate set of laws.<sup>33</sup>

Clarence Nash, an official of the city of Omak, Wash., opposed tribal jurisdiction, because, among other things, the tribe was not ready with the machinery of government.<sup>34</sup>

Thomas Tobin, attorney for civil liberties for South Dakota citizens—an organization generally opposed to tribal jurisdiction—main-

<sup>27a</sup> Court decisions have upheld a variety of limitations on participation in Government.  
<sup>28</sup> Marion Schultz, President of Civil Liberties for South Dakota Citizens, South Dakota Transcript at 280.

<sup>29</sup> See e.g., Testimony of Henry Holwevner, Corson County Real Estate Owners Assn., S. Dakota Transcript, at 209; testimony of Robt. Halferty, Todd County, S.D. rancher, South Dakota Transcript at 112; Ki Dewar, Suquamish Community Club, Northwest Transcript at 12; Les Condrad, Yakima County Commissioner, Northwest Transcript at 146-7.

<sup>30</sup> Northwest Transcript at 11.

<sup>31</sup> South Dakota Transcript at 52.

<sup>32</sup> Testimony of F. L. Ingraham, S. Dak. Transcript at 23-24.

<sup>33</sup> South Dakota Transcript at 77.

<sup>34</sup> Northwest Transcript, at 214.

tained it was not a question of tribal ability, but that tribal courts were inherently defective; that it was impossible to have an independent tribal judiciary "that is not hypercritical of whichever political faction in power."<sup>35</sup> The argument is that tribal courts are under the political control of the tribe, and can be, therefore, swayed and biased in the performance of their duties.

Robert Halferty, also a member of C.L.S.D.C., criticized the "tyranny" and "brevity" of tribal administration.<sup>36</sup>

Another factor of importance is the economic impact that non-Indians perceive tribal jurisdiction to have. Jack Freeman, Ziebach County Real Estate Association, opposed assertion of sovereignty over nonmembers because it would reduce the number of prospective buyers for reservation property.<sup>37</sup> Elizabeth Morris, Quinault Property Owners, felt that tribal jurisdiction, among other things, reduced the value of her group's holdings.

Not all non-Indians, however, felt that tribal jurisdiction was necessarily inappropriate. Larry Long, State attorney for Bennett County, South Dakota, stated:

... my experience is that law enforcement personnel tend to get along very well. And they tend to have nothing short of contempt for attorneys like us who set around and argue about jurisdiction.

*Question.* What are your feelings about the tribe exercising jurisdiction over non-Indians within the exterior boundaries of the reservation?

*Answer.* Well, my reaction would be basically this. If the tribal court was constituted and operated in such a manner that there was no question in anybody's mind but what an Indian or a non-Indian would receive justice, you know, in the tribal court, it wouldn't make any difference what court a person was in.<sup>38</sup>

#### (b) *Indian viewpoints*

The reassertion of jurisdiction over non-Indians is a fairly recent development. Chief Judge William Roy Rhodes,<sup>39</sup> Gila River Reservation, who presided over several thousand Indian and non-Indian cases since his tribe reasserted such jurisdiction in 1972, explains that the tribe was faced with multiple problems concerning nonenforcement of laws against non-Indians on the reservation by other governments to the social and economic detriment of the community. Before asserting jurisdiction, for example, some non-Indian hunters would enter the reservation during quail and white-wing season, and create utter havoc, even chasing birds and firing away in residential areas. Trucks and cars would come in and cut mesquite wood—a valuable commodity—with impunity.

Although the problems differ reservation to reservation, on a practical basis, the failure or unwillingness of other governments—county, State and Federal—to perform with respect to non-Indians, is perceived by some tribes as creating a dangerous vacuum. Although the experiences are not uniform, the exercise of tribal jurisdiction has created certain unanticipated results. Where counties and other non-Indian governments have had to deal with tribal governments exercising power over their citizens, these governments are required to be more cognizant of the rights of tribal members when in their jurisdiction—reciprocity between sovereigns.

<sup>35</sup> South Dakota Transcript, at 77-78.

<sup>36</sup> *Ibid.*, at 112.

<sup>37</sup> *Id.*, at 128.

<sup>38</sup> *Id.*, 245-246.

<sup>39</sup> Judge Rhodes is a member of this task force

Many tribes, whether asserting such jurisdiction or not, preface its existence as an attribute of sovereignty:

The question frequently arises as to whether our tribal police can arrest non-Indians who commit offenses on the reservation which would be punishable under tribal law if committed by tribal members. This question arises with reference to violations of the fish, game and recreation code, traffic and boating offenses, criminal actions, repossessions of personal property, removing property from the reservation, whether it be plants, minerals, gems, rocks or personal property. Desecrating or interfering with tribal graveyards, both historic and prehistoric in the non-Indian sense, and the desecration or interference with areas of the reservation having substantial religious significance to the tribe.

It is our position that every person entering the exterior boundaries of the reservation has consented to the jurisdiction of the tribe, and its courts, and the tribe has the jurisdiction because of its sovereignty to take such action as is necessary to enforce its laws.<sup>40</sup>

The necessity of exercising the jurisdiction was focused on by some tribes as the only way the tribes could protect their economic future:

I think it's (jurisdictional authority re maintaining resources) a bedrock. It's absolutely the basis upon which a tribe exists.<sup>41</sup>

There also was a strong response from tribes to the arguments used by some non-Indians to oppose tribal jurisdiction.

Norbert Hill, vice chairman of the Oneida Nation (Wisconsin) related a viewpoint frequently heard:

Well, when you go to Rome, you do as the Romans do, when you go to Milwaukee, you do as the Milwaukees do \* \* \*<sup>42</sup>

Robert Burnett, president of Rosebud Sioux Tribe, espoused this position in even stronger terms:

\* \* \* when I go to Ohio, I am under the laws of Ohio \* \* \* But when they (non-Indians) come to South Dakota, they think they ought to have their law. Now this land was set aside for the Rosebud Sioux tribe \* \* \* But they don't want to submit themselves to our laws because they think that they are too damn good for our law.<sup>43</sup>

Leonard Tomaskin, chairman of Yakima Nation Council, expressed the strong views echoed by others in Indian country, concerning presence of non-Indians:

If they don't like [on] Yakima, they can always move to Seattle \* \* \* I didn't ask them to set up homes on my reservation.<sup>44</sup>

The view that non-Indians innocently came to Indian country and were victims of Federal misrepresentation was also challenged:

Generally speaking, we don't have too many jurisdictional problems, really, in reality. We have problems with people, people who have come into Indian country understanding that they are coming into Indian country, because it is cheap to live there. It's cheap to lease land. It's cheap land to be purchased.<sup>45</sup>

Counsel for the Suquamish Tribe questioned as a matter of law, the innocent victim thesis; indicating that any abstract of the chain of title to land held by non-Indians, would indicate Indian ownership and would, therefore, create an obligation in the buyer to determine what that meant—reservation status.

<sup>40</sup> Testimony of Buck Kitcheyan, chairman, San Carlos Apache Tribe, Southwest Transcript at 287-288.

<sup>41</sup> Testimony of Thurman Trosper, Flathead Tribal Council, Montana, at 25. Similar views concerning protection of resources were expressed by Quinault, Northwest Transcript at 411-414.

<sup>42</sup> Great Lakes Transcript at 38.

<sup>43</sup> South Dakota Transcript at 277.

<sup>44</sup> Northwest Transcript at 671.

<sup>45</sup> Robert Burnett, president, Rosebud Sioux Tribe, South Dakota Transcript at 263.

The assertion that tribal governments and courts are either functionally or inherently incapable of providing justice was also challenged.

The Gila River Community Court, as noted previously, has handled thousands of cases—Indian and non-Indians, without ever being challenged under the Indian Civil Rights Act.<sup>46</sup>

Mario Gonzales, the former chief judge of Rosebud Sioux, testified that he had many non-Indian cases and always leaned over backward to assure that justice prevailed.<sup>47</sup>

Gary Kimble, former counsel for his reservation at Fort Belknap, and currently a member of State legislature, indicated that some tribal governments and courts were unsophisticated, and needed support, but the same was true for their counterpart State courts.<sup>48</sup>

The view that whatever disabilities the tribal exercise of jurisdiction may suffer is not inherently different from other government, was echoed by Robert Burnett:

[The] Court system of the tribe is as good as their \* \* \* in fact, better \* \* \* The rest of the system (excluding the State supreme court) is handled by people who certainly are easily influenced by political situations \* \* \*

The existence of jurisdictional power, however, does not necessarily mean its exercise. Chief Judge Owens of the Yakima Nation's court indicated that in his view jurisdiction over non-Indians concerning fishing was crucial and that he appreciated the cooperation he had received to date from the State Fisheries Department in their appearances in tribal court to testify against violators (non-Indians). He, however, did not think it was necessary to exercise jurisdiction over Toppenish, a predominantly non-Indian city within reservation boundaries.<sup>50</sup>

The Warm Springs Reservation indicates that while they have jurisdiction over non-Indians, they have not exercised such. This restraint is due to the excellent jurisdictional cooperation existing between the tribe and neighboring jurisdictions—State and local—the fact of jurisdiction, however, is basic to the maintenance of this relationship.<sup>51</sup>

#### FINDINGS

One: Congress has not terminated tribal jurisdiction over non-Indians.

Two: The exercise of jurisdiction assumed by Federal Government or granted to the States is in most instances concurrent with that retained by the tribes.

Three: The issue of jurisdiction over non-Indians has generated much hostility and emotionalism in both the non-Indian community and Indian communities.

Four: The issue of jurisdiction over non-Indians is not appropriately addressed by jurisdictional legislation.

Five: The long-term solution to this political-emotional problem lies in returning to a situation where Indian reservations—containing sufficient land for development and tribal survival and growth—

<sup>46</sup> See Chapter V.

<sup>47</sup> South Dakota Transcript at 344 et seq.

<sup>48</sup> Montana Transcript at 100-105.

<sup>49</sup> South Dakota Transcript at 265.

<sup>50</sup> Northwest Transcript at 664-665.

<sup>51</sup> For an expanded discussion of the Warm Springs situation, see chapter V, section A.

are owned and occupied almost exclusively by the individual Indian tribe.

Six: A number of tribes currently have programs to consolidate their land bases.

(a) These programs are meagerly funded.

(b) Many non-Indians have indicated a willingness to sell out and leave the reservation.

#### RECOMMENDATIONS

Congress should establish a long-term program for the re-purchase of non-Indian owned lands within reservation boundaries.

(a) There should be separate negotiations, under congressional charter, with each tribe and the non-Indian interests in that area to develop the components of each reacquisition plan.

(b) The role of the Federal Government in negotiations should be that of trustee with the duty to assure tribes the right to assess their needs and not a party of interest.

(c) Plans will by necessity vary, but could include:

(1) Expansion of reservation land bases.

(2) The provision of life-estate or similar devices for non-Indian interests, rather than immediate sale.

(3) Redefinition of reservation boundaries only with tribal consent.

(4) Exchange of lands where appropriate.

(5) Allocation of financial responsibility, and the provision of a variety of funding mechanisms.

(d) This process should not be used for any other purposes than land consolidation. It would be an unconscionable abrogation of the Nation's moral obligation to utilize this process to terminate any existing Indian rights.

e. An appropriate mechanism for such planning would be the establishment of a congressional commission authorized to institute negotiations, and report to Congress on a reservation-by-reservation basis, the negotiated plan:

(1) The Commission responsibility would be limited to facilitation and reporting to Congress on a case-by-case basis the plan achieved for each reservation.

(2) Congress should appropriate directly to tribes the necessary funds for planning and technical services.

#### D. TAXATION

As with all analysis of the sovereign nature of tribal governments, the discussion takes its genesis from *Worcester v. Georgia*,<sup>1</sup> in which Justice Marshall referred to Indian tribes as distinct, independent, political communities which were, at once and the same time, domestic dependent nations. More recently, the U.S. Supreme Court referred to them as "unique aggregations possessing attributes of sovereignty over their members and their territory."<sup>2</sup> The nature and extent of those attributes, especially when in relation to local, State and Federal governments, has been a matter of increasing concern and litigation

<sup>1</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>2</sup> *United States v. Mazurie* 419 U.S. 544 577 (1975).

as the tribes begin to reassert their powers—including taxation—and gain control over their resources and destiny.<sup>3</sup> This comes at a time when State and local governments are searching for ever broader sources of revenue to meet the increasing demands of their ever rising costs and burgeoning bureaucracies. It is reasonable to expect, and not surprising to see, increased competition for the jurisdictional authority to exploit by taxation any potentially available resource. This is especially true on many Indian reservations where heretofore, underdeveloped land and resources are potential multi-million dollar generators of tax revenues.<sup>4</sup> Much of the legal analysis for this section is taken from or based upon a paper prepared for the Task Force by Daniel H. Israel, "Proposal for Clarifying the Tax Status of Indians," June 1976. For an excellent discussion of taxation, see Riehl, "Taxation and Indian Affairs" Manual on Indian Law (AILTP, 1976) West (ed.)

Although the special tax status of Indian nations and individuals is central to their special legal relationships with the United States, there have not yet been extended long-term efforts by Indian tribes to exercise their sovereign powers in the field of taxation. Likewise, until recently, there have not been concerted efforts by the Federal and State governments to generate tax revenues from individual Indians or tribal governments. There have been, however, examples of all of these in the past which provide guidelines for jurisdictional assessments of the future.

#### 1. FEDERAL TAXATION OF INDIANS AND INDIAN PROPERTY

In resolving questions concerning the extent of Federal tax jurisdiction over Indians and Indian property, it is generally accepted that Federal tax statutes apply to Indians and Indian property unless such taxation is inconsistent with specific rights reserved either by treaty or Federal statute. Thus, while the United States has recognized that Indian tribes are not taxable entities<sup>5</sup> the courts have taken a case-by-case approach to determine whether general Federal taxing statutes should apply in a given case to Indian individuals or to Indian property. In *Choteau v. Burnett*,<sup>6</sup> and in *Superintendent of Five Civilized Tribes v. Commissioner*,<sup>7</sup> the U.S. Supreme Court ruled that Federal income statutes were designed to apply to each individual resident of the United States and to all income from whatever source, including income earned by an Indian. Nevertheless, the U.S. Supreme Court in *Squire v. Capoeman*,<sup>8</sup> exempted income derived directly from a trust allotment because of a provision in the applicable treaty exempting the land from taxation. The allotment exemption was followed in *Stevens v. Commissioner*,<sup>9</sup> involving the Federal taxability of income earned from allotments which had been acquired by gift or exchange from

<sup>3</sup> Israel, "The Reemergence of Tribal Nationalism", Indian Land Development Institute-Oil, Gas, Coal and Other Minerals, sponsored by the Rocky Mountain Mineral Law Foundation, April 1976.

<sup>4</sup> Estimated revenues from planned coal gasification plants on the eastern end of the Navajo Reservation have been placed at 264.5 million dollars at present New Mexico State tax rates. Goldberg, "A Dynamic View of Tribal Jurisdiction to Tax Non-Indians", unpublished draft, January 1976.

<sup>5</sup> Internal Revenue Rule 67-284, 1967 Cum Bull 55.

<sup>6</sup> 283 U.S. 691 (1931).

<sup>7</sup> 295 U.S. 418 (1935).

<sup>8</sup> 351 U.S. 1 (1956).

<sup>9</sup> 452 F.2d 741 (9th Cir. 1971).

other Indians, but was not followed in *Holt v. Commissioner*,<sup>10</sup> involving the Federal taxability of income earned by a member of an Indian tribe from leased tribal lands. *Big Eagle v. United States*,<sup>11</sup> *United States v. Hallam*,<sup>12</sup> *Commissioner v. Walker*,<sup>13</sup> and Rev. Rule 67-284,<sup>14</sup> each analyze under various circumstances whether an Indian exemption exists limiting Federal tax liability.

It can be generally concluded that individual Indians and their properties located off reservation are subject to general Federal tax statutes absent specific exemptions.<sup>15</sup>

The disparity in the holdings of Stevens and Holt are inconsistent with the general policy of the Federal Government to encourage and support Indian use and development of Indian held lands. Where an individual Indian leases tribally held land and is subject to taxation on income derived therefrom, such taxation may have the effect of depreciating the lease value of that land to the tribe. Such patterns of taxation also cloud clear understanding of the individual Indian and the tribe as to the exact tax implication and may tend to chill the aggressive development and use of such land by Indian people. Moreover, where an Indian entrepreneur is dealing with many parcels of land which have different tax status, the confusion over what is taxable and what is not, is potentially very confusing. A clear determination that income derived by an Indian from Indian held lands is not taxable would go far to encourage the use development, and support of a policy of Indian self-determination.

#### 2. STATE TAXATION OF INDIANS AND INDIAN PROPERTY

In resolving questions concerning the extent of State jurisdiction over reservation Indians, it has been held that the sovereignty of Indian tribes, although no longer the sole determining factor, must still be considered because it provides a background against which the applicable treaties and Federal statutes must be read.<sup>16</sup> Given the existing Federal relationship between Indian tribes and the United States, State taxation over reservation Indians or property can only be sustained if authorized by an act of Congress. Moreover, such authorization must be specific and precise for the Supreme Court recognizes that "the special area of State taxation \* \* \* within reservation boundaries" requires that a narrow construction be given to the scope and extent of State taxation authority.<sup>17</sup>

In *Bryan v. Itasca County*,<sup>18</sup> the Supreme Court disposed of the question reserved in *McClanahan*, "whether the grant of civil jurisdiction to the State conferred by section 4 Public Law 280 \* \* \* is a congressional grant of power to the States to tax reservation Indians except insofar as taxation is expressly excluded by the terms of the statute," holding that there was no grant of authority to tax reserva-

<sup>10</sup> 364 F.2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967).

<sup>11</sup> 300 F.2d 765 (Ct. Cl. 1962).

<sup>12</sup> 304 F.2d 620 (10th Cir. 1962).

<sup>13</sup> 362 F.2d 281 (9th Cir. 1964).

<sup>14</sup> Which spells out in detail the position of the Internal Revenue Service on exemptions of Indian income from federal taxation.

<sup>15</sup> See Riehl, Taxation and Indian Affairs, supra.

<sup>16</sup> *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, — U.S. — 48 L Ed 2d 96 (April 27, 1976), U.S.L.W. 4535 (Apr. 27, 1976).

<sup>17</sup> See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *McClanahan v. Arizona State Tax Commission*, supra; *Moe v. Confederated Salish and Kootenai Tribes*, supra.

<sup>18</sup> — U.S. — 96 S.Ct. +2102 (June 14, 1976), No. 75-5027 (decided June 14, 1976).



tion Indians. Indeed, the holding in *Bryan* with respect to taxation means that Public Law 280 reservations will be treated no differently than non-Public Law 280 reservations. The court states that:

\* \* \* §4(b) in its entirety may be read as simply a reaffirmation of the existing reservation Indian-federal government relationship in all respects save the conferral of state court jurisdiction to adjudicate private civil causes of action involving Indians. We agree with the Court of Appeals for the Ninth Circuit that §4(b) is entirely consistent with, and in effect, is a reaffirmation of, the law as it stood prior to its enactment. *Kirkwood v. Arenas*, 243 F. 2d 863, 865-866 (1957)."

As the *Bryan* court points out, no decision of the Supreme Court had yet defined the State's power to levy a personal property tax on reservation Indians. In *Moe v. Confederated Salish and Kootenai Tribes*, the Supreme Court addressed this issue and held that the States are prohibited from such taxation, but the States were permitted to require Indian merchants to collect a tax assessed against non-Indians purchasing cigarettes from the Indian merchant. Thus, States lack authority to tax either Indian income earned on a reservation,<sup>19</sup> or Indian real and personal property located on a reservation, whether held in trust or not.<sup>20</sup>

State authority over Indian individuals and their property off the reservation is exempt only if a Federal statute or treaty specifically provides for an exemption. *Mescalero Apache Tribe v. Jones*, *supra*.

The decisions concerning on reservation retail operations, whether owned by an Indian or by a non-Indian licensed as an "Indian trader," have concluded that they are not subject to State taxation in its business transactions with Indians.<sup>21</sup> It is clear from *Moe* that the State's requirement of the Indian tribal seller to collect a tax validly imposed on non-Indians is permissible and does not frustrate tribal self-government as protected in *Williams v. Lee*, 358 (U.S. 217 (1959)), or a run afoul of any preexempted Federal fields.<sup>22</sup>

State taxation of non-Indians engaging in businesses dealing with Indian property has been upheld either because an express Act of Congress authorized the tax,<sup>23</sup> or because it was found that the State tax would not significantly interfere with the right of the reservation Indians to govern themselves.<sup>24</sup>

The prime concern of the State of Washington is reflected by its chief executive, Governor Daniel Evans, in his statement to this task force contained in Northwest transcript exhibit 25 at page 6:

It is the State's opinion that the tax question is perhaps the most serious one. The concern in this area is only over possible evasion of taxation by the non-Indians who reside off the reservation. The non-Indians residing on the reservation and intend to use the purchase on the reservation, perhaps could be allowed to make the purchases on reservation relatively free from the tax by the State.

<sup>19</sup> *McClanahan v. Arizona State Tax Commission*, *supra*.

<sup>20</sup> See *United States v. Rickert*, 188 U.S. 432 (1903).

<sup>21</sup> *Moe v. Confederated Salish and Kootenai Tribes*, *supra*; *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965).

<sup>22</sup> *States v. McGowan*, 302 U.S. 535 (1938).

<sup>23</sup> E.g., *British American Oil Producing Co. v. Board of Equalization*, 101 Mont. 268, 54 p.2d 117 (1936). For specific acts authorizing and prohibiting taxation of Indians or Indian property: Authorizing 25 U.S.C. §§ 349, 329, 398, 399, 401, 608, 610b, 674 (1970); Prohibiting, 25 U.S.C. §§ 36, 233, 355, 409a, 416l, 465, 487c, 492, 501, 564c (1970). As compiled in note: "Taxation limitation of State authority over reservation Indians—two new Mexico cases", 3 Am. Ind. L. Rev. 486 n. 19 (1975).

<sup>24</sup> New Mexico cases, 43 Am. Ind. L. Rev. 468 n. 19 (1875).

Mr. Robert Pirtle testified on behalf of the Colville Tribe of Washington at those same hearings and commented that:

The State of Washington recently adopted a tax rule, Rule 192. Now Tax Rule 192 is a fascinating piece of legal work. It defines reservation in such a way as to exclude all nontrust land on the reservation.

\* \* \* any person with two weeks of law school would know that they (the State) have no jurisdiction.<sup>25</sup>

Mary Ellen McCaffree, director, department of revenue, took the position that:

(The Department of Revenue has not initiated court proceedings against Indians; litigation has occurred from challenges by Indians to the Department's administration of State tax laws.) (Parenthesis in original).<sup>26</sup>

It is not known whether any litigation has been started over tax rule 192, but the position that the State as the hapless defendant over innocent assertions of jurisdiction raises serious questions about the State's position.<sup>27</sup>

The director of revenue provided a rough estimate of annual expenditures for "defense" of Indian lawsuits at \$11,654 plus some additional costs incurred for "secretarial support service, fringe benefits and overhead" incidental to the fees paid a private attorney.

It is difficult to sort out exactly what is meant by "has not initiated court proceedings." Perhaps that means that the challenged tax is assessed and for those Indian people who don't pay, there are no judicial enforcement efforts undertaken, which leaves unaccounted for the entire administrative mechanism. Most taxes are individually assessed and most individuals pay rather than resist and undertake expensive litigation. In fairness, these are unknown, and the Washington State revenue department has been most cooperative with the investigations of this task force. But the burden imposed on individual Indians and tribes cannot be denied, especially when it is recognized that they usually have to resort to private attorneys at significant expense, while the entire force of the State stands behind the revenue department which has the staff of the State attorney general at its disposal.

For the State of Washington, two issues emerge:

(1) How to collect taxes from non-Indian purchasers from on-reservation Indian retailers and (2) the competitive advantage which may accrue to on-reservation Indian retailers from being beyond the reach of State sales taxes. The favorite example used by the State of Washington of the first concern is lost revenues from cigarette sales on reservations estimated at from \$8 million to <sup>28</sup> \$9,500,000.<sup>29</sup> State officials also estimate loss of revenues from cigarette sales on military reservations within the State in excess of \$8 million. The State has not taken any legal actions against the Defense Department over that loss, although they claim to be negotiating.<sup>30</sup> Likewise, where Washington

<sup>25</sup> Northwest transcript at 593-94.

<sup>26</sup> Northwest transcript, exhibit 42.

<sup>27</sup> Many States were not sued over racial imbalance problems until recent times when rights long abused were finally asserted. No one seriously asserts that States in these situations were innocent victims of lawsuits. This is not to say that the exercise of tribal sovereign rights protected largely by Federal preemption are basically racial, but that the analogy of rights long ignored now asserted is striking.

<sup>28</sup> Northwest transcript at 291.

<sup>29</sup> Northwest transcript 42 at 3.

<sup>30</sup> Northwest transcript at 299-300.

residents make purchases in Oregon which has no sales tax, there are significant losses of revenues which the State of Washington has done little about.<sup>31</sup> The fair conclusion is that Indians are the prime focus.

There is great emphasis by the State of Washington on the "inequity" of delivering services and collecting relatively few taxes. It should not escape notice that the State undertook jurisdiction over many of the areas voluntarily and such jurisdiction is a double-edged sword. The State of Washington's testimony is capsuled in one statement to the effect that:

The thrust of our position \* \* \* is that the benefits deriving or occurring to the Indian people [from tax exempt status] are not commensurate in dollars with the revenue loss being suffered by the state.<sup>32</sup>

Revenues expended in this area so often cited as support for services delivered to Indians are also viewed by Indians as support for State agency invasions on Indian individual and sovereignty rights. Thousands of Indian children have been and are today removed from Indian homes by State social service agencies. These children are placed outside of the natural homes by adoption and foster placement: many never to return to their culture or heritage. The rate of this practice is grossly disproportionate to the population representation of Indian people.<sup>33</sup> The State of Washington, for example, placed over 80 percent of Indian foster placements in non-Indian homes.

One witness described case histories of four children from one family taken under State jurisdiction from the Colville Indian Reservation, while in foster care, over \$12,500 of these children's money was turned over to the State of Washington by the Bureau of Indian Affairs. That witness indicated the case history to be one of many such cases.<sup>34</sup> The point is that services are not always viewed as useful nor are they exclusively a cost to the State. Likewise, States derive revenues from sources other than traditional tax structures where Indians are involved. Dennis Karnopp, tribal attorney for the Warm Springs Reservation in Oregon, pointed out:

Some people talk about we provide this service for you Indians and you don't pay taxes and that kind of thing. And we're fond of pointing out that the biggest taxpayer in Jefferson County [Oregon] is Portland General Electric which has two hydroelectric projects on the Deschutes River. And that River is the boundary of the reservation and that's the tribe's water rights and that one end of the dam is on the reservation, and half of the dam, at least, and half of the reservoir is on the reservation and would not have been there at all if the tribe had not consented to it. And, secondly, as a practical matter, the tribe is the biggest employer in Jefferson County.<sup>35</sup>

As indicated, State possessory interest taxes have been upheld as not being a significant interference with the right of reservation Indians to govern themselves.<sup>36</sup> An analysis of the economic impact on the value of the lease could not but conclude that it is reduced once the tax is applied. The reasoning that it is not a direct tax on the Indian is difficult to square with economic realities. The application of such a tax is also inconsistent with an overall policy to encourage Indian eco-

<sup>31</sup> Northwest transcript at 312-14.

<sup>32</sup> Northwest transcript at 324.

<sup>33</sup> See the "Child Custody" section of this report.

<sup>34</sup> Northwest hearings at 553; Northwest exhibit No. 21. It is believed that this practice is widespread but is presently diminishing.

<sup>35</sup> Northwest hearings at pp. 254-55; See also Report of Task Force One, American Indian Policy Review Commission, for a discussion of other areas.

<sup>36</sup> *Agua Caliente Band of Mission Indians v. County of Riverside*, supra. Southern California, vol. II at 44.

omic growth and support. Again, tribal resources are siphoned off in costly litigation where Federal help is not forthcoming in this clash between a State and a tribe.<sup>37</sup>

The representative of the department of revenue from Washington State does not believe litigation is helpful in the final resolution of these matters:

\* \* \* the position of the Department of Revenue \* \* \* is that [tax disputes] will never be satisfactorily resolved in the courts in a manner equitable to all concerned. That the more of these court actions that go on, the more legal fees are down the drain as far as both the Indian people and the state are concerned. And the real answer lies in effective Congressional actions that takes care of the Indian needs and spreads the cost of taking care of Indian needs over the entire population of the United States rather than plunking it out of the states.<sup>38</sup>

Litigation is not the most efficient means of clarifying these matters, and they clearly would benefit from congressional clarification. The implicit notion that exclusion of State taxation should be removed in favor of nationwide support ignores, however, the conditions under which the State of Washington accepted statehood; that is, constitutional disclaimer of jurisdiction over Indian country. Such a view accepts the benefits of all of the land and resources accruing to the State and its citizens through Washington State Indian land cessions without accepting the responsibilities. This is not to say that the Federal Government does not have an overall responsibility with respect to Indian people, but this is in addition to, not instead of, those responsibilities, be they by limitation or otherwise, of the various States to their Indian citizens.<sup>39</sup>

There are other areas as yet unresolved in the area of State taxation, such as on-reservation business ventures entered into jointly between Indians and non-Indians. Tribes and individual Indians making business decisions or comprehensive economic plans must do so without reasonable certainty as to the tax consequences. Under the present state of the law, an on-reservation joint venture may result in State taxation of the non-Indian portion absent either an act of Congress prohibiting the tax or a finding that such a tax significantly interferes with the self-government interests of the reservation Indians. This would almost certainly require a case-by-case determination to discern the extent of the tribal interests by examining such things as whether the tribe has established its own tax. Certainly, in such a situation both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions which would have significant effect on tribal self-government.<sup>40</sup>

It is difficult to project the impact of a tribally imposed tax on non-Indians where the State has also assessed a valid tax. The court in *Moe* rejected the notion that the requirement on the tribal seller to collect the State's tax and thereby assist the State in preventing avoidance of the tax by a non-Indian is distinguishable from the situation where the tribe has taxed. The court felt that competitive advantage enjoyed by the tribal seller was dependent on the non-Indian purchaser's willingness to flout the State's tax law. Thus, the State's pro-

<sup>37</sup> Southern California, vol. II at 44.

<sup>38</sup> Northwest hearings at 325.

<sup>39</sup> See Report of Task Force One, American Indian Policy Review Commission.

<sup>40</sup> *McClanahan v. Arizona State Tax Commission*, supra, at 179; *Williams v. Lee*, 358 U.S. 217 (1959).

tected interest expressed in *Williams v. Lee, supra*, is still operative with respect to activities of non-Indians in Indian country. If the tribe would lose revenues as a result of an ability of sellers to survive as a result of "double taxation"—that is, the tribes and the States—the collection might then be an impermissible interference.

### 3. TAXATION BY INDIAN TRIBES

Authority exists for tribes to impose taxes on Indians and non-Indians within their reservations.<sup>41</sup> Even though such authority has existed for years, tribes are just now beginning to realize the need to impose tribal taxes over reservation ventures in order to support increasing tribal governmental activities. Past reluctance to enter the field of taxation may be traceable to uncertainty as to tribal powers in this area.

As noted previously, the assertion of tribal taxation alone, however will not assure tribes of expanded governmental revenues. The value of tribal taxation is significantly diminished if State taxation is not at the same time prevented, for it is clearly not in the interest of Indian tribes to have Indian and non-Indian businesses on their reservation subjected to both State and tribal taxation. Such a result will inevitably deter non-Indian financial and management involvement and diminish the success of tribal enterprise designed to attract non-Indian purchasers.

At present, no cases hold that tribal powers of taxation are limited. However, as has been pointed out, only a small number of tribes have entered the field, some tribal constitutions carry barriers to such exercises over non-Indians and there is relatively little knowledge concerning the implementation and administration of such taxing provisions in most tribes.<sup>42</sup>

At present, there are few limitations on powers of tribes to tax non-Indians. Potential areas of concern which may account for some tribes reluctance to enter this area warrant comment. Examples of Federal limitations may include:

1. Lack of specific congressional enactment which define the area;
2. Where tribal ordinances or constitutional amendments are subject to Bureau of Indian Affairs or Secretary of the Interior's approval, influence may be exerted to impose certain restrictions as a condition for approval;
3. Application of the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* including:

(a) Whether equal protection requires nondiscriminatory taxation of Indians and non-Indians and, if so, to what extent; and

<sup>41</sup> *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89th (8th cir. 1956); *Buster v. Wright*, 135 F. 947 (8th cir. 1905), appeal dismissed, 203 U.S. 599 (1906); *Morris v. Hitchcock*, 21 App. D.C. 556 (1903) aff'd 194 U.S. 384 (1903); *Mawey v. Wright*, 545 W. 807, aff'd 105 F. 1003 (8th cir. 1900). Indian Reorganization Act, 25 U.S.C. sec. 476; and *Baria v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th cir. 1958).

<sup>42</sup> Israel and Smithson, "Indian Taxation, Tribal Sovereignty and Economic Development", 49 N.D.L. Revision 267 (1973). Moreover, the considerations in taxation of non-Indians presents serious issues that suggest careful planning in moving into this area. See, e.g. Goldberg, "A Dynamic View of Tribal Jurisdiction to Tax Non-Indians," *supra*, Note 4, for a particularly thoughtful and comprehensive article on this subject.

(b) Whether taxation on non-Indians who have no right of participation in tribal governments raises due process considerations.

4. Collateral influence in the Secretary of the Interior's power to approve leases and provisions contained therein vis-a-vis tribal taxation.

Each area has double edged considerations, but the better view consistent with sovereignty, Federal pre-emption, and policies supportive of Indian development and self-sufficiency is an unaltered power of tribes to tax. Other approaches appear to proceed on operative assumption of tribal incompetence or inability of tribal governments to exercise self-constraint. Moreover, general applications based on isolated indiscretions ignore individual differences in degrees of sophistication, as prevalent in Indian country as in comparisons of other units of government.

Potential limitations may also arise from conflicts between tribal interests and the protectable interests of the State.<sup>43</sup> At present, there is no congressional authorization for State taxation on reservations to the exclusion of the tribe. It would appear that State taxation powers are not pre-emptive of tribal powers.<sup>44</sup> The power of the State upheld in *Moe* was to require an Indian retailer to assist the State in preventing non-Indian avoidance of a valid State tax. The court specifically noted that there was nothing in that requirement which interfered with reservation Indian tribal self-government. Had the store been a tribal store operated by an individual Indian, the analysis may have been different. At least two separate impacts require examination under such circumstances.

First, the absence of a tribal tax assessed at a retail outlet does not of itself lead to the conclusion that this is not a tribal government revenue resource. Where the proceeds from such enterprises are used to support tribal services such a situation amounts to a "tax" at the other end.<sup>45</sup> The "tax" in that situation may be included in the purchase price.

Second, any competitive advantage derived by the tribe would be consonant with its governmental function to encourage and support enterprise on that reservation. Failure to derive revenues from a sales tax may only reflect a tribal determination to produce revenues from alternative sources.<sup>46</sup> For example, the retail outlet may be on tribally leased land which derives added lease value from the ability to provide an outlet free of State taxation.

The ability of tribes to preempt State taxation may be their single most effective tool for the generation of revenues and the continued viability of their governments. Such an approach would require affirmative action by tribes and would lay a strong foundation for resisting State taxation as an incursion on tribal governments.

Much of the discussion has been around retail outlets. Far more important is protection of reservation resources and the revenues derivable therefrom. Activities peculiarly related to the reservation such as

<sup>43</sup> See *Moe v. Confederated Salish and Kootenai Tribes, supra*.

<sup>44</sup> See e.g., *United States v. Mazurie, supra*. There was in that case a federal statute providing for tribal controls.

<sup>45</sup> Northwest hearings, at p. 245.

<sup>46</sup> Oregon, for example, collects no sales taxes.

mineral extraction, timber, commercial fishery and others require greater protection from State taxation so that tribal governments may reap the full benefits from their exploitation. Tribal taxation should not only preempt State taxation, but these resources and the activities surrounding their exploitation should be beyond the reach of outside taxes altogether.

The effect of taxation surrounding these resources cannot but affect their value to the tribes. Exclusive taxing authority in the tribe would allow great latitude in how best to arrange for exploiting the resources. The ability to provide tax exemption would be an integral part of the economic plans to develop the reservation and provide much needed revenues for tribal governments without forcing them into the traditional forms utilized by the surrounding governments.

#### FINDINGS

(a) Governmental status and powers of Indian tribes has been repeatedly recognized and affirmed by the Congress, the executive branch, and the courts.

(b) The economic stability, development and growth of reservation Indians is seriously affected by taxation or potential taxation of State and Federal Governments.

(c) The ability of tribal governments to exercise taxing authority to the exclusion of State taxation is an important source of revenues for the support of tribal governments and its ability to deliver services.

(d) Income levels of Indian people and relative development of reservation resources is generally much below that of neighboring non-Indian communities and the ability to offer tax advantages to non-member enterprise is an important factor in encouraging development and enterprise on reservations which can derive significant benefits to tribal governments and their members.

(e) Present taxation laws are confusing and uncertain and present significant unresolved areas which tend to discourage aggressive development due to uncertain tax consequences.

(f) Indian tribes and individuals are increasingly becoming involved in litigation in certain areas of taxation and continued assertions of questionable State and Federal taxing authority will continue to impose substantial litigation burdens on Indian tribes and individuals.

(g) State and local governments view tax exempt status of reservation Indians as a serious drain on State and local revenues where these governments provide services to such Indians.

(h) There do not appear to be exact figures for the total costs incurred by States and local governments for the delivery of services to reservation Indians; or for the amount of taxes contributed when such Indians or their tribes do pay State or local taxes; or for funds received by States or local governments from Federal sources as a result of having Indian lands, resources of people within their relative taxing or service areas.

#### RECOMMENDATIONS

(a) Tribal governments should enjoy the same tax exclusions, benefits and privileges generally granted to State and local governments with respect to Federal taxation.

(b) Tribal governments and individuals should be exempt from State and Federal taxation where the economic stability, development and growth of reservation Indians would be adversely affected thereby.

(c) When a tribal tax is imposed within the reservation it should act to the exclusion of any inconsistent State tax which would be applicable to the same person or activity where the development of reservation lands or resources is involved. Taxation here would include the offering of an exemption for the purposes of encouraging development or enterprise which benefit the tribe or its members.

(d) Tribal governments or individual Indians should not be taxable from income derived from any lands held in trust by the U.S. Government, nor should any tax be applicable to the leasing of such lands by any Indian or non-Indian.

(e) Where an Indian or tribe prevails in litigation to resist the application of taxation by the State or Federal Government there should be a statutory provision for attorney fees to that individual Indian or Indian tribe.

(f) There should be extensive investigations into the exact costs incurred by State and local governments for the delivery of services to reservation Indians and into the revenues received either directly from such Indians or their tribes and from other sources which are derived as a result of having Indian people, lands or resources within the relative taxing or service areas.

#### E. LAND USE CONTROLS<sup>1</sup>

The area of land use controls is an extremely sensitive and important one. The importance of which unit of Government determines the limitations or restrictions on the use of land areas cannot be over-emphasized. Significant disputes between tribal and local governments have begun to emerge in various forms. The impact on Indian and non-Indian citizens within reservation boundaries forms the basis for some of the most stimulating testimony gathered by the task force.

From the earliest encounters, it was clear that the Indian and non-Indian cultures held significantly different views concerning their relative use and relationships to the land. Western Europeans had an extremely well defined body of law based on clear cut notions of individual ownership with an entire array of rights and responsibilities. Tribal cultures, by and large, held land communally and shared benefits and burdens.

One of the most significant principles imported by the early European arrivals was the concept of "discovery" which carried with it the right in the "discovering" nation to claim title to the land notwithstanding the presence of aboriginal peoples. As part of their mission in the New World, these "discovering" nations carried the sacred responsibility to "civilize" and Christianize the natives found on the land, and rights these people had were subject to the superior authority of the conquering Europeans.<sup>2</sup>

<sup>1</sup> The limitations on time and resources available for the entire investigation did not allow for the necessary research and preparation required for full and definitive coverage of this area. The parameters and limits of the Federal, State, and tribal jurisdictional interplay are therefore addressed only as specific testimony or documentation relate to them.

<sup>2</sup> For a good discussion of the historical basis of European and Indian claims, see LeBlond, "Compensable Rights In Original Indian Title," unpublished paper for Prof. Ralph Johnson, U. of Washington School of Law, June 1971.

Justice Marshall attempted to describe the relative rights of the holders of original title and the successors to the title taken by the discoverers in *Johnson v. McIntosh*.<sup>3</sup> It was there pointed out that the original occupants of the land have a "legal and just claim to retain possession of it and to use it according to their own discretion." Moreover, only the Federal sovereign could enter into agreements with the original Indian owners for the acquisition of the land, all other sovereigns and individuals being precluded.<sup>4</sup>

The principle in *Johnson v. McIntosh* is that the rights to which the newly united colonies succeeded was the right to be the exclusive agent to treat with Indian tribes, known and unknown, for the acquisition of land. This right is one held relative to other sovereigns and was not founded in any inability of the original possessor to dispose of their lands as they chose,<sup>5</sup> and extended only to "such lands as the natives were willing to sell."<sup>6</sup> The ultimate fee was held to be in the United States while the Indians owned a perpetual right of possession which could not be extinguished without their consent.<sup>7</sup>

At the same time, a separate concept of law was developing which found its expression in *United States v. Kagama*.<sup>8</sup> The Indian tribes subjected to dealings with the United States had been placed in a position of dependency, had become "wards of the nation," and as a result, the United States acquired a duty of protection.<sup>9</sup> This duty arose as well from promises contained in treaties and such a duty carried with it the power "necessary to their protection."<sup>10</sup>

In response to extreme pressure from whites for access to Indian lands and mineral riches, Congress passed the General Allotment Act of 1887.<sup>11</sup> Designed to "civilize" Indians by, at one and the same time, enforcing upon them individual ownership of land and encouraging an agrarian way of life, it also made available vast quantities of unallotted land. These unallotted lands were declared "surplus" and through various enactments, were opened up to non-Indian purchase and settlement.

This policy of opening Indian lands for non-Indian settlement without the required consent of tribal members guaranteed by treaty was first challenged in *Lone Wolf v. Hitchcock*.<sup>12</sup> The Supreme Court held the treaty provisions to be political questions beyond the judicial enforcement powers of the court. Whatever questions that may raise as to what is right or moral, the law holds that the unilateral and unprovoked abrogation of a treaty provision was within the plenary powers of the Congress to administer Indian affairs. Such power is not, however, absolute, and is subject to some constitutional restrictions.<sup>13</sup>

<sup>3</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>4</sup> 25 U.S.C. sec. 177 is the present codification of the Indian Trade and Intercourse Act which is taken from the last in a series of such acts passed from 1802 to 1834: Cohen at 73; see Blunt, "A Historical Sketch of the Formation of the Confederacy" (1823), for an historical discussion of the Confederacy of the original thirteen Colonies and the development of the final acknowledgment that only the central government could deal with Indians and unclaimed territories.

<sup>5</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

<sup>6</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

<sup>7</sup> *Mitchell v. United States*, 34 U.S. (9 Pet.) 761 (1833).

<sup>8</sup> 118 U.S. 375 (1885).

<sup>9</sup> *Ibid.* at 384.

<sup>10</sup> *Ibid.*

<sup>11</sup> 24 Stat. 338. Now codified at 25 U.S.C. sec. 331 and still on the books, the policy of allotting Indian lands was repealed with the passage of the Indian Reorganization Act; 25 U.S.C. sec. 341 *et seq.*

<sup>12</sup> 187 U.S. 533 (1903).

<sup>13</sup> *United States v. Creek Nation*, 292 U.S. 103 (1938).

As a result, Indian land holdings were reduced by nearly 90 million acres from 1887 to 1934. More important for discussion here is that vast quantities of land within the boundaries of Indian reservations were now in non-Indian hands. The opening of the lands to settlement by non-Indians did not in itself disestablish the boundaries of that reservation nor the powers of the tribal governments over those territories.<sup>14</sup> The courts have held that each act must be looked to for the wording of the act and the circumstances surrounding its passage to determine the intent of Congress, as treaty rights must be expressly abrogated and cannot be abrogated by implication.<sup>15</sup>

There are four classes of land to be found within the boundaries of many reservations: (1) tribally held trust land; (2) Indian-held trust allotments; (3) Indian and non-Indian-held fee patent land; and (4) lands under the control of Federal instrumentalities such as the Corps of Engineers. Over this pattern of land, controversies of governmental control arise.

#### 1. THE FEDERAL GOVERNMENT

In 1947, Congress authorized provisions to arrange for the taking of the heart of the Fort Berthold Reservation to establish the Garrison Reservoir flood control project. The legislation<sup>16</sup> provides for the negotiation of a contract between the United States and the Three Affiliated Tribes to approve by the majority of adult members of the tribes and enact into law by Congress. The contract was negotiated and signed by representatives of the U.S. Army Corps of Engineers and the Three Affiliated Tribes of Fort Berthold Indian Reservation on May 20, 1948. The final provision stated:

#### ARTICLE XV

This contract shall not become effective until it has been ratified by a majority of the adult members of the Tribes, by the Council of the Tribes, and on behalf of the United States by the enactment into law by the Congress.<sup>17</sup>

The Three Affiliated Tribes were organized under the Indian Reorganization Act and had adopted a constitution and bylaws on March 11, 1936. As with any complicated give and take negotiation, the governing body of the Three Affiliated Tribes conducted the negotiations, were privy to what was gained for what was conceded, and had a more complete understanding of the contract as a whole. Nonetheless, when Congress enacted the actual legislation for the taking, the council was left out of the approval process which called for only the approval of a majority of the adult members of the tribe.<sup>18</sup>

The effects of establishing the reservoir in the heart of the reservation and scattering the Fort Berthold people in five directions is reviewed in a letter appearing in the *Minot Daily* approximately 20 years ago. The writer concludes that the action destroyed a community and a way of life for which traditional notions of compensation, so familiar to the dominant culture, were inappropriate and insufficient to the people of the three affiliated tribes.<sup>19</sup>

<sup>14</sup> *Reynour v. Superintendent*.

<sup>15</sup> *DeCoteau v. District County Court*.

<sup>16</sup> Public Law 80-296, July 31, 1947.

<sup>17</sup> Midwest Transcript, exhibit 4.

<sup>18</sup> 63 Stat. 790, Oct. 29, 1949. Midwest transcript, exhibit 10.

<sup>19</sup> Midwest transcript, exhibit 6.

Today, the Fort Berthold people find themselves in a struggle with the Federal Government in the form of the Corps of Engineers. There are a number of specific issues concerning the use and control of land within the boundaries of the reservation surrounding the reservoir. The issues are outlined in a memorandum of a meeting held between the tribe and representatives of the corps held on August 27, 1974 and include: (1) the return of lands taken for flood control which are not needed for that purpose (five specific areas are identified); (2) the adjustment of use allocation on project land to allow for more interim grazing; (3) land leased to the State of North Dakota Department of Game and Fish; (4) range management allocations; (5) the future taking of land which has now become shoreline due to erosion; (6) protection of gravesites encroached upon by erosion of shoreline.<sup>20</sup>

Over return of designated lands, the corps has taken a firm position opposing such return.<sup>21</sup> Although the corps has administrative power to return the lands, it claims only Congress has such responsibility, which it opposes Congress doing. Congress has returned similar lands of Van Hook Township to Mountrail County.<sup>22</sup>

In approximately 1960, the corps sold the 13 lots of previously Indian held lands acquired for flood control to non-Indians and then built a public recreation site in the same area, Mahto Bay. These lots were sold with no right-of-way across Indian land which is the only access. Due to abuse of the land, the tribe has closed the access and there is, of course, conflict.<sup>23</sup> Whether that conflict stems from the sale of originally held Indian lands or from the failure to secure right-of-way, it is traceable to the actions of the U.S. Government within the boundaries of an Indian reservation.<sup>24</sup> The corps is now offering lands for bid within the reservation boundaries, not previously Indian owned, which the tribe feels is in conflict with the law and their best interests.<sup>25</sup> The corps disagrees.<sup>26</sup>

The tribe asserts the continued right to exercise hunting and fishing rights guaranteed by treaty and as yet not expressly extinguished. Moreover, the tribe claims jurisdiction over all areas within the boundaries of the reservation, including areas taken by the corps.<sup>27</sup> The corps rejects both of these contentions.<sup>28</sup>

The list goes on and further particulars are unnecessary to demonstrate the difficulty created around the use of land between the corps and the tribe. The corp's representative views the taking of the land as a complete diminishment of the reservation to the extent taken and the passing of the act as authority to take still further lands. Likewise, the corps sees no difference in the taking of tribal lands as compared to private lands and sees no special trust responsibility toward Indians, viewing it as residing solely within the Department of the Interior.<sup>29</sup>

<sup>20</sup> Midwest transcript, exhibit 1, memo of Aug. 27, 1974.

<sup>21</sup> Ibid, letter of Nov. 7, 1975, to Senator Burdick.

<sup>22</sup> Midwest transcript, exhibit 9, at 65.

<sup>23</sup> Midwest transcript at 244-49 and 435-36.

<sup>24</sup> Midwest transcript exhibit 1, telegram of Mar. 16, 1976.

<sup>25</sup> Midwest transcript exhibit 1, letter of Aug. 22, 1975, telegram of Mar. 16, 1976.

<sup>26</sup> Midwest transcript at 67-68, 77-80, 86-89, 115-118; Midwest exhibit 1 and 2 and letters of Mar. 17, 18, and 19, 1976.

<sup>27</sup> Ibid at 25.

<sup>28</sup> Midwest transcript exhibit 1, letters of Mar. 17, 18, and 19, 1976.

<sup>29</sup> See generally Midwest transcript 59-118; Midwest exhibits 1 and 2.

The economic impact on the tribe is significant. The incident over Mahto Bay alone has cost \$10,000 in attorneys' fees.<sup>30</sup> Continued and largely unproductive negotiations consume much time and resources of tribal leaders and personnel. At times, the corps is unresponsive to requests to negotiate, even when made by a U.S. Senator.<sup>31</sup> There is a recognition that in a conflict situation, one or the other most likely has to retain private counsel.<sup>32</sup> Experience indicates it will probably be the tribe. It costs the corps nothing to refuse to negotiate and to oppose and obstruct the attempts to return land. It costs the tribe a great deal, especially in the context of far more limited resources.

## 2. FEDERAL, STATE, AND TRIBAL INTERPLAY

The Aqua Caliente Band of Mission Indians and the city of Palm Springs have long been at odds over the jurisdictional powers to regulate land use. The issue is important to all concerned as the area is economically very lucrative.

In 1949, Congress passed a law<sup>33</sup> providing for the application of the laws of the State of California and its political subdivisions to the Aqua Caliente Reservation. The legislation originally was to provide for the straightening of a street to facilitate the development of Indian land and, as such, received Indian consent and support. As enacted, however, the law included the jurisdiction section without even so much as knowledge on behalf of the tribe.<sup>34</sup>

During the 1960's, the city of Palm Springs zoned the land including Indian-held trust lands. The tribe filed suit against the city to enjoin the application of those zoning laws. The tribe and the city entered into a stipulated judgment which was never approved by the Secretary of the Interior. However, the Secretary did agree to apply the city's zoning provisions with seven exceptions to trust lands.<sup>35</sup>

The tribe has again filed suit and is still in litigation over the power to zone.<sup>36</sup> Witnesses indicate that they receive little or no help from the Federal Government in this struggle and, in fact, actions taken by the Secretary of the Interior have been detrimental to their position.<sup>37</sup>

The city of Palm Springs and the Aqua Caliente Tribe estimated the cost of litigation over these matters since 1965 to be approximately \$250,000 each.<sup>38</sup> The tribe's portion of this is paid out of tribal funds from various revenue sources. The city also pays from its revenue sources, one of which is moneys from the possessory interest tax collected from Indian land.<sup>39</sup>

There are more particulars, but the thrust is that tripartite governmental action has been detrimental to the status and economic well-

<sup>30</sup> Midwest transcript at 435.

<sup>31</sup> Midwest exhibit 1, letter of Nov. 7, 1975.

<sup>32</sup> Midwest transcript at 107-07.

<sup>33</sup> 63 Stat. 205, October 1949.

<sup>34</sup> Southern California transcript, vol. II at 51-53; exhibit 18; vol. I at 83-84; and vol. II at 39-41.

<sup>35</sup> Southern California transcript, vol. II at 37.

<sup>36</sup> Ibid, at 36 and following.

<sup>37</sup> Southern California, vol. II at 43.

<sup>38</sup> Southern California transcript, vol. II at 54; and exhibit 18.

<sup>39</sup> Southern California transcript, vol. II at 54-55; see *Aqua Caliente Band of Mission Indians Tribal Council v. City of Palm Spring*, 347 F. Supp. 42 (C.D. Cal. 1972).

being of the Aqua Caliente Tribe. Laws passed by Congress have been piecemeal and have done more to confuse and undermine the needs and development of the tribe than to facilitate them. Moreover, such legislation has been passed without the tribe's consent and, in one case, without their knowledge as to a significant jurisdiction provision.

### 3. STATE CONTROLS ON TRIBAL LAND

Within the State of California, several conflicts over land-use powers have been to court for resolution. Until recently, these courts have not generally accepted Indian views on the limitations of State powers to regulate the use of reservation land in States where Public Law 280 is operative.<sup>40</sup> The Ninth Circuit Court of Appeals recently decided *Santa Rosa Band of Indians v. Kings County*,<sup>41</sup> and in a well-reasoned opinion, rejected earlier opinions which gave a narrow interpretation to the "encumbrance" exception contained in Public Law 280. The *Santa Rosa* court offers a number of alternative reasons why the State and local governments are without jurisdiction to enforce zoning and building codes. The reasoning falls under three general rationales: (1) local laws are not the laws of general application with the State contemplated by Public Law 280; (2) application of 25 C.F.R. section 1.4 and the "encumbrance" limitation in Public Law 280 independently and taken together are a bar to State regulation of Indian trust land use; and (3) application of State land-use ordinances which have the effect of frustrating the administration of Federal programs are "inconsistent" with such Federal statutes and are therefore impermissible.

The importance of the *Santa Rosa* reasoning is the policy expressed that:

Suffice it to say that application of State or local zoning regulations to Indian trust lands threatens the use and economic development of the main tribal resource—here it even handicaps the Indians in living on the reservation—and interferes with tribal government of the reservation.<sup>42</sup>

The court also refused, when confronted with ambiguous instances, to strain to implement the now rejected assimilationist policy behind the passage of Public Law 280. This reasoning was approved in *Bryan v. Itasca County*,<sup>43</sup> where the U.S. Supreme Court in striking down a State tax on a reservation Indian also recognized the "devastating impact on tribal governments that might result from an interpretation of section 4 [of Public Law 280] as conferring upon State and local governments general civil regulatory control over reservation Indians [citations omitted]. \* \* \* Present Federal policy appears to be returning to a focus upon strengthening tribal self-government. [Citations omitted]."<sup>44</sup>

The *Santa Rosa* court criticized the reasoning of previous holdings which limited use of tribal land by allowing application of local jurisdiction through a narrow reading of the "encumbrance" limitation in Public Law 280, but said:

As we read "encumbrance" it is directed consonant with the flavor of the word's narrow legal meaning, at traditional land use regulations and restrictions

<sup>40</sup> See *Roldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev. 535, 584-89 (1975).

<sup>41</sup> 532 F.2d 655 (9th Cir. 1975).

<sup>42</sup> No. 74-1565, Slip Op. at 19 (C.A. 9, Nov. 3, 1975).

<sup>43</sup> — U.S. — 96 S. Ct. 2120, (June 14, 1976).

<sup>44</sup> *Ibid.*, Slip Op. at 15 n. 14.

directed against the property itself, and does not encompass regulations of activity which only accidentally involve the property. *Rincon [Band of Mission Indians v. County of San Diego]*, 324 F. Supp. 371, 376-77, (S.D. Cal. 1971).<sup>45</sup>

That court also recognized that:

\* \* \* subjecting a reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually proven Indians' priorities, or may in fact be in economic competition with the Indians and seek under the guise of general regulations, to channel development elsewhere in the community. And even where local regulations are adopted in the best of faith, the differing economic situations of reservation Indians and the general citizenry may give the ordinance of equal application a vastly disproportionate impact.<sup>46</sup>

Certainly what is said of State and local jurisdiction for those States exercising jurisdiction under Public Law 280 must follow a *fortiori* for non-Public Law 280 States. Indian tribes may have, and often do, a significant need for land uses which do not comport with local non-Indian priorities. The continued viability and development of tribal resources would be better left to the unhampered design of those people to fashion their own destiny.

### 4. TRIBAL CONTROLS OF LANDS WITHIN RESERVATION BOUNDARIES

The control of land use by tribal governments over tribally held and individual allotted land, subject to some Federal limitations,<sup>47</sup> is clear. Tribal control over non-Indian lands is less clear. As noted previously, past congressional policy and legislation have created various land patterns within reservation boundaries. Tribal attempts to implement uniform land use regulations largely designed to protect reservation resources have met with some opposition. The emergence of tribal governments as responsible and assertive governing entities is seen by one observer as related to three series of events evolving over the past decade:

\* \* \* [F]irst, a significant change by the Congress the Executive, and the Supreme Court toward increased protection of Indian rights; second, a substantial increase in the amount of federal monies provided directly to the tribes designed to free tribes from their historical dependence on the United States; third, a number of courageous and successful actions undertaken by tribes on their own initiative often against overwhelming non-Indian opposition, which have inspired other tribes to take direct protective action.<sup>48</sup>

As these tribal governments emerge, they will come into potential conflict with Federal, State and local governmental agencies as many already have.<sup>49</sup> Clear guidelines for expeditious resolution are needed which do not undercut the viability of the tribal governments. Potential conflicts may have affected the ability of tribes to plan and move definitively for the development, exploitation and protection of reservation resources.

<sup>45</sup> *Santa Rosa Band of Indians v. Kings Co.* CA 9, Nov. 3, 1975, *supra*, at 19 n. 19.

<sup>46</sup> *Ibid.*, Slip Op. at 13.

<sup>47</sup> E.G. 25 C.F.R. § 1.4.

<sup>48</sup> Israel, "The Reemergence of Tribal Nationalist," (1975).

<sup>49</sup> See e.g., Northwest transcript at 199-201, 170-71, 175-77 (Yakima Nation and Yakima County); Northwest transcript at 224-25 (Colville Tribes and Okanogan County); Northern California transcript at 90-103, 106-09 (Desecration of sacred grounds and cemeteries in California); Aqua Caliente Tribe and city of Palm Springs, previously discussed; The Affiliated Tribes of Fort Berthold and Corps of Engineers, previously discussed; Oneida Tribe and Oneida Co., Great Lakes transcript, vol. I and 31.

Beyond conflicts with local governmental agencies, there was significant testimony offered by non-Indian fee patent residents on Indian reservations. Testimony was often highly emotional in its content with continuous appeals to constitutional rights and reflected bitterness against the U.S. Government for the manner in which these lands were made available for purchase.

Our problems arise because the United States government created a two-headed monster. The problem of the Indian, on and off the reservation, has long been recognized. What has not been recognized is the equally serious problems of the fee patent landowners.

\* \* \* \* \*

The same government body that allowed the Indian people to sell their fee patent land allowed us to buy it. We are both victims, but there is one difference. The Indians have never trusted the BIA or the federal government. Unfortunately, we did.

The rip-off of the fee patent land owner in America rivals anything you can dig up about Watergate.<sup>50</sup>

The thrust of that testimony and testimony by other fee patent owners<sup>51</sup> was that they purchase land either without knowledge that the land was within reservation boundaries or that they believed that the powers of the tribal governments on those reservations had been extinguished.

There was an appeal for assimilationist policies which would recognize that the treaties were "a mistake" and that there should be no right of succession to rights for present-day Indian people from treaties made over 100 years ago.<sup>52</sup> More serious were the objections raised to exercises of tribal control in zoning, taxation, and criminal laws over nonmembers who have no right of representation in those Indian governments.

Nonmember residents of reservations do have those rights guaranteed in the Indian Civil Rights Act of 1968.<sup>53</sup> Moreover, non-Indians which make up the vast majority of nonmembers on reservations, are the beneficiaries of the policies passed by Congress which placed such lands in their hands.<sup>54</sup> Any notion that Indian people received adequate compensation for those lands does not require refutation here. If nonmembers are in a position of loss of property without due process of law, then they must look at the body which occasioned that loss—the United States Congress.

Remedies available to nonmember fee patent owners should not come at the expense of tribal entities which were subjected to such policies without their consent and, often, over their objections.<sup>55</sup> Such limitations may have the effect of stifling the very forward movements so long promised and so long sought after by Indian people and tribal governments.

#### FINDINGS

(a) The area of land-use controls within Indian reservations is complex and unclear and may work to the detriment of all concerned

<sup>50</sup> Northwest transcript at 107-08.

<sup>51</sup> Northwest transcript at 7 and following.

<sup>52</sup> Northwest transcript at 11, 43-44.

<sup>53</sup> 25 U.S.C. 1302, *et. seq.*

<sup>54</sup> General Allotment Act, *supra*.

<sup>55</sup> *Lone Wolf v. Hitchcock*, *supra*.

in present and future efforts to develop and protect the land and other resources of Indian people.

(b) Past policies and enactments of Congress have had and continue to have significant adverse effects on the use and development of land within the boundaries of Indian reservations.

(c) Continuing conflicts with Federal agencies require substantial expenditures of tribal funds to clarify or resist adverse actions or rulings of such agencies.

(d) Application of State or local land-use controls, directly or indirectly, have serious adverse effects on the ability of reservation Indians to formulate and implement comprehensive and beneficial development and protection of Indian resources.

(e) There is a need to provide tribal governments with the resources and assistance necessary to develop comprehensive plans for reservation development and control.

(f) Nonmembers of Indian governments holding fee patents on lands within reservation boundaries may have been misled by the congressional policies or the representations of Federal agencies when purchasing land within reservation boundaries.

#### RECOMMENDATIONS

a. The present scheme of Federal land use laws must be clarified and simplified to provide reliable guidelines consistent with reservation Indian control over the development and protection of Indian resources.

b. Past enactments of Congress which work to the detriment of reservation development and land use and are not in furtherance of a necessary and compelling public policy (e.g., recreational use of land and water appurtenant to flood control projects) should be amended to clearly reflect a paramount interest in the Indian tribe of that reservation.

c. Where Indian people or tribal governments find themselves in conflict with Federal agencies over land use, there should be appropriations for obtaining private counsel; provision for attorney fees against such agency where the Indian individual or tribe prevail; and resolution in favor of Indian tribe's request for Federal intervention into lawsuits on their behalf.

d. Indian tribal regulation of land use within reservation boundaries should be preemptive of any State or local control over both trust and fee patent lands where the purpose of such regulation is in furtherance of a scheme to development or protect reservation land or resources.

e. Federal appropriations should be made directly to tribal governments for the development of comprehensive plans for land use and resource protection and development.

f. Where nonmembers of Indian governments holding fee patents on lands within reservation boundaries are adversely affected by valid land use regulations and have obtained land within reservation boundaries as a result of misleading congressional policies, or actions of Federal agencies, there should be congressional provision for compensation from Federal sources.



## F. OKLAHOMA

It was the intention of the task force to do a special report on the special section on the State of Oklahoma. As Felix Cohen observed:

The laws governing the Indians of Oklahoma are so numerous that analysis of them would require a treatise in itself.<sup>1</sup>

<sup>1</sup> Cohen, "Handbook of Federal Indian Law," ch. 15.

We have found it impossible to devote the necessary time to this important task. For this we apologize to those tribes and Indian people who our cursory investigations indicate are desperately in need of assistance.

The situation in Oklahoma has been well reviewed in task force 1's reports on Oklahoma by Mr. Kevin Gover. There is nothing in that report with which this task force does not most heartily agree.

Three things clearly emerged from the hearings and documentation accumulated from and about the situation there.

1. There is a definite need to clarify jurisdictional relationships of the tribes which includes a clear recognition that Oklahoma tribes do enjoy "reservation status."

2. The exclusion of those tribes from the full extension of the Indian Reorganization Act of 1934 has had a deleterious and demoralizing affect on the people and the tribes.

3. There is an overwhelming need for a separately authorized congressional study to develop a rational and beneficial policy for the Indian tribes of Oklahoma.

## V. THE EXERCISE OF JURISDICTION BY INDIAN JUSTICE SYSTEMS

## A. BACKGROUND

Much has changed in the manner and form of tribal government operation since the arrival of Western European institutions on the American Continent. Some of the change has been evolution, produced by the tribes themselves; the greater change, however, has been imposed upon the tribes by the direct and indirect operation of the U.S. Government. At their present level of development, few tribal institutions correspond to any traditional form or style. What modes of government Indian tribes would have developed to meet the demands of the changing centuries without the persuasive presence of the Federal Government is not known; what options are open to the tribes other than these Western modes can only be speculated upon.

In the first several hundred years of contact, those tribes that were not destroyed by disease and war were, for the most part, able to retain their traditional governing modes. Divergence was substantial: ranging from the sophisticated confederacy of the Iroquois—a precursor of the Federal system—to informal systems of communal consensus. To characterize all Indian tribes by any single generalization as too many observers have been wont to do, is factually misleading. Several general observations about Indian systems of government, in contrast to Western systems, however, are pertinent. Most Western governments are formalized institutions with voluminous sets of laws and regulations, largely related to private property concepts. Indian tribes and societies generally did not consider private property as central to a government's relationship to citizens; communal property concepts are far more prevalent in tribal societies than are individual property concepts. Because of this, theft within tribes was "virtually unknown." The comments of the first Commission of Indian Affairs are instructive both as to the Indian system and non-Indian rejection of that system:

The absence of "meum" and "tuum" in the general community of possessions, which is the grand conservative principle of the social state, is a perpetual cause of the "vis inertiae" of savage life \* \* \*<sup>1</sup>

Rather than the representative style typical of Western governments, tribal societies were often governed by communal systems of chiefs and elders. Leadership was often earned by performance or acknowledgement, and rested upon consensus and theological grounds for exercise. Many different systems existed for resolving disputes and maintaining order. Some tribes had warrior societies which functioned as enforcement mechanisms, other tribes utilized community pressure to enforce norms: scorn is said to have been an extremely

<sup>1</sup> Quoted in Hagan, "Indian Police and Judges," at 7 (1966).

effective method of enforcement. Imprisonment was unknown, and restitution, banishment, and death were the major retributive sanctions utilized.

Some tribes, notably those known as the Five Civilized Tribes, specifically adopted Western-style institutions for governance in the late 18th and early 19th century; these tribes, however, were the exceptions.

The first three-quarters of the 19th century wreaked havoc on those tribal governing bodies that survived the non-Indian presence on the continent. Removal, continuous war, and the reservation era reduced most tribes to de facto wards of the Government. Traditional food supplies—buffalo and others—were gone. Tribes were forced, oftentimes brutally, into reservations, numbers and strength were depleted, and pure survival from starvation placed tribes at the mercy of the Government dole.<sup>2</sup> This dole was used as a frequent weapon by Indian agents to enforce the policy of the moment.

At this point in history, several factors merge creating new mechanisms for tribal governance which would eventually evolve, albeit contrary to the motives of the creators, into institutions for the maintenance of tribal sovereignty.

A major struggle for power occurred in the 1870's and 1880's between the civilian and military authorities for control over Indian reservations. The civilian authorities, supported by many church organizations, sought ways to control the reservations without reliance on military troops. Aside from simple bureaucratic competition, opposition to military authority was based primarily on the military tendency to settle all matters by extermination. The presence of soldiers also caused problems such as the:<sup>3</sup> "inevitable demoralization of intemperance and lewdness which comes to a reservation from a camp of soldiers."

In addition to the power dispute, there was a growing assimilation fever among the so-called friends of the Indians who felt that law and order was a necessary component in their job of "civilizing" the Indians; to educate; to Christianize; and to transform the Indian economy from a subsistence hunting-fishing, gathering, and trapping system to a Western-style farming economy. A system of laws was felt necessary because:

They cannot live without law. We have broken up, in part, their tribal relationships, and they must have something in their place.<sup>4</sup>

One final factor strongly influenced the development of federally controlled Indian police and courts. This was the desire by Indian agents, as part of the assimilation process, to further erode and undercut the remaining power and authority of the traditional leaders and the systems they represented.

Commissioner of Indian Affairs Price in 1881 referred to the recently created system as: "\* \* \* a power entirely independent of the Chiefs. It weakens, and will finally destroy, the power of tribes and bands."<sup>5</sup>

<sup>2</sup> *Ibid.*, Hagan at 6, Indian agents are referred to "as the local representative of the U.S. and fount of all favors."

<sup>3</sup> *Id.*, quoting Indian agent Edward P. Smith (1875), at 6.

<sup>4</sup> *Id.*, quoting Bishop Whipple's advice to President Lincoln, at 9. Hagan also comments "But what was to be gained by destroying the concept of communal ownership if the new property owner had no legal machinery to protect his right?" at 5.

<sup>5</sup> *Id.*, at 79.

The development of Indian police and Indian courts under the auspices of the Indian agent was the result of these factors. The major experiment credited with being the foundation for the almost universal use of Indian police and courts occurred on the San Carlos Apache Reservation in 1873. Agent John P. Clum, observing the sporadic use of Indian scouts and groups to control other Indians, institutionalized the system by creating an Indian "police force." After demonstrating the effectiveness of this force, including the capture of Geronimo, Clum was able to oust the Federal military from San Carlos. Indian police forces were soon created for the Chippewas (Wisconsin), Blackfeet, Sioux and Assiniboin, Kiowas, Comanches, and Wichitas. By 1890, there were Indian police at nearly all the agencies.<sup>6</sup>

During this same period, the Indian court was also being developed.<sup>7</sup> R. H. Milroy, the Indian agent at Yakima, set up five judicial districts on the reservation from which judges were to be elected, and an appellate system with the agent at the top was created. In 1883, with the approval of the Secretary of the Interior, the Commissioner of Indian Affairs authorized the creation of Courts of Indian Offenses. He also created a set of substantive and procedural rules under which the courts were to operate. By 1890, two-thirds of the agencies had established Courts of Indian Offenses.

Both the Indian police and the Courts of Indian Offenses have suffered a mixed history.<sup>8</sup> Inadequacy of funding has always been a significant problem; it was not until 5 years after their creation that Congress provided any funds for the courts, and then to a very meager degree. Neither the Indian police nor the courts were successful in eradicating the influences of traditional Indians or Indian custom, as some of the assimilationists had hoped. Instead, the combination provided a curious mixture of Western-style law and tribal custom. The Indian police and Courts of Indian Offenses exercised jurisdiction over Indians and non-Indians. In the early days of Western expansion, the breed of whites settling on or near Indian reservations created much trouble for the Indians. The famous "hanging" Judge Parker described these newcomers to reservation areas as: "a class of men \* \* \* who revel in the idea that they have an inherent natural right to steal from Indians."<sup>9</sup>

In some areas, in fact, non-Indians caused the principal problems for Indian police and courts. In western Oklahoma, much of the Indian police effort was directed at removing non-Indian livestock from Indian lands.

The status of the Courts of Indian Offenses within the jurisdictional framework was unclear, and when potential test cases arose, the Department of the Interior generally avoided the test rather than meeting the issue.

Congress did meet the issue finally in 1934 when the Indian Reorganization Act (IRA)<sup>10</sup> was passed providing a system for reestablishing tribal governments. The act provided for federally chartered institutions with constitutions and court systems. Although at the time of

<sup>6</sup> *Id.*, at 27-43.

<sup>7</sup> Of course the Five Civilized Tribes, the New York Indians, the Osage the Pueblos and Eastern Cherokees all had their own justice systems.

<sup>8</sup> See generally, BJA, Bureau of Law Enforcement, "Indian Law Enforcement History."

<sup>9</sup> Hagan, *supra* at 53.

<sup>10</sup> 25 U.S.C. § 461, *et seq.*

passage the IRA was perceived as a major shift in Federal policy favoring tribal self-determination and ending the erosion of tribes and their land bases, it also provided a distinctly western model of government for the tribes. With assistance from the Department of the Interior, tribes were to draft their own constitutions, establish their own courts and codes of laws. In practice, most tribes using the IRA model either adopted the old system, which had become known as 25 CFR courts<sup>11</sup> and law and order codes, or adopted their own codes and courts closely modeled on 25 CFR.

Of major importance to an understanding of tribal courts in terms of present day issues and operations is the 1968 Indian Civil Rights Act,<sup>12</sup> which extended certain U.S. constitutional type protections to the operations of tribal governments and courts. The act also congressionally limited the penalties that could be imposed by tribal courts to 6 months' imprisonment and a \$500 fine, or both.

## B. THE CURRENT JUSTICE SYSTEMS

In addition to preexisting tribal systems and 25 C.F.R. systems, many tribal governments have created justice systems pursuant to their inherent sovereignty, and under the auspices of the Indian Reorganization Act.<sup>13</sup> In 1976, there are 117 operative tribal courts in Indian country. This represents an increase of 32 courts since 1973 when there were 85.<sup>14</sup> In 1973, Indian tribal courts handled approximately 70,000 cases; although this caseload has increased, no current figures are available. These courts and the other components of the justice system are faced with herculean tasks and responsibilities. A 1974 survey conducted by the Bureau of Indian Affairs indicated that crime rates—predominantly alcohol related—on Indian reservations were significantly higher than in rural America.<sup>15</sup>

The 117 Indian justice systems vary considerably from one another in both design and effectiveness. Like their non-Indian counterparts, Indian court judges are both appointed and elected.<sup>16</sup> There is no uniform standard, but as a general rule, most tribal judges are not attorneys.<sup>17</sup> At least one tribe requires applicants for judicial positions to pass an oral and written test on the tribe's constitution and laws.<sup>18</sup> Indian tribal courts function in both criminal and civil matters. In some areas, both the judicial and police functions are contracted from neighboring non-Indian communities.<sup>19</sup> In at least one area, a non-Indian government contracts law enforcement services from a tribal police department.<sup>20</sup> Some tribes provide extensive representation for indi-

<sup>11</sup> 25 CFR contains all the elements for the Bureau-created courts.

<sup>12</sup> 25 U.S.C. § 1301 *et seq.*

<sup>13</sup> 25 U.S.C. § 461.

<sup>14</sup> Source: National American Indian Court Judges Association.

<sup>15</sup> Memorandum to the Commissioner of Indian Affairs from T. Krenzke, director, Office of Indian Services, March 13, 1975.

<sup>16</sup> E.g., on Gila River, judges are elected at large for 3-year terms. Southwest transcript at 18. On Papago, judges are appointed by the council for 2-year terms. Southwest transcript at 119.

<sup>17</sup> The majority of non-Indian judges at the J.P. level nationwide are not lawyers. *North v. Russell*, U.S. 96 S. Ct. 2709 (1976) upheld the use of such judges in a case involving the conviction and sentencing of a person by a judge with a high school education but without any judicial training so long as there was the right of appeal to a court with a lawyer judge.

<sup>18</sup> Mojave-Apache, southwest transcript at 257.

<sup>19</sup> Ak-Chin Indian Reservation uses a county judge for its tribal court judge. Interview report.

<sup>20</sup> Nespelam, Wash., contracts police services from the Colville tribal police department, northwest transcript, exhibits, affidavit of members of Nespelam City Council.

gent persons in tribal court; others provide none. Police services may be provided by entirely tribal police, by BIA officers, or by a combination of BIA and tribal police. Tribal appellate systems also vary greatly. On some reservations, there is no appellate court system. Where tribes utilize 25 C.F.R. Courts of Indian Offenses, appeals follow through the Department of the Interior. Some tribes have their own appellate court systems;<sup>21</sup> others use judges from neighboring tribes for special appeals.<sup>22</sup> The tribal council may also constitute itself as the final tribal appellate system.<sup>23</sup>

Any generalization about tribal courts and law enforcement systems is therefore vague by definition. These are evolving institutions responding to tribal and community needs and operating at various levels of sophistication. Contrary to the views of some, there does not appear to be anything inherent in tribal justice systems that makes them any less capable than their non-Indian counterparts in dispensing justice.

However, one strong criticism of tribal government that occurred in the 1950's and used as a rationale for allowing States to assume jurisdiction in Indian country (Public Law 280) was the perceived inadequacy and the non-professional level of tribal justice systems.

As one observer has pointed out:

If jurisdiction was (transferred) because of inability to administer criminal and civil jurisdiction in the early 1950's, it should have been foreseen that such capabilities would someday be developed . . .<sup>24</sup>

In fact, such capabilities have been and continue to be developed. There are currently many institutions and programs that aid in this process that did not exist in the 1950's. The Indian lawyer, a rare phenomenon formerly, is being found in increasing numbers. It is presently estimated that whereas there were only approximately 20 Indian lawyers several decades ago, currently, the number has grown to between 150 and 180 and at least another 100 Indian students are enrolled in law school.<sup>25</sup> The American Indian lawyers training program, which runs a number of training and support programs for Indian law students and lawyers, has played a significant role in this development. The National American Indian Court Judges Association now exists, and under Federal funding, provides resources, materials and training to Indian court judges. Among its publications are a five-volume work on "Justice and the American Indian," and a handbook on "Child Welfare and Family Law and Procedural Manual." Other public and private resources, although insufficient for the totality of the need, are also available, such as the Native American Rights Fund, and the various Indian legal services programs.

## 1. ISSUES

### (a) Capabilities

That tribal justice systems are seen as evolving institutions is reflected in the fact that many tribes have just completed or are cur-

<sup>21</sup> Yakima Nation, northwest transcript at 659.

<sup>22</sup> The Papagos have used Judge Rhodes from Gila River.

<sup>23</sup> Conceptually this is similar to the English system where the House of Lords is the court of last resort. This process is used by the Yankton Sioux Tribe, midwest transcript at 144-45.

<sup>24</sup> Letter from Douglas Nash, counsel to the Umatilla Reservation to Donald R. Wharton, task force No. 4.

<sup>25</sup> Source: American Indian lawyers training program.

rently undertaking major revisions of constitutions, bylaws, and law and order codes.<sup>26</sup> Thurman Trosper of the Flathead Reservation expressed the view that judicial systems are essentially new to many tribes as is the non-Indian concept of justice; they are operating quite well in view of their brief experience and are expected to develop a high level of sophistication.<sup>27</sup>

The critical reviews tribal courts receive are varied. MOD, an organization opposed to tribal jurisdiction over non-Indians, as previously indicated, does not think much of tribal court systems in Montana.<sup>28</sup> The assistant area director for the BIA, Portland, Oreg., however, stated:<sup>29</sup>

While they may not be trained in the law and the relationship to Anglo-Saxon law, I do not know a tribal judge who doesn't know due process . . .

Albert Renie, the Acting BIA Superintendent at Flathead, also felt that the Flathead court made sure that everyone's rights were protected, pointing out that non-Indian business persons use the Court for debt collection.<sup>30</sup>

There are criticisms of tribal justice systems from within the Indian community. Severt Young Bear, a councilman from the Pine Ridge Reservation, was severely critical of one "breakdown" of law on Pine Ridge. He attributed part of the problem to the role the Federal Government played in violating the tribal constitution by dealing solely with the chairman and ignoring the legally constituted governing body of the Oglala Sioux, the tribal council. Another problem has been the multiple exercise of criminal jurisdiction on Pine Ridge—by the FBI, the BIA, the U.S. marshals, state police and various "vigilante" type groups. Notably excluded in that exercise is the tribal government.<sup>31</sup> An important footnote to the Pine Ridge story and the issue that has been raised in some quarters about the Indian capacity for self-government, is that Oglala Sioux people in a popular election in 1976, turned out of office the tribal chairman for Pine Ridge under whose regime most of the problems occurred.

### (b) Training and funding

The ability to operate a justice system is often dependent on the training of the personnel and the financial resources of the system.

An extensive system now exists for the training of both Indian police officers and tribal court judges. The Bureau of Indian Affairs runs a police academy at Brigham, Utah for the training of BIA and tribal police officers. A significant limitation, however, is that tribes must finance the officers' travel to and from training. In addition to this training, some tribal police departments provide supplemental training. Chief Johnson of the Colville tribal police department indicated that his officers receive more training than do the deputies in the local sheriff's department.<sup>32</sup> Tribal police also are often recruited from the ranks of non-Indian police departments. The Suquamish

<sup>26</sup> E.g., San Carlos Apache, southwest transcript, at 320, 321 Nez Perce, northwest transcript at 697-700; Gila River, southwest transcript at 76; Flathead, Mont. transcript at 88; Winnebago, midwest transcript at 431-32; Minnesota Chippewas, Great Lakes transcript at 162; and Oneida, Great Lakes transcript at 36.

<sup>27</sup> Montana transcript at 30.

<sup>28</sup> See Chapter II, and Chapter V, Section E.

<sup>29</sup> *Ibid.*, at 142.

<sup>30</sup> *Ibid.*, at 57-58.

<sup>31</sup> Midwest transcript at 614.

<sup>32</sup> Northwest transcript at 96.

tribal police include several county officers and a former Pennsylvania highway patrolman.<sup>33</sup>

The training provided for tribal judges usually comes through the National American Indian Court Judges Association. In the 1975-76 year, 199 persons participated in tribal court training sessions. In 1974-75, 127 persons participated in training sessions. These training sessions have been conducted for the past 6 years, and generally cover criminal law and family law.<sup>34</sup> The training sessions are conducted in regional centers for several days each month. Non-formalized on-site training is being provided via national programs, although some courts informally train new judges on-site. Some of the limitations of the existing program as indicated by judges include an inability to attend because of work load and a desire for more extensive training.

Funding for justice systems comes from several different sources. The Bureau of Indian Affairs, through contracts with tribes and direct services, expended approximately \$24 million in the 12-month period ending in June 1976. Of this, approximately \$3.5 million was spent on administrative expenses; \$11.5 million in direct services; and \$8 million in contracts to tribes; the remainder went to the training academy.<sup>35</sup> LEAA made grants totaling \$4,691,000 to tribes out of its discretionary funds and another \$900,000 out of LEAA's total block grant budget of \$900 million went to law enforcement agencies in areas where tribes and substantial urban Indian populations are located. It is not known what part of these funds went to tribal law enforcement systems.<sup>36</sup>

In addition to these Federal moneys, substantial tribal resources are expended for law enforcement systems. For example, the Colville Tribe spent \$347,000 of its own funds,<sup>37</sup> (BIA provided \$21,800) for law enforcement this past year. The Yakima Nation spent \$471,225 (BIA provided \$69,400). Warm Springs estimates its expenses at \$450,000—five to six times as much as the BIA spends (\$79,400) on the Warm Springs law and order program. The Navaho Nation's tribal expenditures are close to \$1 million<sup>38</sup> (BIA provides \$465,000). All tribes indicated the need for more resources to support and effectively utilize law enforcement systems. Funds in some areas are being used in creative ways. The Warm Springs Tribe, in cooperation with the State of Oregon, has "a work release program" for criminal offenders. The Yakimas have started an Alcohol Detoxification Center. The unmet needs, are however, substantial. The problems of small tribes in this area are overwhelming, particularly small tribes in Public Law 280 States which receive little or no Federal financial assistance.<sup>39</sup> Of the 481 federally recognized tribes, 326 have resident populations of 350 or less. Many of these tribes do not even have the funds to support the bare rudiments of tribal government, much less additional moneys to support sophisticated justice systems. On the Campo Reservation in southern California, a \$10,000 tribal development grant enabled the tribe, for the first time, to set up a basic record

<sup>33</sup> *Ibid.*

<sup>34</sup> Source: National American Indian Court Judges Association.

<sup>35</sup> Source: Division of Law Enforcement Services, BIA.

<sup>36</sup> Source: Indian Desk, LEAA.

<sup>37</sup> Northwest transcript at 617.

<sup>38</sup> Northwest transcript at 692.

<sup>39</sup> *Ibid.*, at 262.

keeping system.<sup>40</sup> Other small reservations relate similar stories of basic unmet needs.<sup>41</sup>

(c) *Coordination and cooperation*

Because the legal status definition of Indian tribes is not clearly understood or accepted by many non-Indian local governments, the cooperation and coordination often felt to be important to effective law enforcement is generally based on personal relationships rather than on legal principles. This problem of definition permeates such issues as the recognition of tribal court decrees, cross-deputization agreements, and extradition procedures.

On the Flathead Reservation there is currently no cross-deputization agreement with the sheriff's department. Bill Morigeau, a Flathead councilman, stated that such an agreement existed several years ago but was withdrawn by the sheriff, apparently because of the political climate which Councilman Morigeau attributed to MOD.<sup>42</sup> The Suquamish similarly complained that they have not received cooperation from the county police authorities.<sup>43</sup> The Colville tribal police department enjoys cross deputization arrangements with some but not all of its neighboring non-Indian governments.<sup>44</sup> Wayne Ducheneau, chairman of the Cheyenne River Sioux, indicated that no formal arrangements for cross-deputization exist, but that "some sheriffs are pretty good fellows and you can get along with them."<sup>45</sup> The situation in Gila River is similar; tribal officials and the county sheriff have an excellent working relationship and no current problems exist. If the sheriff were to change, however, the tribe felt the relationship could change.<sup>46</sup>

Tribal courts are technically not entitled to "full faith and credit" as they are not States in the constitutional sense. Some state courts have extended such recognition to tribal court decrees;<sup>47</sup> the practice is not universal, however, and is a particular problem with respect to non-Indian law enforcement officers refusing to serve process or other papers for tribal courts.<sup>48</sup>

One particular problem of coordination and cooperation relates to the relationship between the tribal law enforcement apparatus and BIA law enforcement and agency personnel. Tribes do not select the BIA officers as they do their own police officers, and the BIA officers' loyalty is, by definition at least, divided between the tribe and the bureau. BIA agency personnel do not necessarily feel they are obligated to follow an order from a tribal court.

Judge Rhodes of Gila River ordered several BIA police to be stationed at the tribal detention facility. The BIA superintendent took the position that the court has no authority over the BIA's administrative operations; he finally did comply out of "courtesy," maintaining that he is not bound to follow the tribal court.<sup>49</sup> Since BIA operations

<sup>40</sup> Southern California transcript at 83.

<sup>41</sup> See e.g., Pauma, southern California transcript at 9; Pala, southern California transcript at 471; Kaweenaw Community (Michigan) Great Lakes transcript, at volume II, 35.

<sup>42</sup> Montana transcript at 67.

<sup>43</sup> Northwest transcript at 86.

<sup>44</sup> *Ibid.* at 610.

<sup>45</sup> Midwest transcript at 356.

<sup>46</sup> Southwest transcript at 821.

<sup>47</sup> Oregon, northwest transcript at 246-47, and Maryland, in *Walefeld v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975).

<sup>48</sup> Northwest transcript at 432-33.

<sup>49</sup> Southwest transcript at 70-71. Of note, this superintendent was the acting superintendent at the time of the extraordinary problems on Pine Ridge in 1974-75. Although that does not impute any wrongdoing to him, it raises questions about what the lack of cooperation may lead to problems.

permeate many areas of reservation life, including the crucial area of child custody, its subservient relationship to the tribal court needs to be definitely stated. The potential conflict between the BIA and the tribe is not necessarily cured when a tribe contracts law enforcement services from the Bureau. The Mohave Apache tribe contracted and ran its own law enforcement program for approximately four years at a constant funding level. The tribe turned law enforcement back to the Bureau because of tight funding and inflationary pressure. Shortly thereafter, the BIA was able to provide the service at double the funding level.<sup>50</sup>

### C. INDIAN CIVIL RIGHTS ACT

The Indian Civil Rights Act of 1968<sup>51</sup> is the major congressional statement concerning how tribal governments and court systems are to operate. Generally, it applies to tribes whose constitutional standards for operations are similar but not identical to those contained in the "Bill of Rights" and the 14th amendment. Knowledge of the act and the cases arising under it are necessary to an understanding of the current status of tribal courts and governments.

#### 1. LEGISLATIVE HISTORY AND BACKGROUND

In 1959, *Williams v. Lee*,<sup>52</sup> and *Native American Church v. Navajo Tribal Council*<sup>53</sup> reaffirmed tribal sovereignty but denied remedies to individuals, both Indian and non-Indian, aggrieved by actions of tribal governments. The *Native American Church* case, in particular, is credited with spurring the preliminary investigation by Senator Ervin's Subcommittee on Constitutional Rights into dealing with abridgment of individual rights by tribal governments. In that case, a Federal court let stand a tribal ordinance banning the use of peyote, which was used by members of the Native American Church in religious ceremonies, on the ground that the free exercise of religion guarantees of the first amendment was not applicable to the Navajo tribal government.

In addition to the *Native American Church* case, Senator Ervin also cited reports from preliminary investigations of his own staff and reports by the Fund for the Republic,<sup>54</sup> and the Department of the Interior's task force on Indian affairs,<sup>55</sup> as factors in his decision to hold hearings on Indian civil rights.<sup>56</sup>

All these reports advanced the thesis that deviations from U.S. constitutional rights by tribal governments, although constitutionally permissible, were improper and required eventual correction.<sup>57</sup>

Hearings were held in Washington and in various Western States between 1961 and 1968. Testimony showed that 117 of the 247 organized tribes operated under constitutions providing some protection for

<sup>50</sup> Southwest transcript at 216.

<sup>51</sup> 25 U.S.C. 1301.

<sup>52</sup> 358 U.S. 217 (1959).

<sup>53</sup> 272 F.2d 131 (10th Cir. 1959).

<sup>54</sup> Fund for the Republic, report of the commission on the rights, liberties, and responsibilities of the American Indian (W. Brophy, and G. S. Aberle, editors, 1961), at 44.

<sup>55</sup> Task force on Indian affairs, a program for Indian citizens (1961).

<sup>56</sup> 107 Congressional Record 17121 (1961).

<sup>57</sup> Burnett, a historical analysis of the 1968 "Indian Civil Rights Act," 9 Harv. J. Leg. 557 (1972), at 576 [hereinafter Burnett].

individual civil rights, while 130 did not,<sup>58</sup> and 188 tribes were not organized under any tribal constitution.<sup>59</sup>

The principal problem areas for tribal courts in applying due process guarantees were the right to counsel, the right to remain silent, the right to trial by jury, and the right to appeal.<sup>60</sup> According to one writer, the central reason for denial or abridgment of rights was that most tribes lacked resources to allocate for law enforcement.<sup>61</sup> It was pointed out that:<sup>62</sup>

Prohibition of trained lawyers made possible the continued functioning of the tribal court system with untrained judges and without prosecutors. Compulsory testimony of defendants eased the costly burden of police investigations. Eliminating the jury or shifting it to the appeals level relieved pressure on court budgets. Redundancy of judges at the trial and appeals levels and ad hoc appointments of laymen for appealed cases produced similar savings. Despite strivings toward professionalism and the acceptance in principle by many tribal courts of due process requirements, budgetary restrictions made infringement of these rights unavoidable.

Testimony at the hearings showed that the 6,000-member Pima-Maricopa Tribe spent only \$4,500 a year on court and police operations.<sup>63</sup>

Throughout the hearings, the major area of concern to the tribes was violation of Indian civil rights by Federal, State, and local authorities and the failure of BIA to provide adequate financing and services to the tribes. One writer has described the position of the Department of the Interior and BIA in the hearings in the following way:<sup>64</sup>

Throughout the debate sparked by Senator Ervin's proposals, the attitude of the Department of the Interior and of the BIA remained consistent. When vital organizational interests, such as reputation and control, were not involved and when a commitment of resources was not required, they proved to be cooperative. But when confronted with the limitation of their responsibilities or influence or when pressed for a commitment to additional tasks, they resisted even if the interests of the Indian people were compromised.

The Indian Civil Rights Act of 1968 was originally proposed as S. 961 in 1965.<sup>65</sup> It provided that any tribe exercising its powers of self-government would be subject to the same constitutional protections, with the exception of the equal protection requirement of the 14th amendment, imposed on the Federal Government by the Constitution. The Department of the Interior and BIA objected to the impact that full constitutional rights would have on tribes and proposed an alternative bill requirement which contained limited guarantees.<sup>66</sup>

Tribal reaction to the proposed legislation was described as varied. Most tribes echoed the sentiments of the Mescalero Apaches who were sympathetic to the purposes of the bill but deemed it premature because the tribes were not psychologically or financially prepared for it.<sup>67</sup> The Hopis said they already provided protections afforded by the

<sup>58</sup> Hearings on constitutional rights of American Indians before the Subcommittee on the Judiciary, 87th Cong., 1st sess., pt. 1 (1961), at 121 [hereinafter 1961 hearings, pt. 1].

<sup>59</sup> 1961 hearings, pt. 1, at 196.

<sup>60</sup> Burnett, at 579.

<sup>61</sup> Id. at 581.

<sup>62</sup> Id. at 581.

<sup>63</sup> 1961 Hearings, pt. 1, at 367-68.

<sup>64</sup> Burnett, at 602. See Burnett at 589-602 for a discussion of the position of the Department of the Interior and BIA with regard to specific legislative proposals.

<sup>65</sup> 111 Congressional Record 1784 (1965).

<sup>66</sup> Hearings on S. 961-968 and S. J. Res. 40 before Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st sess. 2 (1965) at 318-19 [hereinafter cited at 1965 hearings].

<sup>67</sup> Burnett, at 589, citing 1965 hearings at 325.

Constitution in their own constitution,<sup>68</sup> and the Crow said they felt the people of their tribe were satisfied with the system and meant to keep it unchanged.<sup>69</sup> The Pueblos, however, rejected the bill of rights proposal completely. After the act was passed, they sought special exemption, had bills for exemption introduced, but only in Congress, and succeeded in obtaining a special hearing before the Ervin subcommittee in New Mexico.<sup>70</sup> At those hearings, a Pueblo spokesman stated:<sup>71</sup>

Our whole value structure is based on the concept of harmony between the individual, his fellows, and his social institutions. For this reason, we simply do not share your society's regard for the competitive individualist. In your society, an aggressive campaigner is congratulated for his drive and political ability. In Pueblo society, such behavior would be looked down upon and distrusted by his neighbors. Even the offices themselves, now so respected, would be demeaned by subjecting them to political contest. The mutual trust between governors and governed, so much a part of our social life, would be destroyed.

## 2. SUMMARY OF PROVISIONS OF INDIAN CIVIL RIGHTS ACT

Provisions of the Indian Civil Rights Act of 1968 are similar to the guarantees of various amendments of the Constitution in language, but most have been changed to in part reflect the special tribal situation. Even where language is identical, the history of the legislation makes it clear that the act is to be read against tribal context and does not necessarily incorporate all the guarantees of the Constitution and cases under it.

In general, the act provides that any tribe, in exercising the powers of self-government, cannot:

(1) Make or enforce laws prohibiting the free exercise of religion, or abridging freedom of speech, press, or assembly. There is no prohibition of an establishment of religion.<sup>72</sup>

(2) Violate the protection against unreasonable search and seizure and warrantless searches and seizures of person or property.<sup>73</sup>

(3) Place a person in double jeopardy.<sup>74</sup>

(4) Violate the protection against self-incrimination.<sup>75</sup>

(5) Take property without just compensation.<sup>76</sup>

(6) Deny a person the right to a speedy public trial, confrontation of witnesses, and the right to counsel at his own expense. There is no right to free court-appointed counsel.<sup>77</sup>

(7) Impose excessive bail, inflict cruel and unusual punishment, or impose any penalty or punishment greater than imprisonment for 6 months or a fine of \$500 or both for conviction of one offense.<sup>78</sup>

(8) Deny any person the equal protection of the law or deprive any person of liberty or property without due process of law.<sup>79</sup>

<sup>68</sup> 1965 Hearings at 325.

<sup>69</sup> 1965 Hearings at 234.

<sup>70</sup> Burnett at 614.

<sup>71</sup> Hearings on S. 211 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st sess., 1969.

<sup>72</sup> 25 U.S.C. 1302(1).

<sup>73</sup> 25 U.S.C. 1302(2).

<sup>74</sup> 25 U.S.C. 1302(3).

<sup>75</sup> 25 U.S.C. 1302(4).

<sup>76</sup> 25 U.S.C. 1302(5).

<sup>77</sup> 25 U.S.C. 1302(6).

<sup>78</sup> 25 U.S.C. 1302(7).

<sup>79</sup> 25 U.S.C. 1302(8).

(9) Pass any bill or attainder or ex post factor law.<sup>80</sup>

(10) Deny any person accused of offense punishable by imprisonment, the right, upon request, of a jury trial of not less than 6 persons.<sup>81</sup>

The only remedy contained in the act provides for obtaining a writ of habeas corpus in Federal court to test the legality of detention by order of a tribe.<sup>82</sup>

### 3. SCOPE OF INTERVENTION BY FEDERAL COURTS

#### (a) Legislative history of habeas corpus provision

Testimony before the Ervin subcommittee indicated that appellate procedures in tribal courts are not effective. One writer described the subcommittee's findings as follows:<sup>83</sup>

Appellate procedures were similarly attenuated. Among many tribes, such as the Navajo, the court of appeals was comprised of all the trial judges sitting together as a panel. Tribes with only a single judge devised more ingenious procedures; for example, the Shoshone-Bannock system provided trial by jury on appeal, while the Pima-Maricopa tribal council appointed two laymen when the need arose to serve with the tribal judge on a three-member appeals board.

Again, the principal reason for these appellate procedures was lack of resources. Appointment of laymen and panels of trial judges saved the tribe the cost of paying for a second level in its judicial system.<sup>84</sup>

As a remedy for denial or abridgment of the right of appeal, the original bill provided for appeals of criminal convictions from tribal courts to Federal district courts, and expanded the scope of review to include trial de novo. The effect was to integrate "criminal justice on the reservation directly into the existing Federal system and reduce the Indian courts to a 'screening role'."<sup>85</sup>

The tribes' reaction has been described as follows:<sup>86</sup>

Many tribes, while not opposed to S. 962's authorization of appeals of criminal convictions from tribal courts to federal district courts, objected to the bill's provision for trial de novo in the district court because it would severely restrict the functions of the tribal courts. The Pima-Maricopa claimed that law enforcement on the reservation would suffer as a result. The United Sioux Tribes expressed opposition because Indians could not afford to pay for the legal representation needed in federal court, and the American Civil Liberties Union called for absolute right to appointed counsel not provided by the 1964 Criminal Justice Act. The Mescalero Apache suggested that cases be remanded to the tribal courts upon a finding of error. The Fort Belknap attorney concurred, urging that this procedure would serve as a training device and improve the quality of the tribal courts. The attorney warned, however, that S. 962 like S. 961, would impose an impossible financial burden for review by federal courts and almost certainly would require the tribes to keep fuller court records, use proper procedures, and hire prosecutors.

The Department and the BIA were opposed to S. 962. The Department had appellate jurisdiction over Courts of Indian Offenses and was unwilling to surrender it. It suggested that the district courts should be empowered to review reservation court decisions only upon the full exhaustion of the administrative remedy. But the Department's insistence on retaining a role in the tribal justice system contradicted its earlier testimony to the effect that the Solicitor's office had

<sup>80</sup> 25 U.S.C. 1302(9).

<sup>81</sup> 25 U.S.C. 1302(10).

<sup>82</sup> 25 U.S.C. 1303.

<sup>83</sup> Burnett at 580-51, citing 1961 hearings, pt. 2, at 366 and 1963 hearing at 826 and 862.

<sup>84</sup> *Id.* at 581.

<sup>85</sup> *Id.* at 593. Burnett believed that Ervin's view of Indian civil rights was strongly colored by the experience of the Lumbees and Cherokees with constitutional form of government in North Carolina. Burnett at 574-76.

<sup>86</sup> Burnett at 593-94.

received no appeals from Courts of Indian Offenses. It became clear to Subcommittee counsel that the Department was fighting for a nominal power only, and had never regarded its appellate role with commitment.

As finally enacted, the act dropped the trial de novo provision and provided that the privilege of writ of habeas corpus would be available to any person in Federal court to test the legality of his detention by order of an Indian tribe.<sup>87</sup> According to one commentator:<sup>88</sup>

Senator Ervin apparently was convinced by arguments of many tribal attorneys and United States attorneys that trial de novo under S. 962 would put an intolerable strain on the district courts, already suffering from a chronic overload of cases.

Furthermore, the habeas corpus provision did little more than enact the ninth circuit's decision in *Colliflower v. Garland*<sup>89</sup> and *Settler v. Yakima Tribal Court*,<sup>90</sup> which, prior to the act, found that a Federal district court could issue writs of habeas corpus over both tribal courts and Courts of Indian Offenses, since these courts functioned as Federal agencies created by the BIA and were governed by the BIA's model code of Indian offenses.

#### (b) Expansion of jurisdiction under 28 U.S.C. 1331(a) and 28 U.S.C. 1343(4)

Following enactment of the Indian Civil Rights Act, the "chronically overloaded" Federal courts were hit with actions charging violations of the act. In most cases, the relief sought was equitable or money damages rather than the habeas corpus remedy provided for in the act. Courts quickly rejected the limited role of habeas corpus set forth in the statute for them and established a trend to take jurisdiction of all claims under the act, regardless of whether detention was involved, and to grant equitable and money damage relief in appropriate cases against tribes, tribal governing bodies, tribal court judges, and other tribal officials.<sup>91</sup>

The principal vehicles for this expansion of jurisdiction have been 28 U.S.C. 1331(a) [Federal question jurisdiction where the jurisdictional minimum of \$10,000 is met] and 28 U.S.C. 1343(4) [providing jurisdiction for relief under any act of Congress providing for the protection of civil rights]. The first reported cases under the act, *Dodge v. Nakai*,<sup>92</sup> and *Spotted Eagle v. Blackfeet Tribe*,<sup>93</sup> found jurisdiction under these statutes. In *Dodge*, a white legal services lawyer sought an injunction and money damages for exclusion from the reservation under order of the tribal council. He charged violations of 25 U.S.C. 1302(1) [free speech guarantees] and 25 U.S.C., section 1302(8) [due process rights]. In *Spotted Eagle*, the action was by tribal members against the Blackfeet Tribe to enjoin use of the tribal jail; to nullify the tribal law and order code; to require tribal judges to grant persons within their jurisdiction all rights enjoyed by defendants in State and Federal courts; plus other rights [such as the right to treatment rather than imprisonment for alcoholics], not

<sup>87</sup> 25 U.S.C., sec. 1303.

<sup>88</sup> Burnett at 240, note 240.

<sup>89</sup> 342 F.2d 369 (9th cir. 1965).

<sup>90</sup> 419 F.2d 486 (9th cir. 1965).

<sup>91</sup> Ziontz, "In Defense of Tribal Sovereignty: An Analysis of Individual Error in Construction of the Indian Civil Rights Act," 20 S.D.L. Rev. 1 (1975), at 21 [hereinafter cited as Ziontz].

<sup>92</sup> 298 F. supp. 26 (D. Arizona 1969).

<sup>93</sup> 301 F. supp. 85 (D. Montana 1969).

uniformly enjoyed by the general public; and for actual and punitive damages. Both courts found the power to exercise jurisdiction under 28 U.S.C. 1331(a). The *Spotted Eagle* court, however, refused jurisdiction for plaintiff's failure to meet the \$10,000 minimum.

(c) *Exhaustion of tribal remedies or limitation on Federal court intervention*

Exhaustion of tribal remedies is required as a matter of comity in furtherance of the Federal policy of preserving the unique sovereign and cultural identity of the tribes. *Janis v. Wilson*.<sup>94</sup> The requirement, however, is not inflexible. Case-by-case balancing is required, weighing the need to preserve cultural identity of the tribes by strengthening tribal courts against the need to immediately adjudicate the deprivation of individual rights. *O'Neal v. Cheyenne River Sioux Tribe*.<sup>95</sup> This general exhaustion requirement is unnecessary if, on balance, the merits for exhaustion might threaten constitutional guarantees of equal protection and due process. *Rosebud Sioux Tribe v. Driving Hawk*.<sup>96</sup>

In *O'Neal*, tribal members operated a ranch on the reservation on grazing land leased from the tribe with cattle purchased through a loan from the tribe. When the tribe foreclosed the loan and repossessed the cattle, the ranchowners brought an action for damages and an injunction under the due process provision of 25 U.S.C. 1302(8) and under the taking without just compensation provision of 25 U.S.C. 302(5). The district court dismissed for failure to exhaust tribal remedies, and the eighth circuit affirmed, rejecting plaintiff's position that since the purpose of the legislation was to give Indians the constitutional rights enjoyed by other Americans. Congress did not intend to require exhaustion of tribal remedies. The circuit court, however, viewed the Indian Civil Rights Act as seeking to protect and preserve the rights of individual Indian persons and that this was best done by maintaining Indian culture and strengthening tribal governments. In this regard, the exhaustion was consistent with the statute. The court then found that plaintiffs had two actions available to them in tribal courts.

In *Janis v. Wilson*,<sup>97</sup> the executive committee of the Oglala Sioux Tribal Council fired several members of a community health program because they had participated during regular work hours in public demonstrations advocating the overthrow of the tribal government. Plaintiffs brought an action charging violations of their right to free speech and association under 25 U.S.C. § 1302(1) and due process under 25 U.S.C. Section 1302(8).

The court found that further resort to tribal administrative remedies was not required but remanded to the district court to give plaintiffs an opportunity to show that resort to the tribal judiciary would also be futile. Similar to *O'Neal*, plaintiffs had argued that the tribal court was subservient to the executive committee which had fired them, that it had no jurisdiction over the tribe in an original action, and that it did not have appellate jurisdiction over decisions by the tribal personnel evaluation committee.

At least one court has found that nonexistence of tribal procedures for handling internal political disputes, not specifically provided for

<sup>94</sup> 521 F.2d 724 (8th cir. 1975).

<sup>95</sup> 482 F.2d 1140 (8th cir. 1973).

<sup>96</sup> 534 F.2d, U.S. 2709 (8th Cir., March 5, 1976).

<sup>97</sup> 521 F.2d 724 (8th cir. 1975).

in the tribal constitution, does not justify immediate intervention by the Federal courts, since the council could promulgate and enforce ordinances and set up enforcement agencies. *McCurdy v. Steele*.<sup>98</sup> The case involved alleged violations of the Goshute tribal constitution with respect to candidate qualification, election results certification, and procedures for removal from office. While this decision favors the protection of tribal sovereignty intent of the act, its practical effect in an election dispute case is questionable since the party expected to provide rules by which the dispute will be settled is usually a party to the dispute, and can influence the outcome through the rules adopted or through the appointments made to any independent body assigned to resolve the dispute.<sup>99</sup>

The ninth circuit, in *United States ex rel Cobell v. Cobell*,<sup>100</sup> affirmed a district court's finding that a father who sought enforcement of a State custody order against a tribal court which had granted a temporary restraining order barring custody, lacked meaningful remedies in the trial court because the tribal judge's order had not contained an invitation to participate in the appellate processes and the judge had stated that only a Federal court order would cause him to rescind his action. The ninth circuit determined that the State had jurisdiction over custody of the children incidental to its jurisdiction over the parent's divorce and that the tribal law and order code had disclaimed jurisdiction over marriage, divorce, and adoption in favor of the State. The circuit court interpreted this as a relinquishment of jurisdiction over custody incident to divorce and rejected any concurrent jurisdiction in the tribal court over the case.

(d) *Lack of justiciable issue*

The only case declining Federal review to discuss this ground for refusing jurisdiction over a dispute was *McCurd v. Steele*,<sup>101</sup> which also found a failure to exhaust tribal remedies. On the lack of a justiciable issue, the court found that the tribal elections board had not certified a winner or determined whether contested, write-in ballots were valid under the tribal constitution and bylaws. Such a decision relating to the mechanics of a tribal election was an internal political matter which the tribe had to decide before there could be a controversy in a justiciable form over which the Federal court could exercise jurisdiction.

4. SOVEREIGN IMMUNITY OF TRIBE FROM SUIT

A court cannot take jurisdiction over an action brought against a government which has sovereign immunity from suit.<sup>102</sup> Because of their status as dependent sovereigns with authority over their internal affairs, absent qualification by treaty or Federal statute, tribes possess the immunity from suit of any sovereign. *United States v. United States Fidelity and Guarantee Co.*<sup>103</sup> This immunity is coextensive

<sup>98</sup> 503 F.2d 653, 656 (10th cir. 1974).

<sup>99</sup> See: *Rosebud Sioux v. Driving Hawk*, upholding the district court's appointment of a "special master" from the tribe to hear evidence on election disputes after finding that further attempts to exhaust tribal remedies would be futile.

<sup>100</sup> 503, F.2d 790 (9th cir. 1974) cert. denied, sub. non. *Sharp v. Cobell*, 421 U.S. 999 (1975).

<sup>101</sup> 503 F.2d 653 (10th cir. 1974).

<sup>102</sup> 395 U.S. 1 (1969); 312 U.S. 584 (1941).

<sup>103</sup> 309 U.S. 506 (1940).



with that of the United States,<sup>104</sup> and may not be waived except by express language; general jurisdiction statutes are not sufficient. *Thebo v. Choctaw Tribe*.<sup>105</sup>

After passage of the Indian Civil Rights Act, courts took jurisdiction of cases and either ignored the sovereign immunity from suit issue or found a waiver of immunity without discussing the basis for their decision. But in *Loncassion v. Leekity*,<sup>106</sup> the court faced the issue and held that while the act did not, in so many words, provide for waiver of immunity or for suits against the tribe, it did imply a waiver since that was the only way suits could be enforced. The court also found a waiver in the terms of the tribe's contract with the BIA for police services which provided for tribal liability for suits by persons against tribal responsibility for liability insurance. This reasoning violates the principle that there should be no implied waiver of immunity from suit. Even if an "overwhelming implication" test is used, there is not such a degree of evidence in the legislative history of the act to support such a finding. Furthermore, a finding of waiver of immunity rests on another questionable finding of federal courts: that habeas corpus was not the exclusive basis for their exercising jurisdiction. Finally, in finding a waiver by contract terms, the court ignored the established rule that waiver required a treaty or act of Congress for Indian tribes.

Following *Loncassion*, other courts have also implied a waiver of immunity.<sup>107</sup> Only *O'Neal v. Cheyenne River Sioux Tribe*,<sup>108</sup> citing an immunity from suit provision in the tribal code, found that the tribe had sovereign immunity from suit. Although *Daly* and *Brown* were decided within 2 months after the decision in *O'Neal*, neither was mentioned in finding that the tribe's immunity from suit was abrogated by the Indian Civil Rights Act. One reason for this discrepancy may be in the type of relief sought. *Daly* and *Brown* were reappointment cases in which the relief sought was equitable, while *O'Neal* was an action for wrongful taking of property which involved equitable relief and a claim for \$50,000 actual and \$1 million punitive damages.

A memorandum requested by the United States Supreme Court in connection with a pending petition for *certiorari* in *Thompson v. Tonasket*,<sup>109</sup> was prepared for guidance of the Justice Department in 1974.<sup>110</sup> The memorandum criticized the *Johnson* and *Loncassion* line of cases as violative of the doctrine requiring express waiver of sovereign immunity laid down in *Edleman*, *Thebo*, and *Adams*. The memorandum also argued that if Federal courts had jurisdiction over 25 U.S.C. Section 1302 cases, suits could be brought against tribal officials for violations of the act but the tribes themselves were immune from suit.

<sup>104</sup> 453 F.2d 152 (9th cir. 1971).

<sup>105</sup> 66 F. 372 (8th cir. 1895).

<sup>106</sup> 334 F. Supp. 370 (D.N.M. 1971).

<sup>107</sup> See *Johnson v. Lower Elcha Tribal Community*, 484 F. 2d 200 (9th cir. 1973); *Brown v. United States*, 486 F. 2d 648 (8th cir. 1973); *Daly v. United States*, 483 F. 2d 700 (8th cir. 1973).

<sup>108</sup> 482 F.2d 1140 (8th cir. 1973).

<sup>109</sup> 187 F.2d 316 (9th cir. 1973).

<sup>110</sup> Memorandum of Law and Accompanying letter from Kent Frizzell, U.S. Dept. of Interior, to Lawrence G. Wallace, Dep. Solicitor General, U.S. Dept. of Justice, May 22, 1974, cited in Ziontz at 44

The memorandum reasoned by analogy to the sovereign immunity of the States under the 11th amendment and the qualified immunity for officials provided for in *Scheuer v. Rhodes*.<sup>111</sup> Furthermore, the memorandum stated that waiver of sovereignty for tribes posed dangers to Federal policy of self-government and, more importantly, posed serious danger to the parallel Federal aim of aiding tribes in achieving economic independence not depleting limited tribal resources, since the tribes would be forced not only to pay money judgments in various instances, but also, in a much broader range of instances, to expend substantial funds to employ or retain tribal counsel. Finally, the memorandum argued that the 25 U.S.C. 1303 habeas corpus remedy was the only remedy available under the act. This is an important aspect of the argument against waiver of sovereignty immunity since if jurisdiction were limited to habeas corpus, there would be no sovereign immunity problem. A subsequent Justice Department memo agreed that neither 28 U.S.C. 1343(4) nor the ICRA had the effect of waiving sovereign immunity from suit by tribes who were protected, just as the States were immune under the 11th amendment and the United States under the sovereign immunity principle.<sup>112</sup>

#### 5. CASES BY SUBJECT MATTER

##### (a) *Free exercise of religion, freedom of speech, press and assembly*

(1) *Free Exercise of Religion*.—A prime factor in the Ervin subcommittee's decision to hold hearings on deprivations of Indian civil rights was the decision in *Native American Church v. Navajo Tribal Court*.<sup>113</sup> In that case, the Tenth Circuit held that the First Amendment guarantee of the right to free exercise of religion was not applicable to the Navajo Tribal Government, since both the First and 14th amendments were restrictions on Federal and State, but not on tribal government. The decision let stand a tribal ordinance banning the use of peyote which was used by members of the Native American Church in religious ceremonies.<sup>114</sup>

At hearings by the Ervin subcommittee, church members complained of police harassment and employment discrimination by both tribal and BIA officials.<sup>115</sup>

The *Native American Church* case illustrated the paradox created by the interaction of Anglo-American culture and government with that of the tribes. Religious practices, which often antedate modern Navajo tribal government, were outlawed and church members forced to resort to civil rights actions, themselves an infringement on tribal sovereignty if successful, to gain acceptance of what was once an accepted traditional religious practice of the tribe.

As a result of this and other testimony, S. 961, the original Ervin proposal for an Indian bill of rights included a provision which would have incorporated the first amendment guarantees of free exercise,

<sup>111</sup> 94 S.Ct. 1683 (1974).

<sup>112</sup> Memorandum for the United States as *amicus curiae*, *Thompson v. Tonasket*, 487 F.2d 316 (9th cir. 1973) *cert. denied*, 95 S.Ct. 132 (1974).

<sup>113</sup> 272 F.2d 131 (10th cir. 1959).

<sup>114</sup> See also, *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 1954). Action charging infringement of religious freedom of Protestants in a Catholic pueblo dismissed by Federal court for lack of jurisdiction.

<sup>115</sup> 1961 Hearings, pt. 2, at 467-68.

and nonestablishment, of religion. In response to testimony that the prohibition against establishment would disintegrate the theocratic tribes, such as the Pueblos, the final version contained only the free exercise guarantee.<sup>116</sup>

As noted previously, prior to the Indian Civil Rights Act, Federal courts did not have to distinguish between the requirements of non-establishment and free exercise because, where they overlapped, they were mutually reinforcing. After the ICRA, courts had to respect establishment of religion to the point of allowing tribal government involvement in religious practices which result in psychological pressures on the individual to conform while at the same time assuring the individual's right to free exercise. The practical effect of the free exercise clause in a theocracy, it was suggested, should be to proscribe only overtly coerced involvement in community practices or overt prohibition of divergent practices.<sup>117</sup> For example, members of the Native American Church testified that they were prohibited from using communal grazing areas by tribal authorities because of their religious beliefs.<sup>118</sup>

There have been no reported cases charging violations of the free exercise of religion provisions of the Indian Civil Rights Act.<sup>119</sup> Significantly, in 1965, prior to the passage of the act, the Navajo Tribal Council amended its peyote ordinance to permit members of the Native American Church to use peyote in connection with their religious practices and passed a tribal bill of rights.<sup>120</sup>

#### (b) Freedom of speech

Although free speech is an unquestioned right under the U.S. Constitution, it has not been so in Indian culture.<sup>121</sup> Historically, tribes have been homogenous communities which have traditionally suppressed open internal conflict or partisanship, thus full protection for free speech could undermine cultural value.<sup>122</sup>

The first case under the Indian Civil Rights Act gave a graphic illustration of this conflict between tribal and non-Indian concepts of free speech. In *Dodge v. Nakai*,<sup>123</sup> the principal plaintiff was a non-Indian lawyer (Mitchell) who was director of a Navajo OEO legal services program (DNA). He became the center of a dispute between the Navajo Tribal Council and the legal services program over the independence of DNA from the council. Efforts by the tribal council to renegotiate DNA's contract and remove Mitchell as director were rejected by DNA's board of directors. In the middle of the dispute, representatives of the Department of the Interior came to the reservation to explain the recently enacted Indian Civil Rights Act. At a meeting with a council advisory committee, a council member asked

<sup>116</sup> Comment: "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 Harv. L. [hereinafter cited as Harvard note] Rev. 1344, 1359 (1969), 1965 Hearings at 18, 21, 221; Staff of Subcommittee on Constitutional Rights of Senate Committee on the Judiciary, 89th Cong., 2d sess. Constitutional Rights of the American Indian (com. print 1966).

<sup>117</sup> Harvard note at 1364-65.

<sup>118</sup> 1961 Hearings at 98.

<sup>119</sup> 25 U.S.C. 1302(1).

<sup>120</sup> Ziontz, at 7, note 22.

<sup>121</sup> It can be argued that legal protection of first amendment free speech rights have only been afforded up to the point where it becomes dangerous to the majority view of society. At that point, courts have often stepped in to "protect" the community from dangerous outside speech. In this sense then, Anglo-American concepts of free speech may be only relatively different from those of the tribes but not absolutely.

<sup>122</sup> Fretz "The Bill of Rights and American Indian Tribal Governments," 6 Nat. Res. J. 581, 609-610.

<sup>123</sup> 298 F. Supp. 26 (D. Ariz. 1969).

whether the statute would prevent the tribe from evicting a person from the reservation. Mitchell, who was present, allegedly laughed in a scornful manner and was admonished. The next day, he was confronted by a council member, struck, and told to leave the council chambers. In subsequent action, the committee passed a resolution excluding him from the reservation. Mitchell then sued to enjoin enforcement of the order and asked for \$10,000 in damages in Federal district court.

On the merits, the court recognized the tribe's power over persons under treaty provisions, but said that the Indian Civil Rights Act had imposed new responsibilities on the tribe with respect to the manner in which it could exercise its governmental powers and the objectives it could pursue. Assuming the laugh was as described by the tribe, the court said, exclusion for that reason was unlawful as lacking in due process under 25 U.S.C. 1302(8) and as abridging freedom of speech under 25 U.S.C. 1302(1). Attempts by the tribe to remove Mitchell as director for DNA for his role in a school dispute was abridgment of freedom of speech granted to both the lawyer and his clients. The *Dodge* court case shows a failure to apply its free speech test in a cultural context. Implicit in the decision is a value judgment based on Anglo-American models.<sup>124</sup> Furthermore, the decision points up possible problems created by Senator Ervin's late amendment of the ICRA to cover all persons rather than tribal members alone.

One commentator has argued that free speech guarantees should not prohibit tribes from excluding nonmembers from the reservation for political agitation as in the *Dodge* case,<sup>125</sup> because cultural autonomy is not compatible with political pressure from outside. Unfortunately, the irony, as in the free exercise of religion situation, is that some tribal governments have, through their organization under the IRA and Federal support, solidified power and abused the rights of dissident persons, both members and nonmembers. One Federal action may now require further Federal intrusion to remedy the ill, but the risk is that the remedy will only lessen tribal sovereignty without curing the ill. For example, in two cases arising on the Pine Ridge Reservation of the Oglala Sioux, *Janis v. Wilson*,<sup>126</sup> and *Means v. Wilson*,<sup>127</sup> dissident tribal members relied on the ICRA to fight employment discrimination and election irregularities by the tribal governments in power. In *Means*, plaintiff was an unsuccessful candidate for tribal council president who charged the incumbent president, council, and election board with election irregularities in violation of his right to a fair election under various sections of the act including section 1302(1).

#### c. Equal protection

The Indian Civil Rights Act of 1968 provides that no tribe exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of the law.<sup>128</sup> This requirement was not contained in initial legislative proposals but was added later in

<sup>124</sup> See Ziontz at 48-52.

<sup>125</sup> See also 1961-63 Senate hearings 120-21, 149 1965 Senate hearings 265; 1968 House hearings 94-99. In 1965, a Catholic priest was excluded from the Isleta Pueblo for attacking tribal religion, refusing sacraments to those participating in tribal customs, and advocating political reforms and changes in the government structure.

<sup>126</sup> 521 F.2d 724 (8th cir. 1975).

<sup>127</sup> 522 F.2d 833 (8th cir. 1975).

<sup>128</sup> 25 U.S.C., Section 1302(8).

response to substitute legislation recommended by the Department of the Interior at subcommittee hearings on the bill.<sup>129</sup>

As proposed by the Interior Department, equal protection guarantees would be extended only to members of the tribe. Senator Ervin redrafted S.961 to include the equal protection guarantee but expanded it to apply to any person including members of the tribe.<sup>130</sup>

The inclusion of an equal protection guarantee raised the question of whether alleged violations are to be tested by Indian or by Anglo-American constitutional standards.<sup>131</sup> Courts have generally held that the act's equal protection guarantees must be read against the background of tribal sovereignty and interpreted within the context of tribal law and custom.<sup>132</sup> Thus, the desirability of preserving unique tribal cultures and the continued validity of tribal governments counsels great caution in applying traditional principles of construction to Indian tribal governments.<sup>133</sup> At a minimum, equal protection in a tribal context requires that existing tribal law be applied with an even hand rather than being arbitrarily enforced in some cases and not in others.<sup>134</sup> In applying this test in cases involving legislative reapportionment, membership in the tribe for voting purposes, enrollment, residency requirements, and fair elections, courts have tended to modify traditional equal protection concepts to fit particular tribal customs or special tribal governmental purposes to the extent that those customs or purposes do not resemble those of Anglo-American culture and government.<sup>135</sup>

(1) *Legislative reapportionment.*—Equal protection guarantees posed two problems for tribes in regard to their governing bodies. In some tribes, the governing body was appointed rather than elected. For example, the Pueblos are theocracies whose council and governor are generally appointed by a nonelected group of religious leaders called Caciques. In some cases, this arrangement has been modified to allow the members to vote for candidates for tribal office chosen by the Caciques who continue to exercise veto powers through their religious influence.<sup>136</sup> This was seen to create possible problems with requirements of an election under a republican form of government.<sup>137</sup> On the other hand, where tribes did elect officials, equal protection created possible requirements that the council be elected by people from equal population districts.<sup>137a</sup>

The problem of appointed rather than elected councils appears to have been resolved by the holding in *Groundhog v. Keeler*,<sup>138</sup> that nothing in the Indian Civil Rights Act or its history indicated any intent to require that a tribe select its leaders by elections. Legislative apportionment in tribes with elected councils, however, has created problems as courts have applied the one-man, one-vote standards of *Baker v. Carr*.<sup>139</sup> One case has held that in light of the quasi-sovereign

<sup>129</sup> Summary Report of the Constitutional Rights of American Indians of the Senate Subcommittee on Constitutional Rights, of the Senate Judiciary Committee 89th Cong., 2d sess., at 9-10.

<sup>130</sup> Burnett, at 602, note 239.

<sup>131</sup> Harvard note at 1360.

<sup>132</sup> *Martinez v. Santa Clara Pueblo*, 420 F. supp. 5, 18 (D.N.M. 1975).

<sup>133</sup> *Means v. Wilson*, 522 F.2d 833, 842 (8th cir. 1975).

<sup>134</sup> *Martinez v. Santa Clara Pueblo*, *supra*.

<sup>135</sup> *Means v. Wilson*, *supra*.

<sup>136</sup> See *Martinez v. Santa Clara Pueblo*, *supra*.

<sup>137</sup> Harvard note at 1361.

<sup>137a</sup> Harvard note at 1360, noting that equal population has been deliberately departed from on reservations occupied by more than one tribe but only one council.

<sup>138</sup> 442 F.2d 674, 682 (10th cir. 1971).

<sup>139</sup> 369 U.S. 186 (1962).

status of tribes, they are entitled to determine the extent to which the franchise is to be exercised in tribal election, absent explicit congressional legislation to the contrary.<sup>140</sup> Nevertheless, in *White Eagle v. One Feather*,<sup>141</sup> an action was brought to enjoin a general tribal election and require reapportionment of election districts of the Standing Rock Reservation. The court held that 25 U.S.C. 1302(8) included the one-man, one-vote principle, but reversed the district court's injunction because of insufficient evidence of population distribution. Noting that the tribe had established voting procedures paralleling those found in Anglo-American culture, the court said:<sup>142</sup>

Here, then, we have no problem of forcing an alien culture, with strange procedures, on this tribe. What the plaintiffs seek is merely fair compliance with the tribe's own voting procedures in accordance with the principles of *Baker v. Carr*, *supra*, and subsequent cases.

The eighth circuit in two subsequent cases, followed *White Eagle* in laying down a rule that the one-man, one-vote principle of equal protection under the 14th amendment is applicable to the tribes under 25 U.S.C. 1302(b), where the tribe has adopted election procedures analogous to those found in Anglo-American culture.<sup>143</sup>

In *Daly*, the court found that in designing their apportionment plan and election rules, the Crow Creek Sioux were entitled to set requirements they found appropriate so long as they were uniformly applied in all districts, but in this case, the variations between the number of eligible voters per council member far exceeded those allowed State legislatures. Reapportionment was ordered based on tribal population rather than eligible voters, with appropriate amendments of the tribal constitution and recommendations for inclusion of periodic review of apportionment provisions.<sup>144</sup> Reapportionment on the basis of either population or qualified voters is permitted where the tribal constitution specifies the basis for apportionment.<sup>145</sup> This was not the case in *Daly* where the constitution was silent on the basis for apportionment, and the court applied population as the preferable standard.<sup>146</sup>

(2) *Fair election practices.*—Federal courts have been called upon to act as mediators of election disputes among opposing factions in the same tribes. It is questionable whether such intervention was intended by the Indian Civil Rights Act, and courts have exercised a sometimes stated presumption against interference in tribal election matters.<sup>147</sup>

The leading case involving tribal election irregularities was *Means v. Wilson*.<sup>148</sup> Means and his supporters sued Wilson, the incumbent council president and election winner, the Oglala Sioux Tribal Council, and the tribal election board for election irregularities in violation of their right to a fair election under 25 U.S.C. 1301(2), 1302(1), and 1302(8), as well as other Federal statutes barring private conspiracies depriving a person of the equal protection of the law. The eighth circuit held that the standard for setting aside a tribal election had to be at least as

<sup>140</sup> *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1311 (8th cir. 1975).

<sup>141</sup> 487 F.2d 1311 (8th cir. 1973).

<sup>142</sup> *Id.* at 1314.

<sup>143</sup> *Daly v. United States*, 483 F.2d 700, 701-02 (8th cir. 1973); *Brown v. United States*, 486 F.2d 653, 661-62 (8th cir. 1973).

<sup>144</sup> *Daly v. United States*, *supra* at 707.

<sup>145</sup> *Brown v. United States*, *supra*.

<sup>146</sup> See also *St. Marks v. Caman*, Civ. No. 2028 (D. Mont. Jan. 1971). Reapportionment required in election of at-large member of Chippewa-Creek Tribal Council.

<sup>147</sup> But, see DeRairner "The Indian Civil Rights Act of 1968, and the Pursuit of Responsible Tribal Self Government," 20 S.D.L. Rev. 59 (1975) (Arguing that there are situations in which tribal government at least deserves respect.)

<sup>148</sup> 522 F.2d 833 (8th cir. 1975).

restrictive as that applied in non-Indian local election cases under the Constitution. This required that an intentional deprecation or interference with the right to vote or participate in government be found, and the court found a basis for the claim against the election board.

In *Luxon v. Rosebud Sioux Tribe of South Dakota*,<sup>149</sup> a member of the Rosebud Sioux brought an action for declaratory relief and an injunction against enforcement of a provision in the tribal constitution which disqualified any employee of the Public Health Service or Department of the Interior from the candidacy for tribal council, charging violations of the equal protection section of 25 U.S.C. section 1302(8). The eighth circuit decided the case on jurisdictional ground and remanded to the district court which held that the plaintiff's disqualification, solely on the basis of his employment with PHS, was a denial of equal protection and ordered a new election with his name on the ballot.

One writer has questioned the decision in *Luxon* as operating against strong tribal interest in excluding certain employees from public office, arguing that given the relationships between BIA and PHS personnel and tribal members dependent on them for services, such persons would be in a strong position to grant favors.<sup>150</sup> Such exclusions are also partially explained by tribal hostility and mistrust of Federal officials as outsiders and oftentimes adversaries.

(3) *Age and residency requirements for voting.*—The 26th amendment has been held not to be applicable to tribal elections; the equal protection clause of the Indian Civil Rights Act also does not limit a tribe's power to fix 21 as the voting age in tribal elections.<sup>151</sup> In that case, one 18-year-old and one 19-year-old were prevented from voting. The court also said that the 1970 Voting Rights Act was not applicable to tribes under the Indian Civil Rights Act because tribes were neither States nor political subdivisions of the State.<sup>152</sup>

Absentee voting by off-reservation tribal members has raised questions of violations of equal protection under 25 U.S.C. section 1302(8). No cases have dealt with the issue yet, but a letter from the Associate Solicitor (March 31, 1972) advised the Department of Justice against instituting litigation regarding prohibitions of absentee voting by off-reservation voters who had lived for at least 1 year on the reservation, but did not at the time of voting. The Associate Solicitor termed this view incorrect and stated that the Supreme Court's decision on voter residency in *Dunn v. Blumstein* need not necessarily affect tribal election requirements, especially where a majority of the members resided off the reservation. In such cases, off-reservation votes could terminate the tribe's status as a landed sovereign.

(4) *Enrollment and membership in the tribe.*—Equal protection guarantees in the Indian Civil Rights Act create special problems because of the common use of minimum percentage of Indian ancestry to determine membership in the tribe, voting eligibility, and right to inherit property. A complete prohibition on racial distinctions be-

cause of equal protection requirements would destroy the tribe since it would have to accept any outsider who wanted membership.<sup>153</sup> If enough people exercised the "right" to join the tribe, in time this would dilute the tribe's culture and deplete its limited resources.

Prior to the Indian Civil Rights Act, courts had ruled that tribes had complete authority to determine all questions concerning their own membership as a necessary incident to their sovereign status.<sup>154</sup> Courts have generally remained sensitive to the critical importance of maintaining tribal culture through control of membership under the Indian Civil Rights Act but this control is no longer absolute, and there is some indication that courts will be willing to interfere where the classification is not based in traditional tribal custom or law.

Most cases involving equal protection challenges to membership classifications based on blood quantum or some other criteria have required that the equal protection guarantee of the Indian Civil Rights Act be read against the backdrop of tribal sovereignty, law, and custom. For example, in *Martinez v. Santa Clara Pueblo*,<sup>155</sup> the court refused to invalidate a tribal membership ordinance which denied membership to children of female, but not male, members of the pueblo who had married non-members, where the classification attacked was one based on criteria traditionally employed by the tribe in considering membership questions.

The Tenth Circuit, in *Slattery v. Arapahoe Tribal Council*,<sup>156</sup> declined to rule on whether tribal enrollment procedures were subject to equal protection and due process requirements under 25 U.S.C. section 1302(8) because the complaint did not disclose sufficient facts to show that the ordinance had been applied in a discriminatory manner. Denial of membership for insufficient blood quantum under the ordinance itself, which was not questioned at all, was not found to be violative of equal protection or due process. The ordinance challenged enrollment denied to the children of an Arapahoe woman and a non-Indian man because they did not have the required one-fourth blood quantum. The mother argued that the ordinance was applied arbitrarily. This distinction between the challenge to the ordinance as against a challenge to its application is important because *Slattery* is often distinguished on its facts, due to the insufficient complaint, as not barring Federal court intervention in enrollment cases for equal protection violations. Following *Slattery*, the Assistant Solicitor's letter (June 30, 1972) considered whether, in light of that case, the Department of Interior should abandon its previous position that the equal protection provision of the Indian Civil Rights Act applied to enrollment criteria. The letter concluded that *Slattery* should not deter the Department from continuing to assert that tribal ordinances, even enrollment ordinances, had to meet the strictures of equal protection under the act. *Slattery* was distinguished as limited to its facts and turning on the insufficiency of the complaint.<sup>157</sup>

<sup>149</sup> Harvard Law Note at 1361-62.

<sup>154</sup> See *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915 (10th cir. 1957).

<sup>155</sup> 402 F. Supp. 5 (D.N.M. 1975).

<sup>156</sup> 453 F.2d 278 (10th cir. 1971).

<sup>157</sup> See also letter of the Assistant Secretary of the Interior (Feb. 25, 1971) to the Shoshone Business Council in which he disapproves a proposed resolution of the Council which contained an enrollment provision similar to the one in *Martinez* as a violation of equal protection.

<sup>140</sup> 455 F.2d 698 (8th cir. 1972).

<sup>150</sup> Zlontz at 51.

<sup>151</sup> *Wounded Head v. Tribal Council of Oglala Sioux Tribe of the Pine Ridge Reservation*, 507 F.2d 1079 (8th cir. 1975).

<sup>152</sup> See also Memo. Solicitor. M-36840 (Nov. 9, 1971) to the same effect but nothing that definitions of "adult Indian" in Federal laws and regulations had been changed from 21 to 18 years old.

The Department of Interior's position on applying equal protection requirements to enrollment criteria is based on an early Solicitor's opinion, which followed passage of the act, in which a provision of the Jicarilla Apache tribal constitution placing more restrictive membership requirements on illegitimate children than other persons was considered.<sup>158</sup>

The Indian Civil Rights Act was viewed as placing equal protection restrictions on the tribe's former complete authority to determine questions of membership. Denial of rights to illegitimate persons to membership was considered to be not a rational exercise of governmental power in the deterrence of illicit conduct and not based on an essential requirement of the tribe. The opinion then suggests that there would be no equal protection problem were the tribe to establish a rebuttable presumption that an illegitimate child possessed no more than one-half the blood quantum shown for his mother or father on the tribal membership roll, since the Solicitor viewed blood quantum as an essential requirement of the tribe.

The Interior Department has also applied this "essential requirement of membership" standard to void membership provisions for sex discrimination and residency requirements. The Assistant Secretary of the Interior, in a letter (February 23, 1972), considered several provisions of the constitution and bylaws of the Colusa Indian Community in California which governed the adoption into the band of persons of one-half or more Indian blood related by marriage or descent to members of the band who had resided in the community for at least 2 years prior to application for membership. This residency requirement was held to be valid and not in violation of 25 U.S.C. Section 1302(8), but another section which excluded an Indian wife of a non-Indian husband from eligibility into the band was held to be impermissible sex discrimination, as was a third section which provided for loss of membership by a female member who married a nonmember.

One Federal district court has held that loss of membership by a Colville woman through marriage to a Canadian Indian was not a Federal question over which the court had jurisdiction.<sup>159</sup>

#### (d) Due process

Strict application of the full panoply of due process safeguards which have developed under the Constitution creates significant problems for many tribes for a variety of reasons. First, lack of resources, both financial and technical makes it impossible for all but the most affluent tribes to provide the necessary hearings and notice required by procedural due process concepts. Second, informality in tribal governments is often the rule. Most tribes have not adopted a bureaucratic mentality.<sup>160</sup> Third, a traditional cultural value makes the good of the community primary rather than the rights of the individual. In this context, fairness in the procedures used to reach the communal end has a different meaning than that usually applied to constitutional due process guarantees.

Cases charging due process violations have arisen most often with regard to enrollment or membership and election disputes. At a mini-

<sup>158</sup> Op. Dep. Sec. M-36793 76 I.D. 353 (1969).

<sup>159</sup> *Hein v. Nicholson*, Civ. No. 3459 (D. Wash. Nov. 30, 1971).

<sup>160</sup> Ziontz, at 47.

num, 25 U.S.C. Section 1302(8) requires that certain aspects of procedural due process, principally notice and a hearing, must be observed in granting or denying benefits of tribal membership.<sup>161</sup>

The right to procedural due process under 25 U.S.C. 1302(8) has also been upheld where a tribe divided the possessory land holdings of a member's father and assigned the land to another member.<sup>162</sup> In a case not decided on the merits by the eighth circuit because of failure to exhaust remedies, the district court found that due process requirements of 25 U.S.C. 1302(8) were met where tribal employees, terminated for political activity against the tribal government during work hours, were given a post-termination hearing. No pretermination hearing was required by due process, the court ruled.<sup>163</sup>

Most due process cases have involved election disputes. In *Solomon v. LaRose*,<sup>164</sup> five electees to the Winnebago tribal council challenged the right of the incumbent tribal council to exclude them from council seats in violation of the tribal constitution and bylaws and due process guarantees of 25 U.S.C. 1302(8). The court, in granting a temporary injunction, stated that:<sup>165</sup>

Due process is more than requiring that a government's decision be based upon national evidentiary basis and that certain concomitants of procedural safeguards be observed, but entails the overriding notion that government must operate within the bounds of the instrument which created it.

The danger of the *Solomon* case is its implicit view that Federal courts will interpret the governing documents of a tribe according to Anglo-American standards.<sup>166</sup>

In *Luxon v. Rosebud Sioux Tribe*,<sup>167</sup> the court dismissed for lack of jurisdiction an action which challenged on due process and equal protection grounds a provision of the tribe's constitution which disqualified any employee of the PHS or Department of the Interior from candidacy for tribal council.<sup>168</sup> The ninth circuit has recently upheld a tribal 1-year residency requirement for candidates seeking public office as not in violation of due process or equal protection guarantees.<sup>169</sup>

Another critical area involving due process guarantees is that of exclusion from the reservation. When the Indian Civil Rights Act was passed, it was felt that due process requirements, coupled with the prohibition of bills of attainder, could create problems for tribal governments which sought to exclude persons from the reservation, especially where there were functionally separate tribal courts.<sup>170</sup> The first case under the act realized this fear. In *Dodge v. Nakai*,<sup>171</sup> the court overturned the order of a subcommittee of the tribal council excluding a nonmember attorney from the reservation. In doing so, the court stated that due process required governmental entities to utilize reasonable means in seeking to achieve legitimate ends. Banishment was

<sup>161</sup> See *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5 (D.N.M. 1975).

<sup>162</sup> *Crow v. Eastern Band of Cherokees, Inc.*, 506 F.2d 1231 (4th cir. 1974).

<sup>163</sup> *Janis v. Wilson*, *supra*, note 94.

<sup>164</sup> 355 F. Supp. 715 (D. Neb. 1971).

<sup>165</sup> *Id.* at 723.

<sup>166</sup> See, also *Williams v. Sisseton Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194 (D.S.D. 1975).

<sup>167</sup> *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698 (8th cir. 1972).

<sup>168</sup> Ziontz argues that this type of disqualification represents a legitimate tribal interest in light of tribal sovereignty.

<sup>169</sup> *Howlett v. The Salish and Kootenai Tribe of the Flathead Reservation*, Civ. Civ. No. 75-1478, 529 F.2d 233 (Jan. 22, 1976) (9th cir. Jan. 22, 1976).

<sup>170</sup> Harvard note at 1365.

<sup>171</sup> 298 F. Supp. 26 (D. Arizona 1969).

found to be a severe remedial device, and nonmembers on the reservation were found to be entitled to the assurance that they would not be subject to summary ejection from their homes and place of employment because of the disfavor of a ruling segment of the tribe. One commentator has argued that due process requirements in such cases should be less stringent for tribal members than for nonmembers because when the traditional interest of the tribe in controlling its membership and territory is weighed against individual interest, exclusion means a greater loss of benefit, similar to banishment from one's country, to a member than a nonmember.<sup>172</sup>

(e) *Property disputes*

A leading case in this area is *Crow v. Eastern Band of Cherokee Indians, Inc.*, 127 506 F.2d 1079 (4th Cir. 1975). A Cherokee tribal member brought an action charging violation of equal protection and due process guarantees of 25 U.S.C. 1302(8) by the tribal government in dividing her father's possessory land holding and assigning it to others. The fourth circuit held that under the ICRA the plaintiff was entitled to procedural due process incident to the property division, as well as an even handed application of tribal customs, tradition and any formalized rules relative to tribal land. Federal courts, however, do not have power to go beyond due process to rule on the merits since there was nothing in ICRA which swept aside Indian sovereignty over property law. If there were, it would conflict with the policy of the Indian Reorganization Act. The circuit court observed the district court had not taken into account the communal nature of Cherokee land ownership and appeared to be applying Anglo-American real property principles which were incompatible with the fact that Indian lands belonged to the tribe or community, rather than to individuals severally or as tenants in common. Indian customs and traditions were to be used as guides rather than the technical rules of common law.

The *Crow* holding is consistent with ICRA policy favoring tribal sovereignty and statements by the Ervin subcommittee that the ICRA was not intended to apply full equal protection and due process guarantees and the attendant dislocations in too quickly subjecting tribal governments to a sophisticated legal structure.

In *Johnson v. Lower Elwha Tribal Community*, 128 484 F.2d 200 (9th Cir. 1973), plaintiff challenged revocation of his land assignment without meaningful opportunity for a hearing by the tribal council as a violation of equal protection and due process. While the case was decided on jurisdictional grounds, *Johnson* contains a footnote discussion of the meaning of due process under 25 U.S.C. 1302(8) in which the court stated that:

There may be some provision of the Indian Civil Rights Act that under some circumstances may have a modified meaning because of the special historic nature of particular tribal customs or organization. However, this is not one of them.

As support for its position, the court quotes a reaction from the Ervin subcommittee hearing which says, with certain exceptions, the same limitations and restraints as those imposed on the U.S. Government by the Constitution are to be imposed on tribal governments ex-

<sup>172</sup> Harvard note at 1365-66.

ercising powers of self-government. The *Johnson* court says this view supports its finding that the clear intention of the subcommittee was that due process requirements be interpreted in the same manner as is applied to the United States or individual States. The court also noted that the tribal constitutions provide that members may not be denied rights or guarantees, including due process, enjoyed by citizens under U.S. Constitution.

One court has recognized that tribes have the power of eminent domain. In *Seneca Constitutional Rights Organization v. George*, 130 348 F. Supp. 51 (D.N.Y. 1972), plaintiff sought to prevent the Seneca Nation from signing or implementing an agreement with a corporation which wished to locate a factory in an industrial park to be developed by the Nation. Among his claims for relief, the plaintiff charged that the Seneca Nation lacked the power of eminent domain. The court held that the Nation had eminent domain power as an inherent right of sovereignty except where restrictions were placed on it by the United States and that 25 U.S.C. 1302(5) was a Congressional recognition of the power of eminent domain.

(f) *Criminal procedures and ordinances*

(1) *Attorney cases.*—It has been held that 25 U.S.C. 1302(6), guaranteeing the right to defense counsel in one's own defense, prohibits a tribal judge and chief of police from denying an Indian the right to retain a professional defense attorney in his own defense.<sup>173</sup> Another court reasoned that professional attorneys were necessary to protect the habeas corpus power granted by the Indian Civil Rights Act. Such cases have generally rejected tribal arguments that 25 U.S.C. 1302(6) requirements are satisfied by permitting fellow tribesmen to represent plaintiffs in court.<sup>174</sup> These cases illustrate a realized fear of the tribes at the hearings on the Indian Civil Rights Act: introduction of professional attorneys into informal tribal settings and the inequality of resources where a tribe is too poor to employ professional counsel.

(2) *Jury trial.*—In *Low Dog v. Cheyenne River Sioux Tribal Court*,<sup>175</sup> the court struck down a provision of the tribal code which required a \$17 fee and a cash bond in order for a defendant to obtain a jury trial *de novo* on appeal of a conviction in tribal court. The court also found that the defendant was entitled to be informed of his right to appeal and a free jury trial. Furthermore, any sentence following conviction by jury on appeal could not exceed sentence received in the lower court and credit had to be given for pretrial confinement and confinement pending appeal. In *Claw v. Armstrong*,<sup>176</sup> a Federal district court ordered the tribal preparation of a procedure for granting jury trials in trial court under the 25 U.S.C. 1302(10) guarantee of the right to trial by jury of not less than six persons. The free jury trial requirement can be serious because of its potential impact on poor tribes.

(3) *Revocation of probation.*—Due process does not require a hearing before a trial court before revocation of suspended sentence for violation of parole.<sup>177</sup>

<sup>173</sup> *Claw v. Armstrong*, Civ. No. C-2307 (D. Colo. Aug. 7, 1970).

<sup>174</sup> *Toppersap v. Ft. Hall Indian Tribal Court*, Civ. No. 4-70-37 (D. Idaho Dec. 28, 1971).

<sup>175</sup> Civ. No. 60-21 C (D. S. Dak. Mar. 14, 1969).

<sup>176</sup> Civ. No. C-2307 (D. Colo. Aug. 7, 1970).

<sup>177</sup> *Richards v. Pine Ridge Tribal Court*, Civ. No. 70-74W (D. S. Dak., June 13, 1970).

(4) *Imprisonment for inability to pay fine.*—An indigent member of the Papago Tribe was jailed for inability to pay a fine imposed on conviction for theft. Defendant petitioned for writ of habeas corpus under 25 U.S.C. 1303, arguing that the Supreme Court's decision in *Tate v. Short*, 401 U.S. 395 (1971) holding that a person could not be imprisoned for inability to pay a fine was binding on tribal court through the equal protection clause of 25 U.S.C. 1302(8). The court granted the writ, declaring confinement unlawful but did not expressly hold that *Tate* was incorporated in 25 U.S.C. 1303(8).<sup>178</sup>

(5) *Unreasonable search and seizure.*—The right of persons to be secure in their persons, houses, papers, and effects against unreasonable search and seizure is contained in 25 U.S.C. 1302(2). The leading case, *Loncassion v. Leekity*,<sup>179</sup> concerns the shooting by a Zuni tribal police officer of a member of the Pueblo who was attempting to escape arrest for drunkenness. The member brought an action for damages under 25 U.S.C. 1302(2) and 25 U.S.C. 1302(8) charging that the officer was intentionally or grossly negligent and that the tribe was negligent in hiring and training the officer. The court held that the right to be free from excessive injurious force, arbitrarily inflicted, was among the rights protected under the Indian Civil Rights Act provisions on due process and unreasonable search and seizure.

*Loncassion* should also be noted for its finding that damages were allowable under the Indian Civil Rights Act, even though the statute makes no provision for them, because courts have the power to adjust remedies where Federal rights have been invaded. The court rejected sovereign immunity from suit for the tribe based on the statute and on finding a waiver in the terms of a contract between the Pueblo and BIA, whereby the tribe set up a law enforcement program and agreed to be liable for damages or injury to persons or property, attorney's fees and liability for damages or injury to persons or property, attorney's fees, and liability insurance for suits brought for wrongful conduct by tribal officers. The court allowed plaintiff's claim for damages resulting from the Pueblo's negligence in hiring and training its officers under the agreement with the BIA. Furthermore, the court applied *Bivens v. Six Unknown Named Agents*,<sup>180</sup> to hold the individual officer liable for violations of 25 U.S.C. 1302(2).

*Loncassion* has far reaching implications for tribes attempting to exercise sovereign powers. With limited financial resources, tribes may nevertheless be faced with large damage actions for injuries caused by tribal employees. The legal cost in defending against suits of this kind and the cost of insurance could also be prohibitive. Thus, at the same time Federal policy is encouraging tribes to expand their areas of responsibilities, the unavailability of financial support is operating to cut back the expansion. Finally, the effect of individual liability on tribal officers will harm recruitment of qualified personnel. Federal support for training tribal officers is limited.

The Indian Civil Rights Act of 1968 has also been used as the basis for a State court holding that the act did not create power in a tribal government to issue search warrants. In *State v. Railey*,<sup>181</sup> a Zuni tribal court had issued a search warrant. Evidence seized pursuant to

the warrant was admitted into evidence against the defendant at his trial in State court and conviction resulted. On appeal, the New Mexico appellate court overturned the conviction and ordered a new trial on the ground that the evidence was inadmissible in State court, since the tribe did not have power to issue search warrants. The provision in the Indian Civil Rights Act<sup>182</sup> prohibiting warrantless searches and requiring probable cause did not create power in the tribal government to issue search warrants. Using a rationale often employed by Federal courts in interpreting the act, a prohibition against warrantless searches and seizures of persons or property provision of habeas corpus for unlawful detention would be meaningless if no power in the tribal government to issue warrants existed.

Furthermore, the tribe does not draw its power to issue warrants from the Indian Civil Rights Act, but from its tribal sovereignty.

#### FINDINGS

One: Tribal Justice systems—police and courts—are evolving institutions.

Two: The design and structure of most existing tribal justice systems have been explicitly or implicitly imposed on tribes by the Federal Government.

Three: There is a significant need for tribal flexibility in the redesign and restructuring of these justice institutions.

Four: The Federal courts, through the Indian Civil Rights Act and 28 U.S.C. 1331(a) have become intimately involved in the functioning of tribal governments.

Five: The closer tribal governments come to non-Indian modes of government in structure and functioning—as opposed to any traditional systems—the closer they are held to American constitutional standards.

Six: Because of colonial status of many tribal economies, the financial burden must be borne by the Federal Government.

Seven: Tribal justice systems with proper funding are capable of, and are, providing effective delivery of services to all persons subject to their jurisdiction.

#### RECOMMENDATIONS

One: Congress should appropriate significant additional moneys for the maintenance and development of tribal justice systems.

(a) Funding should be channeled directly to tribes.

(b) Funding should specifically provide for making tribal courts, courts of record.

(c) This funding should provide tribes with the opportunity to revise existing systems in order to develop systems of their own choosing.

Two: Congress should provide for development of tribal appellate court systems.

(a) Appellate systems will vary from tribe to tribe and region to region.

(b) The development of appellate systems will require tribal experimentation and time.

<sup>182</sup> 25 U.S.C. 1302(2)

<sup>178</sup> In re Pablo, Civ. No. 72-99 (D. Ariz., July 21, 1972).

<sup>179</sup> 334 F. Supp. 370 (D. N. Mex., 1971).

<sup>180</sup> 403 U.S. 388 (1971).

<sup>181</sup> 87 N.M. 275, 532 P.2d 204 (1975).

(c) Congress should, by statute, recognize such appellate systems as court systems separate from State and Federal systems.

Three: Tribal court decisions should be entitled to "full faith and credit" by State and Federal courts.

Four: When tribal appellate systems—be they by individual tribes or multiribal—are firmly operative, the Federal court's role in review of their decisions should be limited exclusively to "writs of habeas corpus."

## VI. FINDINGS AND RECOMMENDATIONS

### A. GENERAL

#### FINDINGS

One: There is throughout all levels of American society substantial ignorance and much misinformation concerning the legal-political status of Indian tribes and the history of the unique relationship between the United States and Indian tribes.

Two: This ignorance and misinformation, particularly when found among all levels of government—Federal, State and local—has significant negative impact on Indian tribes.

#### RECOMMENDATIONS

One: Congress should require mandatory training concerning Indian history, legal status and cultures of all government employees administering any Federal program or State or local program funded in whole or in part by Federal funds.

Two: Congress should allocate sufficient resources so that a comprehensive program of Indian education for non-Indians can be conducted; such program should include:

(a) An evaluation of the history and civics curricula utilized by elementary, secondary, higher education institutions.

(b) The identification of gaps and inaccuracies in such curricula.

(c) The provision of model curricula which accurately reflects Indian history, tribal status and Indian culture.



## APPENDIX A

### SPECIAL PROBLEM AREAS: INDIAN WATER RIGHTS

#### INTRODUCTION

This portion of the report will concentrate on the jurisdictional aspects of Indian water rights. Other Task Forces will discuss in greater detail the derivation of those rights, the application and administration thereof, and the role of the trustee United States in the protection, conservation, and utilization of those rights. The purpose here is to chronicle the importance of water to tribal existence; the conflicts that exist between the tribes and several states in which they are located; and finally, the federal-tribal conflicts over the performance of the federal government in administering the trust owing to the Indians under the Constitution regarding their most invaluable of all natural resources, their water rights.

Survival for the American Indian ultimately boils down to the relationship he bears to the lands to which he has been confined. White Americans have always moved to new locations once the resources were exhausted. Not so with the Indians—the maintenance of viable tribal structures and cultures is geared directly to the land base and the development and utilization of their resources contained therein.

This rapport between the Indians and their land is difficult to comprehend, much less describe. Failure to take cognizance of the Indians' concept of nature and their relationship with the land they and their ancestors occupied since time immemorial is to ignore a crucial concept of any development program and to impair potential economic reservation development, development which is inseparable from Indian rights to the use of water, which is their most invaluable possession. For, without water, reservation lands, or any other lands for that matter, are virtually without any economic value.

The demands of national energy and the scarcity of water supply are closing in on the American Indians at a rate which heightens the need for protective legislation that, as applied to Indians and their water rights, will sufficiently embrace Indian intangibles. To the fullest extent possible, development should recognize a role for the special identification Indians have with their land, water, and related natural resources.

#### INDIAN DEVELOPMENT AND UTILIZATION OF WATER RESOURCES

History bears testimony to Indian use of water for sustenance as they shaped their lives to the demands of the varying environments. When an indigenous people called the Hohokams occupied lands in the Gila and Salt River Valleys over two thousand years ago, they diverted water by means of canals which even now are recognized as highly refined engineering accomplishments. They long ago demonstrated that water applied to the land was essential if communities were to be maintained and to have more than a rudimentary culture. They demonstrated the need for economic development which they undertook as a means of survival.<sup>1</sup>

Arizona's former Senator Hayden devoted much time to the history of the Pima and Maricopa Indians.<sup>2</sup> In great detail, he chronicles the use of the Gila River water by the Pimas and Maricopas. The first description of the Indian diversion and use of water in modern times, he reports, comes from Father Kino, a Jesuit Missionary who visited the Pimas in 1687. The missionary refers to the "very great aqueduct" constructed by the Indians to conduct Gila River water across great distances to irrigate large acreages of their river bottom lands.

<sup>1</sup> National Geographic Magazine, May 1907, Vol. 131, No. 5, pp. 670 et seq.

<sup>2</sup> A History of the Pima Indians and the San Carlos Irrigation Project, 89th Congress, 1st session; Document No. 11, first printed in 1924, reprinted in 1965.

The Pimas and Maricopas had flourishing communities of great magnitude in Arizona. The Spaniards described them as they existed near the end of the seventeenth century and marveled at the Indian economic development.

They observed the adjustments made by the Indians to a desert environment which, without water, produced a most meager subsistence. A half-century later, another Spanish Missionary was to report the Pima and Maricopa communities still undisturbed by non-Indian intrusion. He described the results of their use of the Gila River water:

"All these settlements on both banks of the river and on its islands have much green land. The Indians sow corn, beans, pumpkins, watermelons, cotton from which they make garments, \* \* \*."

According to the report, wheat was also grown. A hundred years later, the industrious Pimas and Maricopas continued to amaze soldiers, travelers, trappers, and explorers with their agricultural practices, their use of water, and the produce that supplied not only the Indians, but many others taking the southern route west. A short half-century was to elapse before the seizure of Indian lands was well underway, and, in another twenty-five years, the wanton divestiture of Indian land and water was far advanced.

Like the Arizona Indians, the Pueblos of the Rio Grande Valley adjusted to a desert environment by using water to promote agricultural development. Mohaves, Yumas, and Chemehuevis likewise adapted their lives to the surrounding desert by occupying lands on both sides of the Colorado River. In the "Great Colorado Valley," as early explorers referred to it, the soldiers and missionaries first encountered these Indians. Years later, Lieutenant Ives, in his 1858 explorations on the Colorado River, reports the Quechan Indians using water to raise their crops. Of the Mohaves, Ives said:

"It is somewhat remarkable that these Indians should thrive so well upon the diet to which they compelled to adhere. There is no game in the valley. The fish are scarce and of inferior quality. They subsist almost exclusively upon beans and corn, with occasional watermelons and pumpkins, and are as fine a race, physically, as there is in existence."

Those Mohave crops were raised by the Indians who planted the lush river bottoms as soon as the perennial overflow had receded, thus using the natural irrigation furnished by the Colorado River. It goes without saying, that the importance of the rivers to the indigenous cultures throughout the western United States was not limited strictly to agricultural purposes. For example, the Northern Paiutes, in the vast desert areas of the present state of Nevada, depended upon fish taken from Pyramid Lake and the Truskee River as a source of sustenance. This was long before the so-called "discovery" of that lake by Fremont in 1844.<sup>5</sup>

Fisheries to the Indians of the Pacific Northwest, "were not much less necessary to the existence of the Indians than the atmosphere they breathed."<sup>6</sup> Salmon and other fish taken from the Columbia River were always an important item of trade among the Indians, as reported by Lewis and Clark.<sup>7</sup> And, of course, rivers were not only the source of sustenance for the American Indians, but they were also the arteries of crude commerce and travel. Quite significantly, when transition from their traditional way of life was forced upon the Western Indians, they relied upon their streams and rivers as a source of sustenance and the means to adopt the new ways of living. The Yakimas, in their transition from a nation given over largely to hunting and fishing, were the first in the state of Washington to undertake to irrigate their meager gardens. That change came about under the direction of missionaries who attempted to assist in the economic development of lands to which the Yakimas were restricted.<sup>8</sup>

Potential for economic development of the Indian reservations is inextricably related to the legal title to the right to divert and use water. Those reservations were established in perpetuity as a "home and abiding place" for the Indians. In the words of the Supreme Court: "It can be said without overstatement that when the Indians were put on these reservations, they were not considered to

be located in the most desirable areas of the Nation."<sup>9</sup> Most of them were established during times when this Nation was experiencing great changes economically and socially. Changes were anticipated and changes came about, and the process of change continues. From a predominantly rural culture geared to the cultivation of the soil, this Nation has developed into an urban and industrial country. Changes likewise came about concerning the American Indians' occupation of reservations which were established by treaty and agreement between Indians and the National Government. Reservations were also established unilaterally by Congressional enactments and Executive Order. At the time of their establishment, those reservations were primarily suitable for farming and livestock raising. Coinciding with the shift in our national economy, the reservations have changed. Some, including the Pueblos of New Mexico and the Salt River Indian Reservation in Arizona, are close to and are rapidly becoming part of urban areas. This transformation required new thinking as to land uses which necessitates concomitant changes in water uses. Equally important is the fact that American Indian reservations are at the headwaters of, border upon, or are traversed by the major interstate stream systems of the West. For a variety of reasons, Indian water rights have remained unexercised to a very large extent. Sharp competition exists now—and will be accentuated with expanded economic development on the reservations—between the vested Indian water rights and those claimed by individuals or corporations, public or private, asserted under state law.

Title to water rights, although stemming from the Constitution itself, and fully recognized by the courts, does not in any sense guarantee to the American Indians that those rights cannot be taken from them. Far from humorous is the description that state permits to appropriate rights to the use of water are called "hunting licenses." For example, in California, a permit to appropriate water " \* \* \* is \* \* \* no assurance of water supply \* \* \*."<sup>10</sup> However, "Surplus" waters in a stream frequently are diverted and used, and economies are built upon those waters quite aside from the fact that the "surplus" is actually water the rights to which reside in the Indians. Constitutional law, ethics, and a good conscience become mere technicalities to be avoided or ignored under the circumstances. To the holder of a permit from the state to appropriate water rights—although it is subject to vested rights—the existence of a surplus, although it may be momentary, allows him to expend money to develop its use with the hope that time will come to his aid as a barrier to the Indians' recovering the waters to which they are justly entitled. As a consequence of actual practice, as distinguished from legal niceties, the American Indians' rights to the use of water are rapidly being eroded away by those claiming under the guise of compliance with state law. They eloquently prove a truism about water in the West, however harsh and cynical it may be: "use it or lose it."

It is against that backdrop of history and law that the legal aspects of Indian water rights will be discussed, and recognition taken of the unique jurisdictional problems relating to the regulation and use of this most scarce commodity by the western states and the various Indian tribes.

#### WINTERS DOCTRINE RIGHTS

Winters Doctrine Rights are unique in the field of Western Water Law. They differ drastically from, and by reason of their nature, are vastly superior to those water rights acquired privately through compliance with State law. American Indians probably did not pause much to give thought to the nature of a right to divert and use water or to maintain a fishery. The concept of title to land and the bundle of rights which constitute it was wholly foreign to them. In entering into treaties and agreements, or whatever means were used, they were totally unaware of the principles of conveyancing or of the formulation of written conventions, the terms of which, under the law, would be required to protect their vital interests, and thus, they did not and could not understand the legal implications flowing from those treaties and agreements. Most assuredly, these in no far stretch of the meaning of that term could be called equal, at-arms length transactions.

The Winters Doctrine, as enunciated by the courts, is based on law, equity, and history—the facts behind which are simple in the extreme: The Fort Belknap

<sup>9</sup> *Arizona v. California*, 373 U.S. 546, 598 (1962).

<sup>10</sup> California's "Rules and Regulations" governing appropriation of rights to the use of water.

<sup>3</sup> *Ibid.* A History of the Pima Indians \* \* \* p. 9.

<sup>4</sup> *Mohave Tribe of Indians* \* \* \* v. *United States of America*, 7 Ind. Cl. Comm. 219, Finding 12(a), and sources relied upon.

<sup>5</sup> *Popular Science Monthly*, Vol. 58, 1900-1901, pp. 505-514.

<sup>6</sup> *United States v. Winans*, 198 U.S. 371, 381 (1904).

<sup>7</sup> *Journals of Lewis and Clark, Bernard DeVoto*, pp. 259 et seq.

<sup>8</sup> " \* \* \* Ahtanum (Creek) was the cradle and proving ground of irrigation in the State of Washington \* \* \*." —Pakima Valley Catholic Centennial, the Beginning of Irrigation in the State of Washington.

Indian Reservation, in the state of Montana, is the residue of a once-vast area guaranteed to the Indians by the 1855 Treaty with the Blackfeet. (11 Stat. 657) In 1874, the original area established by the Treaty was sharply constricted. By an agreement in 1888, the Indians were limited to a small semi-arid acreage which could be made habitable only by means of irrigation. The north boundary of the reservation was the center of the Milk River, a tributary of the Missouri.<sup>11</sup>

In 1899, water was diverted from the Milk River to irrigate lands within the Fort Belknap Reservation. Upstream from the Indian diversion, Winters and other defendants, non-Indians, constructed dams, diversion works, and other structures which prevented the waters of the Milk River from flowing down to the Indian irrigation project. An action to restrain the Winters diversion was initiated in the federal district court, and an injunction ensued.

Winters appealed that injunction, and in sustaining the injunction, the Ninth Circuit Court of Appeals declared:

"In conclusion, we are of opinion that the court below did not err in holding that, 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk River' at least to the extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees."<sup>12</sup>

Thus, it was the Indians granting to the United States; it was the Indians reserving unto themselves that which was not granted—the rights to the use of the water of the Milk River to the extent required for their properties. That conclusion was reflective of the rationale in an earlier decision, the *Winans Decision*, rendered by the United States Supreme Court two years earlier which stated:

"\* \* \* the treaty was not a grant of rights to the Indians, but a grant of rights from them [to the United States], a reservation of those not granted."<sup>13</sup> That concept, that the Indians granted title to the United States, and not the converse, is important in regard to the nature of the title of the Indians. In *Winans*, the Court had before it the fishery provisions of the Treaty of June 9, 1855, between the United States and Confederated Tribes of Yakima Indians. By that document, the Indians retained the "exclusive right of taking fish in all the streams where running through or bordering" their reservation; also, "the right of taking fish at all usual and accustomed places" on and off the reservation. Patents were issued by the United States to lands along the Columbia River from which the Yakimas had traditionally fished. Those patents did not include any reference to the Indian treaty fishing rights, and the owners of the land denied that the lands thus patented were subject to Indian treaty fishery rights.

Moreover, the State of Washington had issued licenses to the landowners to operate fishing wheels which, it was asserted, "necessitates the exclusive possession of the space occupied by the wheels."<sup>14</sup> Rejecting the contentions of the landowners that the Yakima fishing rights in the Columbia River had been abrogated by the issuance of the patents, the Court declared:

"The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians \* \* \* which were not much less necessary to the existence of the Indians than the atmosphere they breathed. Only a limitation of them, however, was necessary and intended, and not a taking away."

Having thus appraised the Yakima treaty, the Court then pronounced the crux of the decision:

"\* \* \* the treaty was not a grant of rights to the Indians, but a grant of rights from them [to the United States], a reservation of those not granted."<sup>15</sup>

The Court further observed: "the right of [fishing] was intended to be continuing against the United States and its grantees as well as against the State and its grantees."<sup>16</sup> Thus, the nature of the title of the Indians under the treaties between them and the United States was cast in the correct light. Indian title does not stem from a conveyance to them, but rather, the title which resides in them to their lands, their rights to the use of water, their rights of fishery, their timber—all interests in real property and natural resources were

<sup>11</sup> For a full factual and procedural review, see *Winters v. United States*, 143 Fed. 740, 741 (CA9, 1906); *Winters v. United States*, 148 Fed. 684 (CA9, 1906).

<sup>12</sup> *Winters v. United States*, 143 Fed. 684 (CA9, 1906).

<sup>13</sup> *United States v. Winans*, 198 U.S. 371, 381 (1904).

<sup>14</sup> *Id.*, at 380 (1904).

<sup>15</sup> *Id.*, at 381 (1904).

<sup>16</sup> *Id.*, at 381-382 (1904).

retained by them when they granted title to vast areas which had once been theirs.

Those pronouncements by the Supreme Court, declared in advance of the *Winters Decision*, are fundamental precepts of the law, recognizing that rights of fishery are interests in real property subject to protection under the Constitution.

On appeal, the Winters case presented two basic problems to the Supreme Court for resolution: (1). Were rights to the use of water in the Milk River reserved for the Fort Belknap Indian land, though no mention of those rights is contained in the treaty of October 17, 1855, the Act of 1874, or the Agreement of 1888; (2). assuming those rights were reserved for the Indian lands, was there a divestiture of them upon Montana's admission into the Union?<sup>17</sup>

In rendering its keystone opinion, the Court analyzed the unique relationship between the United States and the Indians, together with the objectives of the Agreement of 1888, in which the Indians ceded away a vast tract of land, retaining for themselves a mere vestige of that which they had formerly occupied. The Court then addressed itself to the non-Indian positions:

"The lands (retained by the Indians) were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. \* \* \* The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? \* \* \* If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible.

"The Government is asserting the rights of the Indians."<sup>18</sup> Following the *Winans* concept of the Indians being the grantors, the Court further inquired: Did the Indians grant and the United States accept all the Indian rights to the use of water without which the lands were uninhabitable? It rejected that proposition out of hand as being without merit. Likewise significant prospectively was the Court's observation that, as the owners of the land and waters, the Indians could use them for hunting, grazing, or, in the Court's own words, for "agriculture and the arts of civilization." The Court could find no limitation here as to the application of the Indian water rights.

As to the part-legal, part-political question of Montana's jurisdiction over Indian water rights, the Supreme Court had this to say:

"The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690 702(—); *United States v. Winans*, 198 U.S. 371(—). That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year, Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits and yet did not leave them the power to change to new ones."<sup>19</sup>

The crucial aspect of the character of the Indian title is thus clear: (1). By the Agreement of 1888, the Indians reserved to themselves the rights to the use of water in the Milk River although that Agreement made no mention of rights of that nature; (2). The Indian rights thus reserved were not open to appropriation under the laws of the State of Montana upon its admission into the Union, but rather, were exempt from the operation of those laws.

That concept of a grant from the Indians to the National Government, and other decisions applied to the Indian title of rights to the use of water the principles governing interests in realty, viz: "This is a suit brought by the United States as trustee for the Yakima Tribe of Indians to establish and quiet title to the Indians' right to the use of waters of Ahtanum Creek in the State of Washington. . . ." With further reference to the nature of the rights and the action brought to have them determined, the Court states: "The suit (to protect

<sup>17</sup> *Winters v. United States*, 207 U.S. 564, 575 et seq. (1907).

<sup>18</sup> *Id.*, 207 U.S. 564, 576 (1907).

<sup>19</sup> *Id.*, 207 U.S. 564, 577 (1907).

<sup>20</sup> *United States v. Ahtanum Irrigation District*, 236 F. 2d 321, 323 (CA9, 1956).

the Yakima rights), like other proceedings designed to procure an adjudication of water rights, was, in its purpose and effect, one to quiet title to realty."<sup>21</sup>

As interests in real property, Winters Doctrine Rights are entitled to be protected, and the obligation to protect them against abridgement and loss is identical with the obligations respecting land itself. This concept goes far toward elimination of the confusion which has on occasion arisen respecting the course of conduct to pursue in protecting and exercising these rights.

Title to those rights are free of limitation on the purposes to which they could be applied. In *Conrad Investment Company*, 161 Fed. 829 (1908), the Court referred to the fact that there was vested in the Indians the rights to the use of the streams to meet future developments "for irrigation and other useful purposes."

It is pertinent at this phase of the consideration to turn to the state law governing water rights of private persons and briefly to discuss the exemption of Indian water rights from the operation of those laws. The location of Indian reservations and the competition to meet present and future water demands necessitates reference to the individual, corporation, municipal, and quasimunicipal rights acquired under the doctrine of prior appropriation. Western water law is generally the outgrowth of experience, not logic, and where logic purports to override experience, such as in California or Oregon and other Western states where there is some adherence to greatly modified principles of riparian rights, together with the doctrine of prior appropriation, confusion has ensued. Winters Doctrine Rights have been referred to as immemorial in character, prior and paramount, or in similar terms, according to the Indians' preferential status on streams. Indian rights, having been retained by the Indians or invested in them antecedent to settlement of the lands of the Western United States, demonstrate the coalescence of history and law. Those water rights were never opened by the Congress to private acquisition under state law.

Title to most of the Western United States—land, water, minerals, timber, and all natural resources—originally resided in the National Government. Thus, when miners came to the West exploring for precious minerals, water was the key. Without it, the minerals would remain in the ground. Consequently, water was diverted out of the streams to the mine locations, frequently over long distances and at a great cost in terms of personnel, time, and effort.

The mining and water diversions were accomplished with the knowledge and acquiescence of the United States Government. Violence was then very much a part of the history of water law in the West. But, as law and order came to the Old West, there grew up in the mining districts the precept that the "First in time" was "first in right" on the streams of the public domain, subsequently termed the appropriative rights doctrine. The doctrine of prior appropriation has been stated in these terms:

"... To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations... the perfected vested right to appropriate water flowing... cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use."<sup>22</sup>

The date of investiture of title is the prime element in the value of any right to the use of water in the semiarid West, whether acquired by the sovereign pursuant to a treaty or by an individual pursuant to the local laws. *Nichols v. McIntosh*, 19 Colo., 22; 34 Pac. 278, (1893); see, also, *Whitmore v. Murray City*, 107 Utah 445; 154 P.2d 748, 751 (1944). For, where the demand so greatly exceeds the supply, the ownership or control of the legal right first to divert and use water, or to allow others to use it is of transcendent importance. It is likewise axiomatic, that he who controls the rights to the use of water also controls the utilization of the land. As a consequence, it is essential to consider the source of the title and the date of investiture of that title to "Winters Doctrine Rights."

Vast areas of lands were ceded by the Indian Tribes to the United States. Treaties with France, Great Britain, Spain, and Mexico were other sources of title to lands: with France in 1803, it was the land known as the Louisiana Purchase; in 1848, Mexico, by the Treaty of Guadalupe Hidalgo, conveyed to the United States that part of the country generally referred to as the Southwest; and Great Britain, in 1846, ceded to the National Government that area referred

<sup>21</sup> *Ibid.*, 236 F. 2d 321, 339 (CA9, 1956).

<sup>22</sup> *Arizona v. California*, 233 U.S. 423 (1931).

to as the Pacific Northwest. Each of the cessions passed title, subject to then vested rights, to all of the lands and rights to the use of water which were part and parcel of them. By those cessions, not only the title, but complete jurisdiction in the fullest legal sense passed to the Central Government to "\* \* \* all lands, lakes and rivers \* \* \*." These means of acquiring title differ drastically from the requirements for obtaining title to appropriative rights; these rights were acquired by cession and not by appropriation. Other variances are made manifest when you consider that, unlike appropriative rights, Winters Doctrine Rights are reserved for uses "which would be necessarily continued through the years."<sup>23</sup> A "future use" as such, is entirely foreign to the doctrine of appropriative rights. As to that later right, the Supreme Court of Utah declared that "Beneficial use is the basis, the measure, and the limit of all rights to the use of water in this state."<sup>24</sup> That same court, in the same decision also stated: "No one can acquire the right to use more water than is necessary, with reasonable efficiency, to satisfy his beneficial requirements, \* \* \*" and it must be used with due diligence. Indian rights are not thus limited, for, as the courts have stated:

"We deal here with the conduct of the Government as trustee for the Indians. It is not for us to say to the legislative branch of the Government... when those rights are to be exercised."<sup>25</sup>

Winters Doctrine Rights have a date of acquisition (by cession) and not a "priority date" as that term has been applied to the appropriative rights doctrine. That date, when the Winters Doctrine Rights were ceded to the United States is the date of acquisition of them. There is no basis in law for claiming a "priority date" for them as is asserted in connection with an appropriative right privately acquired pursuant to state law. Far from being an appropriator of rights to the use of water, the National Government is the source of title to those rights. Those Winters Doctrine Rights cannot be acquired by use nor lost by disuse, nor is any limitation applied to them as to when, where, and in what manner they should be exercised. Neither are the Winters Rights riparian in character. The doctrine of riparians rights to the use of water has been rejected in the states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming—essentially because it was unsuited to the arid and semiarid climates found in those states as opposed to the more humid climates back East where that doctrine is generally applied. Other states, in varying degrees, recognize the doctrine of riparian rights. California is the principal state in that regard. That state and other western states that take cognizance of riparian rights likewise recognize appropriative rights, with the result that they are referred to as hybrid states. Examination of the principal characteristics of the riparian doctrine is thus warranted.

Perhaps the prime factor in regard to those rights is that they are part and parcel of land and do not exist independent of it.<sup>26</sup> Moreover, a riparian right is held and exercised correlatively with all other riparian owners as a "tenancy in common and not a separate or severable estate."<sup>27</sup>

The concept of a "reserved right" in the National Government (both for itself and for the benefit of the Indians) is at variance with the limitations which are present in a tenancy in common. Further, "A riparian owner has not right to any mathematical or specific amount of the waters of a stream as against other like owners."<sup>28</sup> That aspect of riparian rights results from the fact that those rights are held correlatively with all other riparians. Consequently, the quantity of water riparian owners may use must be "reasonable" in light of the claims of all other riparians. "Reasonableness" is, of course, a variant depending upon the supply of water, the demands of which vary from day to day, and upon a multitude of other factors.<sup>29</sup> Equally at odds with the Winters Doctrine Rights is this limitation upon the exercise of rights riparian in character: "The land, in order to be riparian, must be within the watershed of the stream." The rule as stated in another case is that:

"Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river \* \* \*."<sup>30</sup>

<sup>23</sup> *Winters v. United States*, 207 U.S. 546, 577 (1908).

<sup>24</sup> *McNaughton v. Eaton*, 121 Utah 394; 242 P.2d 570, 573 (1953).

<sup>25</sup> *United States v. Ahtanum Irrigation District, et al*, 236 F.2d 321, 328 (CA9, 1956).

<sup>26</sup> The California Law of Water Rights, p. 187.

<sup>27</sup> *Seneca Consolidated Gold Mines Co., v. Great Western Power Co.*, 209 Cal. 206; 287 Pac. 93, 98 (1930).

<sup>28</sup> *Prather v. Hoberg*, 24 Cal. 2d 549; 150 P. 2d 405, 410 (1944).

<sup>29</sup> The California Law of Water Rights, the Measure of Riparian Right, p. 218, et seq.

<sup>30</sup> *United States v. San Francisco*, 310 U.S. 16, (1939).

There is no reason to limit Indian Winters Doctrine Rights to streams arising upon their reservations. As was pointed out, those rights are against the stream system:

"The suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance. The same was true of the Milk River in Montana; and it would be a novel rule of water law to limit either the riparian proprietor or the appropriator to waters which originated upon his lands or within the area of appropriation. Most streams in this portion of the country originate in the mountains and far from the lands to which their waters ultimately become appurtenant."<sup>31</sup>

And the laws of the various states could not thus restrict the power of Congress over the properties of the Nation. Since neither the Congress nor the Indians have limited the uses for which the Winters Doctrine Rights may be exercised, there is no limit for possible uses to which they may be applied. These are some of the features of the Winters Doctrine Rights which should be contrasted to the appropriative rights or riparian rights which are acquired pursuant to state law. The source of titles to private appropriative rights is the National Government. Those private rights are acquired by compliance with and are subject to state law. Those rights may be used only at the places and for the purposes prescribed by state law. Immunity of Indian Winters Doctrine Rights from state interference or seizure has been guaranteed in a variety of ways. The State of Washington's Enabling Act and Constitution specifically provide that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States \* \* \*."<sup>32</sup>

Concerning identical provisions in the Montana Enabling Act and Constitution, the Court of Appeals for the Ninth Circuit has unequivocally declared that the state laws respecting the appropriation of water rights have no application to the Flathead Indian Reservation.<sup>33</sup> That same court later declared:

"Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them."<sup>34</sup>

These differences in characteristics as to the origin, nature, and extent of Winters Doctrine Rights and state appropriative and riparian rights have inevitably brought Indian and non-Indian claimants into conflict, as well as the Federal Government and the tribes, as the regulation and control of rights to the use of water.

#### TRIBAL—STATE CONFLICTS

The as-yet undeveloped Winters Doctrine Rights of the tribes are quite substantial in extent and in their potential adverse impact upon non-Indian economies built on water use permits issued pursuant to state law "subject to then existing rights." States purport to have the power to issue valid permits for the appropriation of water within the exterior boundaries of Indian reservations. See, for instance, *Colville Confederated Tribes v. Walton*, Civil No. 3421, 412 F. Supp 651 (Ed Wash, April 14, 1976) in the United States District Court for the Eastern District of Washington. There, the state has issued a permit to Walton, a non-Indian, who purchased former allotted lands and subsequently proceeded to develop his property to an extent which seriously impaired the development of tribal and allotted lands above and below his property, not to mention seriously damaging the water quality of Omak Lake which sustains a valuable Lahontan cutthroat game fishery belonging to the tribe. Essentially, the state seeks to regulate the stream for a non-Indian successor in interest to the original allottees—allegedly under the guise that the waters to No Name Creek are surplus to tribal needs. This assertion of jurisdiction encroaches not only upon the authority of the tribe, in its sovereign capacity over land and water within the exterior boundaries of the reservation, but also upon the authority of the Secretary of the Interior to allocate water rights among the Indians on the reservation. The following excerpts from Justice and Interior Department officials highlight the issues, and also point out the conflict existing between the Federal Government and the tribe as to ultimate authority over rights to govern the use of water, indeed, ultimate title to the rights to the use of water. The excerpts are self-explanatory when the conflict between the Col-

<sup>31</sup> *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 325 (CA9, 1956).

<sup>32</sup> Enabling Act, Sec. 4, sec. subdivision; Constitution of the State of Washington, Article XXIV, second subdivision.

<sup>33</sup> *United States v. McIntire*, 101 F.2d 650 (CA9, 1939).

<sup>34</sup> *United States v. Ahanum Irrigation District*, 236 F.2d 321, 328 (CA9, 1956).

vile Tribe and the Secretary of the Interior is understood, for the Secretary not only seeks to divest the tribe of its water rights but also seeks to usurp its power to administer those rights.

Nature of the tribal dilemma is outlined in the following letter prepared by the Department of Justice in response to a request by the Interior Department Solicitor on the Walton Case:

[Air Mail]

MARCH 6, 1973.

U.S. ATTORNEY,  
*Spokane, Wash.*  
(Attention of Robert Sweeney, Esq., Assistant U.S. Attorney).

DEAR SIR: There are enclosed an original and five (5) copies of a complaint which seeks to have enjoined the unauthorized diversion and use of water from an unnamed stream on formerly allotted lands within the exterior boundaries of the Colville Indian Reservation and to have a judicial determination of the validity of a permit issued by the State of Washington to non-Indians for the aforementioned use and diversion of water. It is the position of the United States that the Secretary of the Interior has the exclusive jurisdiction to control and administer the allocation of waters as tribal, allotted and formerly allotted lands of the Colville Reservation pursuant to the authority vested in the Secretary under 25 U.S.C. § 381. This allegation is the same as that made in the *United States v. Bel Bay Community* case. Civil No. 303-71-C2, United States District Court for the Western District of Washington.

As you are aware, now pending in the United States District Court for the Eastern District of Washington is the case entitled *Colville Confederated Tribe v. William Boyd Walton, et ux.*, Civil No. 3421, which addresses the same situation as the proposed suit. By letter dated February 2, 1973, the Department of the Interior requested that we intervene in the aforementioned suit and make the allegations which are now contained in the proposed action. A copy of that letter is enclosed. We have decided, however, not to intervene because the complaint filed on behalf of the tribe does not, in our opinion, raise the issue which must be addressed to obtain a judicial determination in this controversy, i.e., the authority of the Secretary of the Interior to determine the allocation of water on Indian lands.

We are not enclosing a copy of the litigation report provided this office, because the cover letter to that report indicates that you were provided with a copy of the report.

It would be appreciated if you would sign the aforementioned complaint, file it with the Court, and have service made upon the appropriate individuals. If you desire to make any changes in this complaint, to correct crimes or to comply with local court rules, please feel free to do so. It would be appreciated if you would send us a Xerox copy of the complaint as filed with the Court stamped showing the time of filing for our records.

Sincerely,

KENT FRIZZELL,  
*Assistant Attorney General,*  
*Land and Natural Resources Division.*  
By FLOYD L. FRANCE,  
*Chief, General Litigation Section.*

The allegation of power and authority to control water by the U.S. is a severe conflict of jurisdictional authority. The confusion over the ownership of the right to control the use of water is further demonstrated in the letter to that same Kent Frizzell, now Interior Department Solicitor, from Wallace Johnson, then Assistant Attorney General for the Lands and Natural Resources Division:

JULY 18, 1975.

KENT FRIZZELL, Esq.,  
*Solicitor, Department of the Interior,*  
*Washington, D.C.*

DEAR MR. FRIZZELL: We are writing with regard to *United States v. Walton*, et al., Civil No. 3831 in the United States District Court for the Eastern District of Washington.

You will recall that this action was initiated by this Department for the United States in its own right and on behalf of the Colville Confederated Tribes

at the request of the Department of the Interior on March 1973. The primary purposes of this adjudication were to enjoin the defendants Walton from diverting water from No Name Creek in an amount in excess of that authorized by the Secretary of the Interior, and to have the State of Washington, having no authority over the appropriation of waters within the external boundaries of the reservation, enjoined from issuing further permits for pumping or diversion therein. It is the position of the Government herein that consistent with *United States v. Powers*, 305 U.S. 527 (1939), Walton, as a successor in interest to an Indian allottee, has some right to water.

One of the theories on which this litigation has proceeded was that the diversion activities of the Waltons was in excess of their *appropriate share* and that their activities would cause irreparable harm to the Tribe because it has decreased the size of Omak Lake which lies downstream from the Walton allotments. In June of this year, it was determined by representatives of the Office of the Regional Solicitor in Portland, representatives of the Bureau of Indian Affairs, the Colville Tribe, and the Tribe's counsel, that additional hydrological testing was required in the area to establish the proof necessary to support the conclusions of the expert testimony to be presented at trial on October 14, 1975. This conclusion was reached after consultation with, and with the concurrence of the expert, Mr. Noble, and was concurred in by the United States Attorney handling the litigation.

We have now been advised that, as a result of the recommendations of an employee of the Bureau of Indian Affairs, which were contrary to the recommendations of all counsel for the Government and the Tribe, the expert and the United States Attorney, the Tribe has undertaken a well drilling program financed by the Bureau which precludes the possibility of the tests to be conducted. Further, we understand that the same employee of the Bureau recommended that the Tribe not permit the testing program previously agreed upon.

We, of course, cannot predict the ultimate effect of the lack of data on the outcome of this proceeding. However, we wish to express our disapproval of these actions which will result in either a change in a theory of the case to be presented or which will, in the view of the expert, render his testimony in support of that theory vulnerable to attack. Neither of these possible results is likely to improve our chances of success in this litigation and we believe that if a change of theory is necessary at this late time, it would undermine our efforts.

We have encountered another problem while ascertaining the facts of this controversy which is common to other litigation as well. The expert who is to provide the testimony supporting the Government's case here is a consultant employed by the Tribe with funds provided by the Bureau of Indian Affairs. There is no Government witness as such. We, and the United States Attorney, have had great difficulty locating the Tribe's expert and therefore have not always been able to ascertain his views. The ability of counsel to reach and work with experts is, as you know, of critical importance to pretrial preparation. The insulation of experts supporting the Government's case, as exists here, and the inability of counsel to assist in directing their pretrial preparation, prevents this office from effectively performing its mission.

Litigation is difficult under the best of circumstances. Without complete cooperation from the client agency it is much more difficult. Unless such cooperation is received, our efforts to vigorously act on behalf of Indians through the newly created Indian Resources Section will be frustrated. It is because of the severe consequences of less than complete cooperation that we are writing to express disapproval of the activities which prevented the tests deemed necessary by those in control of the litigation.

Sincerely,

WALLACE H. JOHNSON,  
Assistant Attorney General,  
Land and Natural Resources Division.

The assertion of U.S. right to regulation was further made apparent when several tribes attempted to adopt their water codes. Since the tribes owned the rights to the use of water, they assumed they had the right to regulate and control its uses to protect interests held for the benefit of their members. They were encouraged in their efforts at the outset by officials of the Interior Department that someone, in the final analysis, had the power to control rights to the use of water. Secretary Morton was terse in his instructions to prevent approval of

these tribal codes and the tribes were rebuffed at every turn in their quest for assistance and ultimate approval and sanction. The following is a series of memos and correspondence initiated early this year by a memo from Morris Thompson, Commissioner of Indian Affairs, to all Area Directors concerning the enactment of tribal water codes. The material is self-explanatory and is presented in its entirety.

JANUARY 20, 1975.

Memorandum.

To: (All Area Directors).  
From: Commissioner of Indian Affairs.  
Subject: Tribal Water Codes.

The attached directive from the Secretary of the Interior is transmitted to you for your information, guidance and action.

Please notify all Agency Superintendents of this directive immediately and instruct them to comply with the instructions contained in the memorandum.

MORRIS THOMPSON.

Attachment.

JANUARY 15, 1975.

Memorandum.

To: Commissioner of Indian Affairs.  
From: Secretary of the Interior.  
Subject: Tribal Water Codes.

As you know, the Department is currently considering regulations providing for the adoption of tribal codes to allocate the use of reserved waters on Indian reservations.

Our authority to regulate the use of water on Indian reservations is presently in litigation. I am informed, however, that some tribes may be considering the enactment of water use codes of their own. This could lead to confusion and a series of separate legal challenges which might lead to undesirable results. This may be avoided if our regulations could first be adopted.

I ask therefore that you instruct all agency superintendents and area directors to disapprove any tribal ordinance, resolution, code, or other enactment which purports to regulate the use of water on Indian reservations and which by the terms of the tribal governing document is subject to such approval or review in order to become or to remain effective, pending ultimate determination of this matter.

ROGERS C. B. MORTON.

FEBRUARY 20, 1975.

Memorandum.

To: All Superintendents, Aberdeen Area.  
From: Office of the Area Director.  
Subject: Tribal Water Codes.

Enclosed is a copy of General Memorandum No. 75-17 dated February 14, 1975 from Wilkinson, Cragun & Barker, which they generously give us permission to send to the agencies in this area.

The memorandum disagrees with the Secretary of the Interior's position on tribal water codes as set forth in his memorandum of January 15, 1975 to the Commissioner of Indian Affairs, copy of which was furnished to you by our memorandum dated January 27, 1975.

Please make this information available to your Tribal Councils.

ACTING AREA DIRECTOR.

Enclosure.

FEBRUARY 14, 1975.

GENERAL MEMORANDUM No. 75-17

In a memorandum dated January 15, 1975, the Secretary of the Interior directed the Commissioner of Indian Affairs to instruct all area directors and agency superintendents not to approve any tribal water codes purporting to regulate water use on Indian reservations.

The Secretary cited confusion that could result in promulgating such codes until his authority in the matter is settled by pending litigation.

As you will see from the attached response from us on your behalf, we strongly disagree with the position the Secretary has taken. We urge him to reconsider the matter and to issue, as soon as possible, regulatory guidelines for Indian tribes enacting their own water codes.

We shall keep you advised of further developments in this very important area.

Sincerely,

WILKINSON, CRAGUN & BARKER.

Attachment.

FEBRUARY 13, 1975.

Hon. ROGERS C. B. MORTON,  
Secretary of the Interior,  
Washington, D.C.

DEAR SECRETARY MORTON: We are general counsel for the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Quinault Tribe of the Quinault Reservation, Washington, and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; special counsel for the Hoopa Valley Tribe of the Hoopa Valley Reservation, California, and the National Congress of American Indians, and water rights counsel for the Crow Tribe of the Crow Reservation, Montana.

We have received a copy of your memorandum dated January 15, 1975, to the Commissioner of Indian Affairs, directing him to instruct all BIA agency superintendents and area directors to disapprove any tribal ordinances and enactments purporting to regulate water use on Indian reservations, "pending ultimate determination of this matter."

Your concern about approving any such tribal water codes apparently stems from unresolved litigation dealing with your authority and that of the tribes to regulate use of water on Indian reservations. You are also concerned that confusion could result if tribal water codes are enacted before Departmental regulations can be adopted. Implicit in your letter is your position that the Department will not promulgate any regulations or proposed regulations concerning tribal water codes until the referenced litigation is decided.

Our tribal clients and we are deeply disturbed that you are in effect calling a halt to approval of tribal water codes for what could be at least two or three more years. We are informed that your Department was actively considering promulgation of a proposed rulemaking establishing guidelines for tribal governments in enacting their own codes.

We strongly urge that you reconsider your directive to the Commissioner and that your Department promulgate, as soon as possible, the proposed rulemaking. We ask this for three reasons.

First, with each day that passes, pressure from non-Indian water users to diminish or extinguish Indian water rights increases. Years more delay before Indians can obtain your approval to regulate their water rights will only serve to feed those pressures.

Second, issuance of the proposed, and subsequently final, Departmental guidelines for Indian water codes will immeasurably strengthen the position of the United States and the Indian tribes in litigation determining tribal authority to regulate reservation water use. Your active role in issuing guidelines could promote very favorable results in those very cases in which you now await final disposition.

Third, the need to delay is illusory. Cases on individual Indian reservations, even if they reach the United States Supreme Court, will not necessarily fully decide your authority and tribal authority in this important area. Other cases challenging that authority will undoubtedly arise elsewhere and continue for many years to come. Your enactment of guidelines and approval of tribal water codes crystallize the issues that will be involved in that litigation. Unless there is a general resolution of this whole regulatory question by the Supreme Court, Department of the Interior, and Indian tribal regulatory authority will always be open to question on many different Indian reservations where different treaties, statutes, and cases may foreshadow different legal results.

We know it is not your intention to prejudice Indian water rights. It is in the spirit of preserving and protecting those rights that we offer this constructive criticism on behalf of our tribal clients, in the hope you will recognize that reconsideration of your decision is essential.

Very sincerely,

WILKINSON, CRAGUN & BARKER,  
By JERRY C. STRAUS.

The aforementioned authority of the Secretary over allocation of waters within a reservation is derived from Sec. 7 of the Dawes Act of 1887 (The General Allotment Act), 24 Stat. 388 which states as follows:

"That, in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

It is to be observed that the Secretary's authority is limited in application solely to Indians residing within a reservation, and it is interesting to note that that power of the Secretary has gone virtually unexercised since the passage of that act.

Pending in U.S. District Court for the Western District of Washington is a case attempting to resolve questions on state authority to issue permits to non-Indians who hold fee-simple title to former allotted lands within an Indian reservation (the Lummi Indian Reservation) to appropriate waters allegedly "surplus" to tribal needs. See *United States v. Bel Bay Community and Water Association*, File No. 303-71-C2.

The United States seeks to enjoin the pumping of ground water from a well on land within reservation boundaries by the Bel Bay Community and Water Association. The United States alleges that, pursuant to the Treaty of Point Elliot, dated January 22, 1855 (12 Stat. 927), all of the lands which now comprise the Lummi Indian Reservation were reserved by Executive Order of November 22, 1873, for the use and occupancy of the Lummi Tribe and which land was subsequently allotted to the individual tribal members pursuant to Article VII of the treaty. Upon removal of the restrictions against alienation, the land in question was sold to non-Indians and it was subsequently subdivided into 183 individual lots for homesites.

On August 19, 1969, defendant Bel Bay filed an application with the state for a permit to appropriate water in an amount of 50 gallons per minute from a well, for municipal and domestic purposes for an estimated 300 people. On December 17, 1970, the state granted a permit to use 30 gallons per minute. On July 29, 1970, Bel Bay filed another application for a permit to appropriate 50 gallons per minute from another well.

The Government contends that the waters within the reservation were reserved for the purposes of the reservation and that Washington State had no authority to grant permits to appropriate ground waters from within the exterior boundaries of the Lummi Reservation—alleging also that jurisdiction to regulate water use resided solely in the Lummi Tribe and the trustee United States.

The Government also contends that if water pumped from the first well is allowed at its present rate, salt water intrusions from Bellingham Bay will pollute and destroy ground water deposits which are the tribe's sole source of domestic water supply.

Washington alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the danger of salt water intrusions and of the allegations concerning source of supply of domestic water supply. It merely asserts its jurisdiction to issue permits for the appropriation of water surplus to Indian needs.<sup>35</sup>

#### CONFUSION BETWEEN INDIAN RIGHTS AND FEDERAL RIGHTS

This portion of the consideration will focus on the conflicts stemming from the Indian rights and federal rights as to the differences in policy in the establishment of Indian reservations and the policy of encouraging settlement of public lands of the United States. Public lands, of course, are unqualifiedly open for sale and disposition. See, for instance, *Federal Power Commission v. State of Oregon*, 349 U.S. 435, 75 S. Ct. 832, 99 L.Ed 1215. (1955). It was the policy of the U.S. Government to encourage settlement of its lands and to create family-sized farms with little or no regard for Indian rights to the use of water. With

<sup>35</sup> The state of Washington has no legal basis for assessing or advancing the concept respecting its position other than an obscure opinion rendered by the Superior Court for Snohomish County, Washington State, on February 7, 1963, in *Tulalip Tribe v. Walker*. The decision merely states that the State had authority to administer water rights which were surplus to Indian needs since these waters were, in effect, public waters. The State made no attempt to find out the needs of the tribe when permits were issued to non-Indians, subject, of course, to then existing rights.

the encouragement, or at least, the cooperation of the Secretary of the Interior, the principal agent of the trustee United States charged with protecting Indian rights and natural resources, many large irrigation projects were constructed on streams that flowed through or bordered Indian reservations. With few exceptions, these projects were planned and built by the Federal Government without any attempt to define, let alone protect, the prior and paramount rights of the Indians, thereby creating the following dilemma: The future development of Indian water rights on streams fully appropriated would have a significant impact on uses initiated under state law and federal law—and the existence of these Indian rights on streams not yet fully appropriated would make determination of legally available supply difficult and thus prevent satisfactory future planning and development. To meet the need for certainty for effective planning and development was the purpose and intent of the McCarran Act. As to inventorying Indian rights, however, it is safe to assume that major disagreements will arise between the Indian and non-Indian claimants over priority dates, measure of need, and indeed, which forum to use to settle the actual and potential disputes. Prior to decision in *Colorado River Water Conservation District v. United States*, 96 S. Ct 1236 (March 24, 1976), and *Mary Akin v. United States*, 96 S. Ct 1236 (March 24, 1976), it wasn't clear whether Indian tribes should be sued in state courts for adjudication of their water rights.

The issue of jurisdiction turned upon interpretation of the McCarran Water Rights Suit Act of July 10, 1952, 62 Stat. 549, 43 U.S.C. 666, which gave consent to state jurisdiction concurrent with federal jurisdiction over controversies involving federal water rights—did this statute impliedly embrace Indian water rights? The only Supreme Court cases construing the McCarran Amendment were *United States v. District Court of Eagle County* (The Eagle River Case), 401 U.S. 501 (1971), and *United States v. Water Diversion No. 5*, 401 U.S. 527 (1971). The Indians, through their attorneys, experts, and national organizations, were quite vehement in expressing their fears to Justice and Interior Departments that these cases, if decided in favor of the state of Colorado, would subject tribes to suit in state courts without tribal consent and thus jeopardize their invaluable Winters Doctrine Rights. Nevertheless, Justice's brief to the Supreme Court said nothing about Indian water rights except by way of a footnote: "We are not aware of any Indian water rights directly involved in this litigation." The Eagle River cases were argued March 2, 1971, and decided March 24, 1971—an almost unheard of event unless a case had attracted national attention or unless things were pretty much well decided beforehand. In either case, the tribes had no opportunity to participate and to let their positions be known. And five years later, the Supreme Court held that the amendment includes consent to determine in state court reserved water rights held on behalf of Indians and that the exercise of state jurisdiction does not imperil those rights or breach the solemn obligation of the Government to protect the Indians' rights.

Mel Tonasket, President of the National Congress of the American Indians appeared before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary of the United States Senate, and his statements on the *Akin* Decision puts the history of that litigation in its proper perspective. For obvious reasons, his statement is included in its entirety as part of this report.

STATEMENT OF MEL TONASKET, PRESIDENT OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

SUMMARY

The National Congress of American Indians petitions the Congress to amend the McCarran Act (43 U.S.C. 666) to restore to the American Indians their immunity from state jurisdiction, control, and administration of Indian *Winters Doctrine* rights to the use of water. By the March 24, 1976 opinion of the Supreme Court in the *Akin* case, the Western Indian Nations, Tribes, and people, their reservations and their survival are subject to the mercy of state jurisdiction, laws, and courts. Since the turn of the century, no greater catastrophe than the *Akin* decision has occurred to Indian people.

The results of that decision were foreseen five years ago when the *Eagle River* decision subjecting federal rights to state jurisdiction was rendered. Every effort was made by the National Congress of American Indians and the Indian communities in general to avoid the consequences of the *Eagle* decision which fore-

shadowed the *Akin* decision. However, the Department of Justice and the Department of the Interior, due to their inherent conflicts of interest, have refused to distinguish between the Indian *Winters* rights to the use of water and the federal rights for reclamation projects, national parks, and services. At the time of the *Eagle River* decision, the outcome was predictable. However, the Justice Department refused to change its position. Now the Justice Department, by its course of conduct, has again placed the Indians in a most precarious position.

Congress alone, by amending the McCarran Act, can exempt Indian *Winters* rights to the use of water from state jurisdiction. A different course will mark the end of the Indian reservations in Western United States.

I am Mel Tonasket and I am President of the National Congress of American Indians. I wish to thank this Committee for holding this very important hearing and for permitting me to appear before it.

Congress is being requested to preserve the American Indians of Western United States by amending the so-called McCarran Act and to restore to Indian Nations, Tribes, and people their immunity from proceedings in state courts to adjudicate their invaluable *Winters Doctrine* rights to the use of water.<sup>1</sup> Congress alone can preserve the Western Indians from the single greatest disaster they have experienced since before 1900.

I wish to make a part of this record a copy of my letter dated March 26, 1976, addressed to Senator Abourezk, a member of this Subcommittee and Chairman of the Senate Subcommittee on Indian Affairs. Attached to my letter to Senator Abourezk is a simple amendment to the McCarran Act (43 U.S.C. 666). I know of no legislation more vital to the American Indians. In Western United States, the immunity of Indian *Winters Doctrine* rights to the use of water from state law, state courts, state tribunals, state agencies, and state administrators and agents is a matter of survival—a matter of life or death for Western Reservations, particularly in the arid and semi-arid regions.

I do not purport to be able to understand what goes on in the minds of the bureaucracies in the Interior and Justice Department which control the lives and properties of Indian people. But I can tell you this: those bureaucracies knew or most assuredly should have known that the course of conduct they followed in the *Akin Cases* would result in subjugating the invaluable Indian *Winters Doctrine* rights to the use of water to state control, state seizure, and ultimately state destruction of Indian reservations in Western United States.

*The Akin Decision,<sup>2</sup> a Product of Conflicts of Interest in the Justice and Interior Departments*

It is elemental that the Solicitor of the Department of the Interior is assigned by Congress to perform "The legal work for the Department of the Interior \* \* \*" His primary task is to be the lawyer for the Secretary of the Interior. Equally clear is the fact that the Attorney General of the United States is the lawyer for the Secretary of the Interior before the Supreme Court and the lesser courts. As the lawyer for the Secretary of the Interior, both the Solicitor and the Attorney General have disparate and contradictory obligations and responsibilities between the non-Indian agencies of the Interior Department and the American Indian people who are subjected to the control of the Secretary of the Interior.

As previously stated, the Justice Department is primarily the lawyer for the Secretary of the Interior and the lawyer for the American Indians only as a subsidiary interest among the many interests of the Secretary. Thus, the "disparate and contradictory" obligations of the Secretary of the Interior with those of the Indians is frequently manifested. The conflicts between the Secretary and the Indians is all-pervasive in many areas. That conflict is manifested most often in regard to the Indians' *Winters* rights to the use of water and the claims of the Interior on behalf of the Bureau of Reclamation and other non-Indian agencies.

The conflicts between the Secretary of the Interior and the Indians over the use and control of the Indian *Winters* rights is not limited to conflicts among

<sup>1</sup> The Indian *Winters Doctrine* rights to the use of water entitles the Indians to sufficient water from water resources on their reservations to meet their present and future water requirements. *Winters v. United States*, 207 U.S. 564 (1908).

<sup>2</sup> Decided by the Supreme Court of the United States March 24, 1976, *Colorado River Water Conservation District et al. v. United States*; *Mary Akin, et al. v. United States*, Nos. 74-940 and 74-949, October Term 1975.



Indians and non-Indian agencies within the Interior Department. Rather, it extends to the authority of the Indians to manage and to control their own rights to the use of water on their reservations. The attorneys for the Interior and Justice Departments are saying that Indian *Winters* rights to the use of water are identical with and cannot be separated from the federal rights to the use of water. Thus, in the *Eagle River* case, the *Akin* case, and now in the *Walton* case, on my own reservation, the Justice Department is refusing to distinguish between Indian rights held in trust for the Indians and non-federal rights administered for non-Indian purposes and projects.

The Colville Confederated Tribes declare in the *Walton* cases that their Indian *Winters* rights to the use of water are their own property rights. The Colvilles deny that the Secretary of the Interior has the power to seize their Indian *Winters* rights to the use of water, to control those rights, to administer those rights, or to allocate the waters to which the Colvilles are entitled to in the exercise of those rights. What is happening on the Colville Indian Reservation is happening throughout Indian country.

May I respectfully emphasize: severe losses are now and have been experienced due to the refusal of the Department of Justice and the Department of the Interior to distinguish administratively and before the courts the non-federal rights and the Indian *Winters* Doctrine rights to the use of water.

*The Eagle River Decision: "A Preface to Disaster for the American Indian People"*<sup>3</sup>

On March 24, 1971, five years to the day prior to the *Akin* decision, the Supreme Court rendered the *Eagle River* decision. What some call the infamous history of the *Eagle River* decision warrants comment. Briefly, here is what happened in that case. The United States owns the White River National Forest in the State of Colorado. A portion of that national forest is within the drainage system of the Eagle River, a tributary of the Colorado River. There was an on-going state water adjudication in Water District No. 37. Pursuant to the state law of Colorado, a "supplemental" water proceeding was being held in the District Court of Eagle County. As required by state law, service of notice of that supplemental state court proceeding was made upon the Justice Department in accordance with the McCarran Act.

I am advised—and in legal circles it is well known—that the laws and the decisions of the State of Colorado are strictly predicated upon state's rights—anti-federal and anti-Indian. From the moment the State of Colorado was admitted into the Union up to the present time, that State, under its Constitution, has asserted ownership of all the waters within its jurisdiction; has denied the federal claims. May I emphasize: In the court in which it was most likely to fail, the Justice Department asked to have the McCarran Act construed against the State. I do not know if a bureaucracy can have a death wish, but the Justice Department seems pointed in that direction, particularly when Indians are involved. It must be remembered that on repeated occasions the test of the application of the McCarran Act had been successfully avoided in both the Supreme Court and in the lower courts. It necessarily follows, therefore, when the Justice Department willingly invoked the jurisdiction of Colorado's Supreme Court to construe that act, the conduct of the Justice Department now and forever must be viewed with suspicion.

Having placed itself before the Supreme Court of Colorado, the Justice Department adopted the course of co-mingling, without differentiation, the Indian and non-Indian decisions. Justice pursued that dangerous course to support what it called "the reserved rights" of the United States. Indian rights, Justice insisted, are "federal rights." It is not surprising that the Colorado Court discussed the federal and Indian rights as identical in character.

Moreover, before the Supreme Court, the Justice Department relied heavily on the predominantly Indian decision of *Arizona v. California* to support the non-Indian federal claims for the Forest Service. It was not unreasonable, therefore, that the Supreme Court of the State of Colorado, in light of the presentation to it by the Justice Department, did not distinguish between Indian *Winters* rights to the use of water and federal non-Indian rights to the use of water.

Under the circumstances, the Supreme Court of Colorado did exactly what the Justice Department knew, or should have known, that it would do—it said the United States, by the McCarran Act, waived its immunity from suit in water

<sup>3</sup> "Conflicts of Interests in Proceedings Before the Supreme Court of the United States—A Preface to Disaster for the American Indian People," by William H. Veeder.

litigation, declaring: "We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately."<sup>4</sup>

When the Indian community was informed of the *Eagle* decision and the assured impact it would have upon the Indian *Winters* rights, it began immediate action to force the Justice Department to refrain from mingling Indian *Winters* decisions with non-Indian decisions. The Fort Mojave Indian Tribe and the Agua Caliente Tribe, acting through their lawyer Raymond Simpson, wrote to the then Solicitor General. Mr. Simpson, in his letter dated November 20, 1970, detailed the threat of the Colorado decision to Indians in general and to the Fort Mojave Tribe in particular. Emphasis was placed upon the fact that the Fort Mojave Reservation is downstream from the Eagle River and claims rights in it.

The National Congress of American Indians, through Wilkinson, Cragun and Barker, by a letter dated December 22, 1970, joined Ray Simpson in emphasizing to the Justice Department the threat to the Western Indians by reason of the *Eagle River* decision. Louis A. Bruce, then Commissioner of the Bureau of Indian Affairs, and Leon F. Cook, then Acting Director, Economic Development of the Bureau of Indian Affairs and former president of the National Congress of American Indians, joined the Indian Tribes in advising the Department of Justice of the threat of the *Eagle River* decision. Pursuant to the direction of Commissioner Bruce and Leon Cook, there was prepared the above-mentioned analysis of the Colorado Court's *Eagle River* decision and the threat to the American Indians. That analysis is entitled: "Conflicts of Interest in Proceedings Before the Supreme Court—A Preface to Disaster for the American Indian People."

It is now history that the Justice Department filed briefs with the Supreme Court which repeated and emphasized the misconception of the Justice Department that Indian *Winters* rights are identical with federal reserved rights. That was in clear violation of promises made to the Tribes that " \* \* \* the government intends to make the Supreme Court fully aware of its obligation as trustee of Indian rights in this matter, and of any bearing that the decision may have on those rights."<sup>5</sup>

In contrast to its commitments to distinguish the Indian *Winters* rights from the non-Indian federal rights; the Justice Department adhered to precisely the same approach to this Nation's Highest Court—it relied on Indian decisions to support what it referred to as the "reserved" rights of the United States: "Reserved rights have not been defined by this Court as the entitlement of the United States [not the Indians] to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn \* \* \* *Arizona v. California*."<sup>6</sup> In its summary of argument set forth in its brief to the Supreme Court in *Eagle River*, the Department of Justice said this: "That the United States had reserved water rights based on withdrawals from the public domain is well established. \* \* \* *Arizona v. California*, 373 U.S. 546, *Winters v. United States* 207 U.S. 564" Those Indian cases were relied upon to support a claim for strictly federal Forest Service rights. Moreover, it was *not* the United States which reserved the rights in *Winters*—it was the Indians who, by their Treaty and Agreements, reserved the rights—not from the public domain but from their own aboriginal water sources.

Commitments made to the Indian people and violated are nothing new. Seldom, however, has such bad faith in the Justice Department respecting Indian people been more carefully documented and proved. The consequences of that bad faith by the Justice Department are clearly apparent in the words of the Supreme Court of the United States reflecting the failure of the Justice Department to separate the Indian and non-Indian rights in the *Eagle River* case: "It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, 373 U.S. 546, the Federal Government had the authority both before and after a state is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' Id., at 597. The federally reserved lands include any

<sup>4</sup> *United States of America, Petitioner v. The District Court in and for the County of Eagle*, 164 Colo. 555; 458 P2d, 760, 773 (1969).

<sup>5</sup> Letter dated November 6, 1970 to the Chairman of the Fort Mojave Tribe from the Solicitor General.

<sup>6</sup> *Petition of the United States for a Writ of Certiorari to the Supreme Court of Colorado—Eagle River Decision.*

federal enclave. In *Arizona v. California* we were primarily concerned with Indian reservations. Id., at 598-601."<sup>7</sup>

Immediately upon the release of the *Eagle River* decision, the Fort Mojave Tribe, in a final struggle to protect Indian people against the consequences of that decision, requested an opportunity to be heard. That petition was denied by the Supreme Court.<sup>8</sup>

Whether the Justice Department invited the catastrophe of *Eagle River* which foreshadowed *Akin*, does not matter. What does matter is that we are confronted with easily predictable consequences of the conduct of the Justice Department and the grave necessity for Congress to restore to the Indians their immunity from suit in water litigation.

*By Their Treaty of 1868, the Ute Indians Reserved Their Winters Rights to the Use of Water—They Are Not Federal Rights*

Of great importance is the fact that the Supreme Court and the Court of Appeals of the Ninth Circuit have held that: It is the Indians, having Treaties, who reserved to themselves their Indian *Winters* Doctrine rights to the use of water. Those Courts have declared that the Indian Treaties retained those rights for the Indians and that the rights were not derived from the Federal Government. Thus, it is that the Ute Indians, whose rights were involved in the *Akin* decision, retained for themselves those rights by the Treaty of March 2, 1868.<sup>9</sup>

Throughout the *Akin* brief, the Department of Justice failed to make that distinction. Rather than making that all-important differentiation, the Justice Department reiterated its errors in *Eagle River* and, on page 56 of the *Akin* brief, said this: "As recognized in *Arizona v. California* supra, 373 U.S. at 601, the principles of reserved rights doctrine are the same whether Indian or non-Indian federal claims are involved."

It was an imperative necessity for all Western Indians that the Justice Department specifically declare that the Indians, by their treaties, retained their water rights—that those rights were not granted by the United States to the Indians. Yet, as stated, the Justice Department co-mingled the Treaty rights of the Indians with the Forest Service rights and the consequences resulted in the *Akin* decision.

In these terms, the Supreme Court in the *Akin* case adopted the Justice Department rationale. Having referred to the *Eagle River* decision, the Court declared that the McCarran Act subjected "federal reserved rights" to state courts and added: "More specifically, the Court held that reserved rights were included in those rights where the United States was 'otherwise' the owner. *United States v. District Court for Eagle County, supra*, at 524. Though *Eagle County and Water Division No. 5* did not involve reserved rights on Indian reservations, viewing the Government's trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights. Indeed, *Eagle County* spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for purposes of the amendment. Id., at 523."<sup>10</sup>

*As Construed in Akin, The McCarran Act Subjects Western Indian Reservations to State Control (It Must Be Amended)*

Congress is fully cognizant of the historic and presently on-going conflicts among the American Indians and the states. It is equally cognizant that to place the Indian *Winters* rights to the use of water under the control and the administration of state laws, jurisdiction, and administration is to place the Indian lands and property under state control. Yet, that is precisely the result of the *Akin* decision. It totally subjugates Indian rights to the use of water to the will of the state agencies. One of the strangest episodes ever seen in the law arises under the *Akin* decision. The states do not and cannot control Indian lands. Yet the *Akin* decision places under state control the Indian *Winters* rights without which the lands are, in the terms of the *Winters* and *Arizona v. California* decisions, without value; are uninhabitable. The states, by controlling Indian water, will control the Indian Reservations and the very lives of the Indians.

An analysis of the *Akin* decision and the brief of the Justice Department in

<sup>7</sup> *United States v. District Court for Eagle County*, 401 U.S. 520, 522, 523 (1971).

<sup>8</sup> *United States v. District Court for Eagle County*, 402 U.S. 940, (1971).

<sup>9</sup> See *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 326 (C.A. 9, 1956).

<sup>10</sup> *Colorado River Water Conservation District, et al v. United States* — U.S. —, 96 S. Ct., 1236 March 24, 1976) slip opinion pages 8 and 9, March 24, 1976.

that case, simply fail to recognize the power exercised by the state agencies which control the waters within their jurisdiction. Ignored completely is the fact that to administer the use of water on an Indian reservation entails an outright state invasion of every Indian reservation in western United States by state agencies which are now and have always been hostile to Indians and have sought to denigrate the Indian *Winters* rights.

Again, I must refer to the Department of Interior's conflicts of interest. Alliances have always existed between the Bureau of Reclamation and the states. Section 8 of the Reclamation Act provides, in effect, for close cooperation between the Bureau of Reclamation and the states. In the conflicts between the Indians in the San Juan River Basin, the Bureau of Reclamation is solidly aligned with the states against the San Juan River Indians.

On the Rio Grande, the Colorado, the Columbia, and the Missouri Rivers, the states and the Bureau of Reclamation work most closely. So, once again, there is repeated the conflict of interest which brought about the *Eagle* and *Akin* decisions.

*The McCarran Act as Construed in Akin Is Violative of This Nation's Trust Responsibility*

I am advised that the Congress cannot, under the Constitution, delegate its trust responsibility owing to the American Indians in regard to their *Winters* rights or otherwise. Yet, that is precisely how the Supreme Court has construed the *Akin* case.

If the *Akin* decision is permitted to stand, full power and control over the administration and distribution of the waters to which the Indians are legally entitled would be vested in the office of the state engineer. It would be that officer—not the federal officials—who will control the Indian water rights. Under those circumstances, it is respectfully submitted that Congress cannot fulfill its trust obligation. Only by amending the McCarran Act (as it is construed by the Supreme Court) can it protect the Indians' rights. Only by restoring to the Indians their immunity from state jurisdiction respecting their invaluable *Winters* rights to the use of water can true protection of the Indian Reservations be achieved.

On behalf of the National Congress of American Indians and all American Indians, I petition the Congress to act now before it is too late and to stop the threat of Indian destruction by the state invasion of our reservations. The simple amendment to the McCarran Act which is attached will, if it is enacted, preserve the Western Indian People from the threat of the *Akin* decision.

CONGRESS OF AMERICAN INDIANS,  
Washington, D.C., March 26, 1976.

Senator JAMES ABOUREZK,  
Chairman, Senate Indian Affairs Subcommittee,  
Washington, D.C.

DEAR SENATOR ABOUREZK: On March 24, 1976, the Supreme Court rendered its opinion in the *Akin* case, which is entitled *Colorado River Water, Conservation District, et al. v. United States; Mary Akin, et al. v. United States*. A copy of that Opinion is attached.

Consequences of the *Akin* decision can be catastrophic to Indian nations, tribes and people. It construes the so-called McCarran Act (43 U.S.C. 666) as being applicable to Indian rights to the use of water and subjects those rights to state court jurisdiction for the adjudication of them. Tenuous nature of the decision and the extent to which the Court had to strain to arrive at its conclusion is attested to by sharp and cogent dissents of three Justices. Yet, the cruel fact remains, the Indians for the first time in history are confronted with losing their *Winters* Doctrine rights in state courts. Practical experience in those courts has repeatedly demonstrated that the Indians invariably lose in those courts.

Adding to the dilemma created by *Akin*, which the Indian people are facing, is the adamant refusal of the Justice Department to distinguish between Indian rights to the use of water and the rights for reclamation projects, national forests and similar non-Indian federal rights. That refusal by the Justice Department manifestly contributed to the *Akin* decision.

Another factor of great importance and equal seriousness to the Indian people is the ongoing internal struggle within the Department of the Interior between the Bureau of Reclamation and the Bureau of Indian Affairs over the method of determining water requirements for Indians, particularly in the Upper Basin of the Missouri River. Due to that internal and unresolved struggle, the Interior

Department and the Justice Department employees are not in a position to present effectively the Indian claims in a friendly tribunal, much less in hostile state courts.

Pending cases in the State of Montana involving the Crow Tribe and the Northern Cheyenne Tribe, *United States v. Big Horn Canal Company* and *United States v. Tongue River Water Users Association*; in the San Juan River Basin, *New Mexico v. United States*; in the Rio Grande, *United States v. Aamodt*, and other cases all point to irreparable and continuing damage for Indians throughout Western United States.

On that background, I cannot urge too strongly that you introduce an amendment to the McCarran Act exempting Indian rights from its application. A copy of suggested amendatory language is attached.

The National Congress of American Indians and all Indian nations, tribes and people will be forever grateful for your assistance in this matter.

Sincerely,

MEL TONASKET, *President*.

SUGGESTED AMENDATORY LANGUAGE,<sup>1</sup> McCARRAN ACT (43 U.S.C. 666), ACT OF JULY 10, 1952, C. 651, TITLE II, SEC. 208 (A)-(C), 66 STAT. 560

*Provided, however,* That this consent to the joinder of the United States as a defendant in suits or proceedings for the adjudication of rights to the use of water does not extend to or in any way include rights to or interest in the use of water of Indian nations, tribes or people, and those Indian rights to the use of water be and the same are specifically declared to be immune from state jurisdiction, control, administration or adjudication by states, state courts, state agencies, tribunals or administrative officers or state proceedings, any judicial decisions or opinions to the contrary notwithstanding.

Ample time for the tribes to express their fears to state administration of Indian water rights, subsequent to the Eagle River cases, came in 1973 through the National Water Commission hearings held throughout the country. The tribes opposed the Commission's suggestion that states could properly administer all federal water rights, including Indian water rights. At a 1973 hearing in Spokane, Washington, NCAI President Mel Tonasket commented to the Commission Chairman.

"Mr. Luce, as an attorney for the Umatilla Indians, you should know by now what all Indians know—that Indian tribes have never gotten anything but racist double-dealing from the states—which do not recognize tribes (as sovereigns), nor their (inherent) right to reservation self-government."

Philip Roy, a member of the Blackfeet tribe and also a tribal attorney, had this to say: "It is not because Indian people are separate itself. It is because they do not want to deteriorate the federal trust to the federal government." (It was that very same relationship which was being severed during the termination period, and one piece of terminationist legislation was P.L. 83-280 which conferred on certain named states authority to assume jurisdiction for civil and criminal matters on Indian reservations, but which also contained this provision: that nothing in this bill "shall confer jurisdiction upon the state to adjudicate in probate proceedings or otherwise, the ownership or right to possession of any real or personal property, including water rights, belonging to any Indian or Indian tribe . . . that is held in trust by the United States.")

Hilary Skannon, then chairman of the Coeur D'Alene tribe, stated that the Commission's draft recommendation "suggests solutions which are not acceptable to Indians. An example of one of these studies is the Interim State Water Plan for the State of Idaho. Mr. Keith Higginson is the director of the Department of Water for the State of Idaho. He is very knowledgeable about Indian water rights, but the report which was put out by his office, and which is 264 pages long, contains less than one page of its discussion on Indian water rights."

Dennis Karnoff, Warm Springs tribal attorney, had this to say as to some consequences of state court adjudication of tribal water rights:

"The Warm Springs tribe water rights arose from a treaty of negotiation, rather than a treaty of conquest, between two sovereign nations, and we feel it is the solemn obligation of the United States to carry out and protect those rights. It is not a question of state procedural law. We don't think the Indian water

<sup>1</sup> Authorized, National Congress of American Indians Executive Committee Resolution, March 26, 1976.

rights would be afforded the proper priority and recognition under state law, and we also fear that they would in some ways be subject to state subsidy law.

"I notice that the report suggests that it is only procedural law and not substantive law, but in Oregon, as in most of the Western states I am aware of, we have a provision for cancellation of a water permit for non-use for a period of five years.

"If an Indian water permit is filed having a priority dating back to 1855, and there would be a non-use, we believe the state would try to cancel that right pursuant to that. We are not sure, based on this proposal, whether that would be permissible by the state or not.

"We don't think it is permissible, and we don't think that the Indians' water rights should be subject to that type of thing.

"But, conceivably, these procedural rights affect the substance of the water right to a very great extent. Simply, we object to the extension of the state courts' jurisdiction over Indian water rights. We don't think the state courts have been the tribunals that have protected Indian rights . . . but the federal courts have done that."

The National Water Commission, after hearing testimony of the Indians and others as to the devastating impact of state administration and regulation of Indian water rights, concluded in its final report, Chapter 14, Recommendation No. 14-4:

"Jurisdiction of all actions affecting Indian water rights should be in the U.S. District Court for the district or districts in which lie the Indian reservations and the water body to be adjudicated. Indian tribes may initiate such actions and the United States and affected Indian tribes may be joined as parties in any such action. The jurisdiction of the Federal district court in such actions shall be exclusive, except where Article III of the Constitution grants jurisdiction to the U.S. Supreme Court. In such actions, the United States should represent the Indian tribes whose water rights are in issue, unless the tribe itself becomes a party to the action and requests permission to represent itself. Any state in which the reservation lies and any state having water users that might be affected in an Indian water rights adjudication may initiate an adjudication and may intervene in an adjudication commenced by others, including adjudications initiated by the United States, and by Indian tribes. Upon such appearance by the State, the State may move to represent its non-Indian water users *parans patrie*, and the motion should be granted except to non-Indian water users as to whom the state has a conflict of interest."

#### FEDERAL-TRIBAL CONFLICTS

Compounding state-tribal conflicts over water rights is the fact that there are virtually no major interstate stream systems, and few, if any, tributaries of main streams, where there are not any agencies of the Interior Department competing with the Indians for a supply of water inadequate to meet present and future demands.

Because of the magnitude of its projects, the Bureau of Reclamation is the chief competitor with the Indians for the scarce supply of water. Other Interior agencies such as Fish and Wild Life, Recreation, National Parks and Bureau of Land Management all participate in the development undertaken on stream systems by the Bureau of Reclamation. In their efforts to protect what remains of their heritage in the streams of the western states, tribes are confronted with a coalescence of forces far beyond the control of those who are charged with the legal responsibilities for protecting their interests—representatives from the Interior Solicitor's office find themselves becoming victims of a system ill-suited to protect, much less advocate the Indian interests. The confrontation of the agencies and tribes for water frequently gives rise to far-reaching and disastrous results to the Indians. Although charged with the obligation of prosecuting suits to protect and to have Indian rights declared, the Justice Department is confronted with conflicts just as severe if not more so than those faced by Interior. Justice is also charged with the obligation of representing the United States when Indians seek restitution for seizure of their rights by other agencies of the government. When Indian rights to the use of water are being adjudicated on streams upon which the Bureau of Reclamation is likewise asserting claims, Justice Department attorneys become engaged in preparing to defend against claims asserted by the Indians, while, at the same time, another group of attorneys in the same division is preparing to try suits to protect those same Indian

rights. A good case in point was the struggle of the Yakima Tribe and the BIA to protect and preserve the rights of the Indians in Ahtanum Creek—which constituted the northern boundary of their reservation. The Indian and non-Indian lands on both sides of the stream were irrigated by it. Conflict developed between the two in the early 1900's. In 1906, the Bureau of Reclamation undertook the construction of the Yakima Reclamation Project. Ahtanum Creek is a tributary of the Yakima River from which the project was to receive its supply. The conflict between the Indians and the non-Indians concerned the Bureau that it might interfere with the project, chief among its concerns being which law was to apply to settle the dispute—Reclamation wanted to rely on the appropriative rights doctrine, while the Indian Service preferred the riparian rights—the *Winters Doctrine* as enunciated two years later, added to the difficulty—and under these pressures, the Secretary of the Interior entered into an agreement on May 8, 1908, which purportedly gave the non-Indians 75% of the waters of Ahtanum Creek and retained 25% for the Indians. Years passed before the Indians were informed of the agreement. Justice refused to act to recover the Yakimas' rights; and it resisted efforts to convince them to act and to protect the Indians for almost 60 years until the Yakimas were finally successful in getting the agreement overturned and were able to recover their rights.

A recent event which affects the New Mexico and Arizona tribes was the passage of the San Juan-Chama Reclamation Project, 78 Stat. 102, 43 U.S.C. 602a, said passage being the result of almost thirty years of planning and effort.

The first reclamation project in New Mexico, the Rio Grande Project, defined the basic conflict involved with every subsequent reclamation project—providing water for the incoming developers who anticipated the growth of the area through immigration, as opposed to protecting those prior and paramount rights which had been established before New Mexico was a part of the United States. Those prior and paramount rights which were unquestionably established prior to New Mexico's admission into the Union are those of the Indian tribes of the Southwest.

The San Juan-Chama project would enable New Mexico to use a major portion of the waters of the San Juan River in the Upper Colorado River Basin to which it was "entitled" under the earlier Colorado River and Upper Colorado River Basin Compacts—transporting water from the San Juan River across the Continental Divide to the Chama River on the Rio Grande Basin.

In a discussion of the need for this project, the Legislative History repeats the theme of earlier reports—a critical shortage of water: "The water needs of the Rio Grande Basin far exceed the amounts of water available, either in the basin or for the diversion from the San Juan Basin. . . . The economic plight of the small communities in streams (including the Pueblo Indians) in the northern part of the Rio Grande Basin has long been recognized as a major problem of the State. . . . Farther south, along the Rio Grande, the available water supply is over-committed and there is a critical need for supplemental water in order to stabilize the agricultural economy. . . . The need for municipal and industrial water. . . . is even more critical than the need for irrigation water. Albuquerque is one of the fastest growing cities in the United States. . . . An assured water supply is essential. . . . for the anticipated growth of Albuquerque."

A companion project, the Navajo Irrigation Project, anticipates a large diversion from the San Juan system to meet demands of the Four Corners area. While the primary purpose of the Navajo Project is irrigation, the "project is adapted to serve municipal and industrial water users as well as. . . irrigation. The officials of the State of New Mexico anticipated a relatively large municipal and industrial water demand will develop in the San Juan River Basin."

Water from the San Juan, necessary for the development of the Jicarilla Apache and Navajo tribal lands and economy, would thus be diverted to the Rio Grande Basin. The tribes on the lower Colorado River are also interested parties since the waters diverted from the San Juan would affect the downstream flow and threaten their supply.

In 1966, the State of New Mexico instituted one of five suits in the United States District Court of New Mexico, against the United States, four Pueblo tribes, and hundred more, for determination of the water rights of the defendants in the "Nambe-Pojoaque River System," a tributary of the Rio Grande. The purpose of the suit was to facilitate the administration of the San Juan-Chama reclamation project which was under construction.

The New Mexico complaint alleged that the users of the water in the "Nambe-Pojoaque River System," including the Pueblo tribes, used the water under New

Mexico appropriation law. The complaint asked that the court define and determine the water rights of each defendant.

The United States filed a motion to dismiss the action for lack of jurisdiction and then entered a motion to intervene in the suits.

In the motion to intervene, the United States claimed *Winters Doctrine Rights* to the use of water for the Pueblo Tribes to "satisfy the maximum needs and purposes of said Pueblos." But, in a Pre-Trial Memorandum, the United States claimed, as an alternative theory, rights for the Pueblo tribes based on appropriations and beneficial use. This theory would replace the Pueblo water rights and put them on the same basis as the rights of the non-Indian water users.

Several months later, two Pueblo tribes, downstream from the abovementioned tribes, filed a Petition to Intervene in the five suits instituted, on the grounds that their rights were not being protected by the United States in regard to the initial suits, since those suits affected waters from the upstream tributaries that fed the mainstream of the Rio Grande—it traverses the San Felipe and Santo Domingo Pueblos and the main stream and the ground waters thereof comprise the sole source of water to make the semiarid lands of the two Pueblos habitable. The Chama River in which both the San Felipe and Santo Domingo Pueblos own rights to the use of water, yields approximately one-third of the entire natural flow of the Rio Grande. Very substantial but unknown quantities of water, both surface and ground water, enter the Rio Grande from the Santa Cruz, Pojoaque Creek, Rio de Taos, and other streams involved in the multiple actions, and those waters are essential to the San Felipe and Santo Domingo Pueblos.

At a July 20, 1970 hearing on the multiple cases, the Justice Department filed a brief in opposition to the Petitions of the San Felipe and Santo Domingo Pueblos to intervene. In that brief are admissions that the stated objectives of the multiple actions on the Chama River and other tributaries is to have the waters of those tributaries "to which others may be entitled" including the Pueblos, adjudicated for use "within the tributary areas." The brief continues: "Storage facilities will be built (as part of the project) for the impounding and storage of local waters of the Nambe-Pojoaque, Santa Cruz, and Rio de Taos watersheds. This will make more water available during the irrigation season. The storage of water will also reduce the amount of water flowing from the tributaries into the Rio Grande."

Violation of the natural flow rights of the San Felipe and Santo Domingo Pueblos in the source of their water—the tributaries of the Rio Grande, is thus admitted. Violations of the trust responsibility of the United States owing to the Pueblos is thus indisputable.

By building the San Juan-Chama project, foreign water will be brought into the Rio Grande for non-Indian uses with the attendant conflicts inherent in a project of that nature. Further aiding and abetting that crisis is the trustee United States' failure to know or to have the means of knowing the nature, extent, and measure of the Pueblo Indian rights in the main stream of the Rio Grande.

Throughout this phase of the consideration, characteristic examples of the problem, which is widespread throughout the country, have been selected and reviewed to demonstrate the difficulties in protecting and preserving Indian *Winters Doctrine Rights*. The United States Government has made many statements about the protection of tribal land and water rights. Yet through the years, Indian tribes have witnessed a steady deterioration of their land and water resources, both in quality and quantity. They have seen the United States Government give its overt approval to assure the success of special interest groups which are taking away the very resources upon which tribal existence depends. In spite of numerous statements and admissions through the years to the effect that future growth could be accomplished only by bypassing the protection of Indian water rights, the United States has refrained from giving that protection.

Fundamentally, there is a formidable body of law quite favorable to the Indians, but the difficulties stem from the corruption of the federal agents of the United States in administering that law.

While recognizing that the Indians have a unique relationship with the Government and that their land and water rights were to be protected, the Government developed huge schemes to develop resources and use water for large non-Indian projects without first determining the origin, nature, and extent of the tribal land and water rights. Without water in the arid and semiarid regions, any program of development on Indian reservations must fail. It follows that if

Indian tribes are to survive and grow, the United States Government should exert its full effort to protect these tribal land and water rights. In light of the preceding review, there is a grave doubt as to whether the trust responsibility owing to the Indians in regard to development of their reservations can be fulfilled by the Nation under existing laws, policies, practices and procedures.

#### FINDINGS AND RECOMMENDATIONS

1. That the present method utilized by Congress in providing for irrigation development through the Bureau of Reclamation is destructive to Indian *Winters* Doctrine Rights and denigrates tribal sovereignty.

*Recommendation:* that Congress utilize existing funding approaches for Indian irrigation projects that would put the basic authority for administering these projects in tribal hands—Public Law 93-638 could be this mechanism since that Act provides a means for tribes to use the "Intergovernmental Personnel Act" to allow them to acquire from governmental agencies the technical expertise necessary to carry out these projects. This could provide the tribes with the engineering and capability of the Bureau of Reclamation without that agency's historical anti-Indian bias.

2. That events leading to the Supreme Court's decision in the *Akin Case* caused the Court to misconstrue 43 U.S.C. 666 as embracing Indian water rights, whereas the legislative history of the Act indicates contrariwise or would not warrant such a conclusion.

If that decision is allowed to stand, Indians will be forced to litigate their water rights in hostile state tribunals—this may violate their sovereign immunity from suit. They will be forced to compete with the power and authority of state administrative systems that have consistently fought to gain control over Indian rights and would ultimately destroy the *Winters* Doctrine. Our hearings, together with other testimony presented before Congress and the National Water Commission amply illustrate the difficulties Indians would have receiving justice before state judicial bodies.

*Recommendation:* That Congress immediately amend 43 U.S.C. 666 to exclude any application of that law to Indians and their water rights.

3. That the corrupt administration and the conflicts of interest confronting the officials of the Justice and Interior Departments seriously impairs the effectiveness of the role of the United States as trustee for the Indians; that the confusion created by officials of the two departments between "ownership" and "trusteeship" of these rights will destroy the Indians' most valuable resource.

*Recommendation:* Responsibility for the protection of Indian water rights must be removed from the Department of the Interior and the Department of Justice and vested in a separate agency with full power to litigate or to take whatever other action necessary to effectuate the United States' responsibility as trustee over the Indian water rights.

#### APPENDIX B

##### INDIAN CHILD WELFARE STATISTICAL SURVEY, JULY 1976

##### ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

The Association on American Indian Affairs (432 Park Avenue South, New York, New York 10016) is a private, non-profit, national citizens' organization supported by members and contributors. Founded in 1923, it assists American Indian and Alaska Native communities in their efforts to achieve full economic, social and civil equality, and to defend their rights. Policies and programs of the Association are formulated by a Board of Directors, the majority of whom are Indian and Alaska Native.

One of the special publications of the Association is "Indian Family Defense," a newsletter exclusively concerned with Indian child welfare issues.

(177)

## INTRODUCTION

This report presents the results of a nation-wide Indian child-welfare statistical survey done by the Association on American Indian Affairs (AAIA) at the request of the American Indian Policy Review Commission, an agency of the United States Congress, in July 1976.

The report indicates that Indian children are being removed from their families to be placed in adoptive care, foster care, special institutions, and federal boarding schools at rates far out of proportion to their percentage of the population.

The disparity in placement rates for Indian and non-Indian children is shocking and cries out for sweeping reform at all levels of government.

In Maine, Indian children are today placed in foster care at a per capita rate 19 times greater than that for non-Indian children. In Minnesota, an Indian child is 17 times more likely than a non-Indian child to be placed in foster care. In South Dakota per capita foster-care rate for Indians is 22 times the rate for non-Indians. The statistics from other states demonstrated that these rates are not uncommon elsewhere.

Most of the Indian children in foster care are placed with non-Indian families. In Maine, for example, 64 per cent of Indian foster children are living with non-Indian families. In New York approximately 97 per cent of Indian foster children are in non-Indian families, and in Utah 88 per cent of the Indian foster-care placements are with non-Indian families.

Indian children are also placed in adoptive homes at a rate far disproportionate to that for non-Indian children. In California, Indian children were adopted in 1975 at a per capita rate 8 times that for non-Indian children, and 93 per cent of such adoptions were made by non-Indian parents. In Montana, Indian children are adopted at a per capita rate almost 5 times that for non-Indian, and 87 per cent of such adoptions were made by non-Indians.

In states such as Alaska, Arizona, and New Mexico, which have large numbers of Indian children in boarding schools or boarding home programs, the rates at which Indian children are separated from their families indicate an even greater disproportion to the non-Indian rate. In New Mexico, when adoptive care, foster care, and federal boarding school placements are added together, Indian children are being separated from their families today at a per capita rate 74 times that for non-Indian children.

Nationwide, more than 29,000 Indian children (many as young as six years old) are placed in U.S. Bureau of Indian Affairs boarding schools. Enrollment in BIA boarding schools and dormitories is not based primarily on the educational needs of the children; it is chiefly a means of providing substitute care. The standards for taking children from their homes for boarding school placement are as vague and as arbitrary as are standards for Indian foster care placements.

The data base for the individual state reports consists of statistics supplied to the AAIA by responsible federal and state agencies. The statistics do not include many Indian children living outside their natural families for which there are no statistics, among them: (1) informal placements of Indian children that do not go through any legal process; (2) private boarding home programs which, in some western states, place thousands of Indian children away from their families for the entire school year; (3) Indian-to-Indian on-reservation placements which, while preferable to placements with non-Indian families off the reservation, are nevertheless an indication of family breakdown; and (4) Indian juveniles incarcerated in correctional institutions.

The state-wide figures presented here often mask important variations within a state. Those states for which the Association has been able to do county-by-county breakdowns of Indian foster care generally demonstrate a wide variation between communities. This indicates a need for greater precision in how child-welfare statistics are compiled and analyzed by the states and federal government.

The separation of Indian children from their families frequently occurs in situations where one or more of the following exist:

(1) the natural parent does not understand the nature of the documents or proceedings involved;

(2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights;

(3) the public officials involved are unfamiliar with, and often disdainful of, Indian culture and society;

(4) the conditions which led to the separation are not demonstrably harmful or are remediable or transitory in character; and

(5) responsible tribal authorities and Indian community agencies are not consulted about or even informed of the actions.

On August 27, 1976 Senator James Abourezk, Chairman of the U.S. Senate Subcommittee on Indian Affairs, introduced a bill drafted by the Association on American Indian Affairs and entitled the "Indian Child Welfare Act of 1976" (S. 3777). That bill, if enacted, would establish standards for the placement of Indian children in foster or adoptive homes, assure that Indian families will be accorded a full and fair hearing when child placement is at issue, establish a priority for Indian adoptive and foster families to care for Indian children, support Indian family development programs, and generally promote the stability and security of Indian family life.

#### INDIAN CHILDREN IN ADOPTIVE AND FOSTER CARE (SUMMARY)

State	Indian and Alaska Native under 21 yr old	Adopted Indian children (estimate)	Per capita rate of Indians adopted non-Indians (percent)	Indian children in foster care	Per capita rate of Indians in foster care non-Indians (percent)	Indian children in adoptive and foster care combined (estimate)	Per capita rate of Indians in foster and adoptive care compared to non-Indians (percent)
Alaska.....	28,334	957	460	1,393	1,300	12,377	121,110
Arizona.....	54,709	1,039	420	1,558	1,270	11,597	1,350
California.....	39,579	1,507	840	319	270	1,826	610
Idaho.....	3,808	(3)	41,110	296	640	(3)	(3)
Maine.....	1,084	(3)	100	82	1,910	(3)	(3)
Michigan.....	7,404	912	370	82	710	994	390
Minnesota.....	12,672	1,594	390	737	1,650	2,331	520
Montana.....	15,124	541	480	534	1,280	1,075	730
Nevada.....	3,739	(3)	100	73	700	(3)	(3)
New Mexico.....	41,316	(3)	150	287	240	(3)	(3)
New York.....	10,627	(3)	330	142	300	(3)	(3)
North Dakota.....	8,186	269	280	296	2,010	565	520
Oklahoma.....	45,489	1,116	440	337	390	1,453	430
Oregon.....	6,839	402	110	247	820	649	1170
South Dakota.....	18,322	1,019	160	832	2,240	1,851	270
Utah.....	6,690	328	340	249	1,500	577	500
Washington.....	15,980	740	1,880	558	960	1,298	1,330
Wisconsin.....	10,176	733	1,790	545	1,340	1,278	1,560
Wyoming.....	2,832	(3)	400	98	1,040	(3)	(3)

<sup>1</sup> Minimum estimates, see State report.

<sup>2</sup> Includes Alaska Native children living away from home full time during the school year in the State's boarding home and boarding school program.

<sup>3</sup> Not available.

<sup>4</sup> Based only on the 3-yr period 1973-75.

<sup>5</sup> Based only on the 2-yr period 1974-75.

<sup>6</sup> Based only on fiscal year 1976 figures.

<sup>7</sup> Based only on 1976 figures.

<sup>8</sup> Based only on the 4-yr period 1972-75.

Note: For definitions and sources of data see individual State reports.

#### INDIAN FOSTER CARE (10 WORST STATES BY RATE OF INDIAN PLACEMENTS)

State	Foster care placements per thousand		Per capita rate of Indians in foster care compared to non-Indians (percent)
	Indian children	Non-Indian children	
Idaho.....	77.5	12.1	640
Maine.....	75.8	4.0	1,910
Minnesota.....	58.1	3.5	1,650
Wisconsin.....	53.5	4.0	1,340
South Dakota.....	45.5	2.0	2,240
Utah.....	37.2	2.5	1,500
North Dakota.....	36.1	1.8	2,010
Oregon.....	36.1	4.4	820
Montana.....	35.3	2.8	1,280
Washington.....	35.0	3.6	960

Note: For definitions and sources of data see individual State reports.

## ALASKA NATIVE ADOPTION AND FOSTER CARE

## Basic Facts

1. There are 137,044 under twenty-one year olds in Alaska.<sup>1</sup>
2. There are 28,334 under twenty-one year old Alaska Natives (Indian, Eskimo, and Aleut) in Alaska.<sup>2</sup>
3. There are 108,710 non-Natives under twenty-one in Alaska.

## I. ADOPTION

In the State of Alaska, according to the Alaska Department of Health and Social Services Division of Family and Children Services, there is an average of 59 public agency adoptions per year of Alaska Native children.<sup>3</sup> Using federal age-at-adoption figures,<sup>4</sup> 83 percent (or 49) are under one year of age when placed. Another 13 percent (or eight) are one year to less than six years old when placed; and 4 percent (or two) are six years or older when placed. Using the formula, then: 49 Alaska Native children per year are placed in adoption for at least 17 years, eight Alaska Native children are placed in adoption for a minimum average of 14 years, and two Alaska Native children are placed in adoption for a minimum average of six years; there are 957 Alaska Natives under twenty-years old in adoption in Alaska. This represents one out of every 29.6 Alaska Native children in the State.

Using the same formula for non-Natives (there is an average public agency placement of non-Natives in adoptive homes in Alaska of 50 per year),<sup>5</sup> there are 807 under twenty-one year old non-Alaska Natives in adoption in Alaska. This represents one out of every 134.7 non-Alaska Native children in the State.

*Conclusion*

There are therefore by proportion 4.6 times (460 percent) as many Alaska Native children in adoptive homes as non-Alaska Natives; 93 percent of the adopted Native children are placed in non-Native adoptive homes.<sup>6</sup>

## II. FOSTER CARE

According to statistics from the U.S. Bureau of Indian Affairs, there were 263 Alaska Native children (under twenty-one years old) in BIA-administered foster care in 1972-73.<sup>7</sup> The Alaska Division of Family and Children Services does not have a racial breakdown of its foster care placements.<sup>8</sup> Assuming then that the Division of Family and Children Services places Alaska Natives in foster care in direct proportion to their percentage of the total population under twenty-one years old, there were 130 Alaska Native children in State-administered foster

<sup>1</sup> U.S. Bureau of the Census, 1970 Census of the Population, Vol. I: Characteristics of the Population, Part III: Alaska (Washington, D.C.: U.S. Government Printing Office: 1973), Table 19, pp. 3-34.

<sup>2</sup> *Ibid.*, p. 3-34 (Table 19), pp. 3-205, 3-206 (Table 139). Alaska Natives (Indian, Eskimo and Aleut) comprise 81.2 percent of the total non-white population according to Table 139. According to Table 19 there are 34,894 total non-whites under 21. 34,894 times 81.2 percent equals 28,334.

<sup>3</sup> Letter from Connie M. Hansen, ACSW, Foster Care and Child Protection Consultant, State of Alaska Department of Health and Social Services, Division of Family and Children Services, Sept. 11, 1973.

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, Adoptions in 1971. DHEW Publication No. (SRS) 73-03259, NCSS Report E-10 (1971), May 23, 1973. Table 6 "Children adopted by unrelated petitioners: Percentage distribution by age at time of placement, by type of placement, 1971."

<sup>5</sup> Letter from Connie M. Hansen, ACSW, *op. cit.*

<sup>6</sup> *Ibid.*

<sup>7</sup> U.S. Bureau of Indian Affairs, "Fiscal Year 1973—Child Welfare (Unduplicated Case count by States)."

<sup>8</sup> Letter from Connie M. Hansen, ACSW, *op. cit.*

care in 1973.<sup>9</sup> The combined figures (393 children) represent one out of every 72 Alaska Native children in the State.

By comparison (assuming the Division of Family and Children Services also places non-Natives in foster care in direct proportion to their percentage of the population), there were 496 non-Native children in foster care in 1973,<sup>10</sup> representing one out of every 219 non-Native children in the State.

*Conclusion*

By rate, therefore, Alaska Native children are placed in foster homes 3.0 times (300 percent) more often than non-Alaska Natives in Alaska. (Because the Division of Family and Children Services was unable to supply a racial breakdown for foster care, these figures are based on the conservative assumptions stated above. Were it to be assumed that Alaska Natives represent the same percentage of foster care placements as they do adoptive placements, the disproportion in foster care rates would more than double.)

## III. ADOPTIVE CARE, FOSTER CARE, AND BOARDING PROGRAMS

A large number of Native students live away from home full-time during the school year. In 1972-73, 2,427 (94%) of the 2,585 village Native students in public high schools were enrolled in a boarding home or boarding school program.<sup>11</sup> A more proper way of computing the number of Indian children who do not live in their natural homes in the State of Alaska is to include the boarding school figures. When this is done, the combined total of Native children in foster homes, adoptive homes and boarding programs is 3,777, representing one out of every 7.5 Alaska Native children in the State.

Since few, if any, non-Natives must enroll in boarding programs, the non-Native figure of 1,303 children in adoptive homes and foster homes remains the same, representing one in every 83.4 non-Natives.

*Conclusion*

Alaska Native children are out of their homes and in foster homes, adoptive homes, or in boarding programs at a rate 11.1 times (1,110 percent) greater than that for non-Natives in Alaska.

The Alaska statistics do not include placements made by private agencies, and therefore are minimum figures.

*Methodological note to the Alaska statistics.*—The Alaska State Division of Children Services probably removes very few Native children from their parents in the small rural villages. The population base for this report is all Natives, rural and urban; if the percentage of children outside their natural homes was based on only the urban Native population—likely the most revealing comparison—the percentage would of course be much higher. It is virtually certain, therefore, that these are absolutely minimum figures.

<sup>9</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Children Served by Public Welfare Agencies and Voluntary Child Welfare Agencies and Institutions March 1973." DHEW Publication No. (SRS) 76-03258, NCSS Report E-9 (3/73), November 1975. Table 1, "Children receiving social services from State and local public welfare agencies," p. 7. Indian people comprise 20.7 percent of the total under twenty-one year of population of Alaska. There were 626 children in foster family homes in 1973. 626 times 20.7 percent equals 130.

<sup>10</sup> *Ibid.* 626 times 79.3 percent equals 496.

<sup>11</sup> Judith Kleinfeld, "A Long Way From Home" (Fairbanks: Center for Northern Educational Research and Institute of Social, Economic and Government Research of the University of Alaska: 1973), p. 3.



## ARIZONA ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 740,460 under twenty-one-year-olds in the State of Arizona.<sup>1</sup>
2. There are 54,709 under twenty-one-year-old American Indians in the State of Arizona.<sup>2</sup>
3. There are 685,751 non-Indians under twenty-one in the State of Arizona.

## I. ADOPTION

In the State of Arizona, according to the Arizona Department of Economic Security, there were an average of 65 public agency adoptions per year of American Indian children from 1969-1972.<sup>3</sup> Using federal age-at-adoption figures,<sup>4</sup> 83 percent (or 54) are under one year of age when placed. Another 13 percent (or eight) are one year or less than six years old when placed; and 4 percent (or three) are six years or older when placed. Using the formula, then, 54 Arizona Indian children per year are placed in adoption for at least 17 years, eight Arizona Indian children are placed in adoption for a minimum average of 14 years; and three are in adoption for a minimum average of three years; there are 1,039 Indians under twenty-one year olds in adoption in Arizona. This represents one out of every 52.7 Indian children in the state.

Using the same formula for non-Indians (there were an average public agency placement of non-Indians in adoptive homes in Arizona of 194 per year from 1969-1972),<sup>5</sup> there are 3,111 under twenty-one-year-old non-Indians in adoption in Arizona. This represents one out of every 220.4 non-Indian children in the State.

*Conclusion*

By rate, therefore, Indian children are placed in adoptive homes 4.2 times (420%) more often than non-Indian children in Arizona.

## II. FOSTER CARE

In the State of Arizona, according to statistics from the Arizona Department of Economic Security, there were 139 Indian children in foster care in April 1976 under a State contract with the U.S. Bureau of Indian Affairs.<sup>6</sup> There are no statistics giving a racial breakdown for the other State-administered foster care programs that include Indian children. However, making the most conservative assumption possible, that is, that the Arizona Social Services Bureau placed Indian children in foster care in direct proportion to their percentage of the population, there were an additional 208 Indian children in State-administered foster care.<sup>7</sup> (That this is indeed a most conservative assumption is demonstrated by the appendix to this report. The appendix, based on a random sam-

<sup>1</sup> U.S. Bureau of the Census, *Census of Population: 1970, Volume I, Characteristics of the Population, Part 4, Arizona* (U.S. Government Printing Office: Washington, D.C.: 1973), pp. 4-30.

<sup>2</sup> U.S. Bureau of the Census, *Census of Population: 1970, Subject Reports, Final Report PC(2)-1F, "American Indians"* (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 6.

<sup>3</sup> Office of Research and Reports, Social Services Bureau, Arizona Department of Economic Security, "Children placed in adoption during 1969, 1970, 1971, and 1972," (Chart).

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1971," DHEW Publication No. (SRS) 73-03259, NCSRS Report E-10 (1971), May 23, 1973, Table 6, "Children adopted by unrelated petitioners: Percentage distribution by age at time of placement, by type of placement, 1971."

<sup>5</sup> "Children placed in adoption during 1969, 1970, 1971, and 1972," op. cit.

<sup>6</sup> Telephone interview with Mr. Wally Earl, Arizona Department of Economic Security, July 22, 1976.

<sup>7</sup> *Ibid.* Arizona reported 2,809 children in foster care in April 1976, excluding those on the BIA contract. Indian children comprise 7.4 percent of the under twenty-one year olds in Arizona. 2,809 times .074 equals 208.

ple of children in State-administered foster care made by the Arizona Social Services Bureau in March 1974, demonstrates that Indian children are in fact placed in state-administered foster care at rates far disproportionate to their percentage of the population.) Thus, there was a combined total of 347 Indian children in State-administered foster care during April 1976. In addition, the Navajo and Phoenix area offices of the BIA report a combined total of 211 Indian children in foster care in Arizona during April 1976.<sup>8</sup> Combining the State and BIA figures, there were at least 558 Indian children in foster care in April 1976. This represents one out of every 98 Indian children in the State. By comparison, there were 2,601 non-Indian children in foster care in April 1976,<sup>9</sup> representing one out of every 263.6 non-Indian children.

*Conclusion*

By rate, therefore, Indian children are placed in foster care at least 2.7 times (2.0 percent) more often than non-Indians in Arizona.

See the county-by-county analysis in the appendix for projections of the actual rates at which Indian children are placed in state-administered foster care.

## III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures, a total of 1,597 under twenty-one year old Indian children are either in foster homes or adoptive homes in the state of Arizona. This represents one out of every 34.3 Indian children. Similarly, for non-Indians in the state, 5,712 under twenty-one year olds are either in foster care or adoptive care, representing one in every 120.1 non-Indian children.

*Conclusion*

By rate, therefore, Indian children are removed from their homes and placed in adoptive or foster care 3.5 times (350 percent) more often than non-Indian children in the State of Arizona.

## U.S. BUREAU OF INDIAN AFFAIRS BOARDING SCHOOLS

More than 10,000 Indian children in Arizona, in addition to those in foster care or adoptive care, are away from home and their families most of the year attending boarding schools operated by the U.S. Bureau of Indian Affairs. (See Note on boarding schools.) These children properly belong in any computation of children separated from their families. Adding the 10,977 Indian children in federal boarding schools in Arizona<sup>10</sup> to those in adoptive or foster care, there are a minimum of 12,574 Indian children separated from their families. This represents one in every 4.4 Indian children in Arizona.

*Conclusion*

By rate, therefore, Indian children are separated from their families to be placed in adoptive care, foster care, or federal boarding schools 27.3 times (2,730 percent) more often than non-Indian children in Arizona.

## APPENDIX TO THE ARIZONA STATISTICS

## I. YAVAPAI COUNTY

In Yavapai County in a random sample of the children in State-administered foster care made by the Arizona Social Services Bureau in March 1974, 35 percent of the children were known to be American Indian.<sup>11</sup> 42 percent of the

<sup>8</sup> The BIA Phoenix Area Office reported 300 Indian children in foster care in Arizona in April 1976. (Telephone interview with Mr. Bert Grabes, Division of Social Services, Phoenix Area Office, July 23, 1976.) The BIA Navajo Area Office reported 50 Indian children in foster care in Arizona in April 1976. (Telephone interview with Mr. Steve Lacy, Child Welfare Specialist, Navajo Area Office, July 26, 1976.) Thus the BIA had a combined total of 350 Indian children in foster care in Arizona, from which those under the BIA foster care contract with the State should be subtracted: 350 minus 139 equals 211.

<sup>9</sup> Telephone interview with Mr. Wally Earl, op. cit. There were a total of 2,948 children in foster care in April 1976. We have estimated that 347 of these are Indian (see Report). 2,948 minus 347 equals 2,601.

<sup>10</sup> Office of Indian Education Programs, U.S. Bureau of Indian Affairs, "Fiscal Year 1974 Statistics concerning Indian Education" (Lawrence, Kans.: Haskell Indian Junior College: 1975), Table 4, "Boarding Schools Operated by the Bureau of Indian Affairs, Fiscal Year 1974," pp. 13-15.

<sup>11</sup> State of Arizona Social Services Bureau, Program Development and Evaluation, "Foster Care Evaluation Program (July 1974)," District III Foster Care Evaluation, Appendix I, Yavapai County: Evaluation of Foster Children Records, p. 13.

children in the random sample were known to be non-Indian.<sup>2</sup> Indian people comprise 1.9 percent of the population of Yavapai County.<sup>3</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population through Yavapai County, the following tentative conclusion can be drawn.

#### Conclusion

There are by proportion 18.4 times (1,840 percent) as many Indian children as non-Indian children in state-administered foster care in Yavapai County, Arizona.

#### II. NAVAJO COUNTY

In Navajo County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 77 percent were known to be American Indian.<sup>4</sup> 19 percent of the children in the random sample were known to be non-Indian.<sup>5</sup> Indian people comprise 48.3 percent of the population of Navajo County.<sup>6</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Navajo County, the following tentative conclusion can be drawn.

#### Conclusion

There are by proportion 1.6 times (160 percent) as many Indian children as non-Indian children in state-administered foster care in Navajo County, Arizona.

#### III. COCONINO COUNTY

In Coconino County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 58 percent of the children in the random sample were American Indian.<sup>7</sup> 42 percent of the children in the random sample were non-Indian.<sup>8</sup> Indian people comprise 24.8 percent of the population of Coconino County.<sup>9</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Coconino County, the following tentative conclusion can be drawn.

#### Conclusion

There are therefore by proportion 2.3 times (230 percent) as many Indian children as non-Indian children in state-administered foster care in Coconino County, Arizona.

#### IV. YUMA COUNTY

In Yuma County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 13 percent of the children were American Indian.<sup>10</sup> 87 percent of the children in the random sample were non-Indian.<sup>11</sup> Indian people comprise 3.7 percent of the population of Yuma County.<sup>12</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Yuma County, the following tentative conclusion can be drawn.

<sup>2</sup> *Ibid.* The race of 23 percent of the children was unknown. (*Ibid.*) If the figures used in this report were to be based only on the percentage of children for whom race is known, Indian children would comprise 45 percent of the foster care placements in the random sample—thus further increasing the disproportion between Indian and non-Indian placements.

<sup>3</sup> U.S. Bureau of the Census, *Census of the Population: 1970 Supplementary Report PC (S1)-104, "Race of the Population by County: 1970"* (U.S. Government Printing Office: Washington, D.C.: 1975), p. 5.

<sup>4</sup> State of Arizona Social Services Bureau, *op. cit.*, District III Foster Care Evaluation, Appendix III, Navajo County: Evaluation of Foster Children Records, p. 19.

<sup>5</sup> *Ibid.* The race of 4 percent of the children was unknown. (*Ibid.*) If the figures used in this report were to be based only on the percentage of children for whom race is known, Indian children would comprise 80 percent of the foster care placements in the random sample—thus further increasing the disproportion between Indian and non-Indian placements.

<sup>6</sup> "Race of the Population by County: 1970," *op. cit.*, p. 5.

<sup>7</sup> State of Arizona Social Services Bureau, *op. cit.*, District III Foster Care Evaluation, Appendix V, Coconino County: Evaluation of Foster Children Records, p. 25.

<sup>8</sup> *Ibid.*

<sup>9</sup> "Race of the Population by County: 1970," *op. cit.*, p. 5.

<sup>10</sup> State of Arizona Social Services Bureau, *op. cit.*, District IV Foster Care Evaluation, Appendix III, Yuma County: Evaluation of Foster Children Records, p. 16.

<sup>11</sup> *Ibid.*

<sup>12</sup> "Race of the Population by County: 1970," *op. cit.*, p. 5.

#### Conclusion

There are therefore by proportion 3.5 times (350 percent) as many Indian children as non-Indian children in state-administered foster care in Yuma County, Arizona.

#### V. GILA COUNTY

Gila County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 17% of the children were known to be American Indian.<sup>13</sup> 79% of the children in the random sample were known to be non-Indian.<sup>14</sup> Indian people comprise 15.7% of the population of Gila County.<sup>15</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Gila County, the following tentative conclusion can be drawn.

#### Conclusion

There are by proportion 1.1 times (110 percent) as many Indian children as non-Indian children in state-administered foster care in Gila County, Arizona.

#### VI. GRAHAM COUNTY

In Graham County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 18% of the children were American Indian.<sup>16</sup> 81% of the children in the sample were non-Indian.<sup>17</sup> Indian people comprise 10.1% of the population of Graham County.<sup>18</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Gila County, the following tentative conclusion can be drawn.

#### Conclusion

There are by proportion 1.8 times (180 percent) as many Indian children as non-Indian children in state-administered foster care in Graham County, Arizona.

#### VII. COCHISE COUNTY

In Cochise County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 9 percent of the children were American Indian.<sup>19</sup> 91 percent of the children in the random sample were non-Indian.<sup>20</sup> Indian people comprise 0.2 percent of the population of Cochise County.<sup>21</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Cochise County, the following tentative conclusion can be drawn.

#### Conclusion

There are by proportion 45 times (4500 percent) as many Indian children as non-Indian children in state-administered foster care in Cochise County, Arizona.

#### VIII. PINAL COUNTY

In Pinal County, in a random sample of the children in State-administered foster care made by the Arizona Social Services Bureau in March 1974, 20 percent of the children were known to be American Indians.<sup>22</sup> 74 percent of the children in the random sample were known to be non-Indian.<sup>23</sup> Indian people comprise 9.4

<sup>13</sup> State of Arizona Social Services Bureau, *op. cit.*, District V Foster Care Evaluation, Appendix III, Gila County: Evaluation of Foster Children Records, p. 16.

<sup>14</sup> *Ibid.* The race of 4 percent of the children was unknown. (*Ibid.*)

<sup>15</sup> "Race of the Population by County: 1970," *op. cit.*, p. 5.

<sup>16</sup> State of Arizona Social Services Bureau, *op. cit.*, District VI Foster Care Evaluation, Appendix III, Gila County: Evaluation of Foster Children Records, p. 16.

<sup>17</sup> *Ibid.* 1 percent of the children are unaccounted for by the Social Services Bureau. (*Ibid.*)

<sup>18</sup> "Race of the Population by County: 1970," *op. cit.*, p. 5.

<sup>19</sup> State of Arizona Social Services Bureau, *op. cit.*, District VI Foster Care Evaluation, Appendix V, Cochise County: Evaluation of Foster Care Children Records, p. 24.

<sup>20</sup> *Ibid.*

<sup>21</sup> "Race of the Population by County: 1970," *op. cit.*, p. 5.

<sup>22</sup> State of Arizona Social Services Bureau, *op. cit.*, District V Foster Care Evaluation, Appendix I, Pinal County: Evaluation of Foster Children Records, p. 10.

<sup>23</sup> *Ibid.* The race of 6 percent of the children was unknown. If the figures used in this report were to be based only on the percentage of children for whom race is known, Indian children would comprise 21 percent of the foster care placements in the random sample—thus further increasing the disproportion between Indian and non-Indian placements.

percent of the population of Pinal County.<sup>24</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Pinal County, the following tentative conclusion can be drawn.

#### Conclusion

There are by proportion 2.1 times (210 percent) as many Indian children as non-Indian children in state-administered foster care in Pinal County, Arizona.

#### IX. MARICOPA COUNTY

In Maricopa County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 7 percent of the children were known to be American Indian.<sup>25</sup> 86 percent of the children in the random sample were known to be non-Indian.<sup>26</sup> Indian people comprise 1.2 percent of the population of Maricopa County.<sup>27</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Maricopa County, the following tentative conclusion can be drawn.

#### Conclusion

There are by proportion 5.8 times (580 percent) as many Indian children as non-Indian children in state-administered foster care in Maricopa County, Arizona.

#### X. PIMA COUNTY

In Pima County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 12% of the children were known to be American Indian.<sup>28</sup> 83 percent of the children in the random sample were known to be non-Indian.<sup>29</sup> Indian people comprise 2.5 percent of the population of Pima County.<sup>30</sup> Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Pima County, the following tentative conclusion can be drawn.

#### Conclusion

There are by proportion 4.8 times (480 percent) as many Indian children as non-Indian children in state-administered foster care in Pima County, Arizona.

*Methodological notes.*—(1) Since the data on which this appendix is based comes from a random sample (comprising 462 children out of a total of 1,808 children in state-administered foster care)<sup>31</sup> made by the Program Development and Evaluation Department of the Arizona Social Services Bureau, it is subject to the uncertainty of the random sample itself.

(2) It should be emphasized that these statistics include only state-administered placements; no BIA placements—which would undoubtedly be substantial in some counties—are included.

<sup>24</sup> "Race of the Population by County: 1970," op. cit., p. 5.

<sup>25</sup> State of Arizona Social Services Bureau, op. cit., District I Foster Care Evaluation, Appendix I: Evaluation of Foster Children Records, p. 12. Confirmed by telephone interview with Mr. Bob Hoogstraet, Program Development and Evaluation Department, July 12, 1976.

<sup>26</sup> *Ibid.*

<sup>27</sup> "Race of the Population by County: 1970," op. cit., p. 5.

<sup>28</sup> State of Arizona Social Services Bureau, op. cit., District II Foster Care Evaluation, Appendix I: Evaluation of Foster Children Records, p. 11. Confirmed by telephone interview with Mr. Bob Hoogstraet, Program Development and Evaluation Department, July 12, 1976.

<sup>29</sup> *Ibid.* The race of 4 percent of the children was unknown; and 1 percent of the children were unaccounted for by the Social Services Bureau. (*Ibid.*)

<sup>30</sup> "Race of the Population by County: 1970," op. cit., p. 5.

<sup>31</sup> State of Arizona Social Services Bureau, op. cit., p. 1.

### CALIFORNIA ADOPTION AND FOSTER CARE STATISTICS

#### BASIC FACTS

1. There are 6,969,307 under twenty-one-year-olds in the state of California.<sup>1</sup>
2. There are 39,579 under twenty-one-year-old American Indians in the state of California.<sup>2</sup>
3. There are 6,929,728 non-Indians under twenty-one in the state of California.

#### I. ADOPTION

In the state of California, according to the California Department of Health, there were 93 Indian children placed for adoption by public agencies in 1975.<sup>3</sup> Using federal age-at-adoption figures,<sup>4</sup> 83 percent (or 77) are under one year of age when placed. Another 13 percent (or 12) are one year to less than six years old when placed; 3 percent (or three) are six years, but less than twelve years old when placed; and 1 percent (or one) are twelve years of age and older. Using the formula then that: 77 Indian children per year are placed in adoption for at least 17 years, 12 Indian children are placed in adoption for a minimum average of 14 years, three Indian children are placed in adoption for an average of nine years, and one Indian child is placed for adoption for an average of three years; there are 1,507 Indian children under twenty-one years old in adoption at any one time in the State of California. This represents one in every 26.3 Indian children under the age of twenty-one in the State.

Using the same formula for non-Indians (there were 1,942 non-Indian children placed for adoption by public agencies in 1975)<sup>5</sup> there are 31,525 non-Indians under twenty-one years old in adoptive homes at any one time; representing one in every 219.8 non-Indian children.

#### Conclusion

There are therefore, by proportion, 8.4 times (840 percent) as many Indian children as non-Indian children in adoptive homes in California; 92.5 percent of the Indian children placed for adoption by public agencies in 1975 were placed in non-Indian homes.<sup>6</sup>

#### II. FOSTER CARE

According to statistics from the State of California Department of Health there were 319 Indian children in foster family homes in 1974.<sup>7</sup> This represents one out of every 124 Indian children in the State. By comparison there were 20,590 non-Indian children in foster family homes in 1974,<sup>8</sup> representing one out of every 336.6 non-Indian children in the state.

#### Conclusion

There are therefore, by proportion, 2.7 times (270 percent) as many Indian children as non-Indian children in foster family homes in California.

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 6, Section 1, *California* (U.S. Government Printing Office: Washington, D.C.: 1973), p. 6-88.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 6.

<sup>3</sup> AAlA child-welfare survey questionnaire completed by Mrs. T. Chu and Ms. Betsy Strong, Center for Health Statistics, California Department of Health, July 16, 1976.

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education, and Welfare, "Adoptions in 1971." DHEW Publication No. (SRS) 73-03259, NCSS Report E-10 (1971), May 23, 1973. Table 6, "Children adopted by unrelated petitioners: Percent-age distribution by age at time of placement, by type of placement, 1971."

<sup>5</sup> AAlA child-welfare survey questionnaire, op. cit.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

### III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures, a total of 1,826 under-twenty-one Indian children are either in foster homes or adoptive homes in the state of California. This represents one in every 21.7 Indian children. Similarly for non-Indians in the state, 52,115 under-twenty-one-olds are either in foster homes or adoptive homes, representing one in every 133 non-Indian children.

#### Conclusion

By per capita rate, Indian children are removed from their homes and placed in adoptive homes and foster homes 6.1 times (610 percent) more often than non-Indian children in the state of California.

The above figures are based only on the statistics of the California Department of Health and do not include private agency placements. They are therefore minimum figures.

NOTE. In addition to the above figures, approximately 100 California Indian children between the ages of thirteen and eighteen attend a boarding school in California operated by the U.S. Bureau of Indian Affairs (Sherman Indian High School, Riverside, California).<sup>9</sup> An additional 175 California Indian children attend BIA boarding schools in Utah, Nevada, Arizona, and New Mexico.<sup>10</sup> Were these children to be added to the total above, Indian children would be away from their families at a per capita rate 7.1 times (710 percent) greater than that for non-Indians.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

### CALIFORNIA: APPENDIX

#### County-by-County Analysis of California Foster Care Statistics

##### ALAMEDA COUNTY

In Alameda County, according to statistics from the California Department of Health, there were 24 Indian children in state-administered foster family homes in 1974.<sup>1</sup> There are 2,548 Indian children under twenty-one years old in Alameda County.<sup>2</sup> Thus one out of every 106.2 Indian children is in a foster family home.

#### Conclusion

In Alameda County Indian children are in state-administered foster family homes at a per capita rate 3.2 times (320 percent) greater than the state-wide rate for non-Indians in California.

##### II. ALPINE COUNTY

In Alpine County, according to statistics from the California Department of Health, there was one Indian child in a state-administered foster family home in 1974.\* There are 43 Indian children under twenty-one years old in Alpine County.† Thus one out of 43 Indian children is in a family foster home.

#### Conclusion

In Alpine County Indian children are in state-administered foster homes at a per capita rate 7.8 times (780 percent) greater than the state-wide rate for non-Indians in California.

##### III. AMADOR COUNTY

In Amador County, according to statistics from the California Department of Health, there were no Indian children in state-administered foster family homes in 1974.\* There are 72 Indian children under twenty-one years old in Amador County.†

##### IV. BUTTE COUNTY

In Butte County, according to statistics from the California Department of Health, there were six Indian children in state-administered foster family homes in 1974.\* There are 399 Indian children under twenty-one years old in Butte County.† Thus, one out of every 66.5 Indian children is in a foster family home.

#### Conclusion

In Butte County Indian children are in state-administered foster family homes at a per capita rate 5.1 times (510 percent) greater than the statewide rate for non-Indians in California.

##### V. CALAVERAS COUNTY

In Calaveras County, according to statistics from the California Department of Health, there were five Indian children in state-administered foster family

<sup>1</sup> AAIWA child-welfare survey questionnaire completed by Ms. Tulane Chu, Public Health Statistician, Center for Health Statistics, California Department of Health, July 16, 1976.

<sup>2</sup> 44.8 percent of the California Indian population is under twenty-one years old. [U.S. Bureau of the Census, Census of Population: 1970; Subject Report PC(2)-1E, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," pp. 6-7.] The total Indian population of Alameda County is 5,688. [U.S. Bureau of the Census, Census of Population: 1970 Supplementary Report PC(S1)-104, "Race of the Population by County": 1970 (Washington, D.C.: U.S. Government Printing Office: 1975), p. 6.] 5,688 times 44.8 equals 2,548. The same formula is used to determine the Indian under twenty-one year old population in the other California counties. Hereafter cited as "Race."

\*AAIWA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970: 6. 7.

homes in 1974.\* There are 77 Indian children under twenty-one years old in Calaveras County.† Thus, one out of every 15.4 Indian children is in a foster family home.

*Conclusion*

In Calaveras County Indian children are in state-administered foster family homes at a per capita rate 21.9 times (2,190 percent) greater than the state-wide rate for non-Indians in California.

VI. CONTRA COSTA COUNTY

In Contra Costa County, according to statistics from the California Department of Health, there were no Indian children in state-administered foster family homes in 1974.\* There are 762 Indian children under twenty-one years old in Contra Costa County.†

VII. DEL NORTE COUNTY

In Del Norte County, according to statistics from the California Department of Health, there were 15 Indian children in state-administered foster family homes in 1974.\* There are 326 Indian children under twenty-one years old in Del Norte County.† Thus, one out of every 21.7 Indian children is in a foster family home.

*Conclusion*

In Del Norte County Indian children are in foster family homes at a per capita rate 13.5 times (1,550 percent) greater than the state-wide rate for non-Indians in California.

VIII. EL DORADO COUNTY

In El Dorado County, according to statistics from the California Department of Health, there were no Indian children in state-administered foster family homes in 1974.\* There are 103 Indian children under twenty-one years old in El Dorado County.†

IX. FRESNO COUNTY

In Fresno County, according to statistics from the California Department of Health, there were 22 Indian children in state-administered foster family homes in 1974.\* There are 961 Indian children under twenty-one years old in Fresno County.† Thus, one out of every 43.7 Indian children is in a foster family home.

*Conclusion*

In Fresno County Indian children are in foster family homes at a per capita rate 7.7 times (770 percent) greater than the state-wide rate for non-Indians in California.

X. GLENN COUNTY

In Glenn County, according to statistics from the California Department of Health, there were five Indian children in state-administered foster family homes in 1974.\* There are 84 Indian children under twenty-one years old in Glenn County.† Thus, one out of every 16.8 Indian children is in a foster family home.

*Conclusion*

In Glenn County Indian children are in foster family homes at a per capita rate 20 times (2,000 percent) greater than the state-wide rate for non-Indians in California.

XI. HUMBOLDT COUNTY

In Humboldt County, according to statistics from the California Department of Health, there were 18 Indian children in state-administered foster family homes in 1974.\* There are 1,369 Indian children under twenty-one years old in Humboldt County.† Thus, one out of every 76.1 Indian children is in a foster family home.

\*AAIA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970; 6, 7.

*Conclusion*

In Humboldt County Indian children are in foster family homes at a per capita rate 4.4 times (440 percent) greater than the state-wide rate for non-Indians in California.

XII. IMPERIAL COUNTY

In Imperial County, according to statistics from the California Department of Health, there were seven Indian children in state-administered foster family homes in 1974.\* There are 398 Indian children under twenty-one years old in Imperial County.† Thus, one out of every 56.9 Indian children is in a foster family home.

*Conclusion*

In Imperial County Indian children are in foster family homes at a per capita rate 5.9 times (590 percent) greater than the state-wide rate for non-Indians in California.

XIII. INYO COUNTY

In Inyo County, according to statistics from the California Department of Health, there were eight Indian children in state-administered foster family homes in 1974.\* There are 524 Indian children under twenty-one years old in Inyo County.† Thus, one out of every 65.5 Indian children is in a foster family home.

*Conclusion*

In Inyo County Indian children are in State-administered foster family homes at a per capita rate 5.1 times (510 percent) greater than the State-wide rate for non-Indians in California.

XIV. KERN COUNTY

In Kern County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.\* There are 913 Indian children under twenty-one years olds in Kings County.† Thus, one out of every 304 Indian children is in a foster family home.

*Conclusion*

In Kern County Indian children are in State-administered foster family homes at a per capita rate 10.5 times (1,050 percent) greater than the State-wide rate for non-Indians in California.

XV. KINGS COUNTY

In Kings County, according to statistics from the California Department of Health, there were five Indian children in state-administered foster family homes in 1974.\* There are 160 Indian children under twenty-one years old in Kings County.† Thus, one out of every 32 Indian children is in a foster family home.

*Conclusion*

In Kings County Indian children are in State-administered foster family homes at a per capita rate 10.5 times (1,050 percent) greater than the state-wide rate for non-Indians in California.

XVI. LAKE COUNTY

In Lake County, according to statistics from the California Department of Health, there were two Indian children in state-administered foster family homes in 1974.\* There are 145 Indian children under twenty-one years old in Lake County.† Thus, one out of every 72.5 Indian children is in a foster family home.

\*AAIA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970; 6, 7.

*Conclusion*

In Lake County Indian children are in state-administered foster family homes at a per capita rate 4.6 times (460 percent) greater than the State-wide rate for non-Indians in California.

## XVII. LASSEN COUNTY

In Lassen County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.\* There are 156 Indian children under twenty-one years old in Lassen County.† Thus, one out of 156 Indian children is in a foster family home.

*Conclusion*

In Lassen County Indian children are in State-administered foster family homes at a per capita rate 2.2 times (220 percent) greater than the State-wide rate for non-Indians in California.

## XVIII. LOS ANGELES COUNTY

In Los Angeles County, according to statistics from the California Department of Health, there were 45 Indian children in State-administered foster family homes in 1974.\* There are 10,980 Indian children under twenty-one years old in Los Angeles County.† Thus, one out of every 244 Indian children is in a foster family home.

*Conclusion*

In Los Angeles County Indian children are in State-administered foster family homes at a per capita rate 1 1/4 times (140 percent) the State-wide rate for non-Indians in California.

## XIX. MADERA COUNTY

In Madera County, according to statistics from the California Department of Health, there were two Indian children in State-administered foster family homes in 1974.\* There are 335 Indian children under twenty-one years old in Madera County.† Thus, one out of every 168 Indian children is in a foster family home.

*Conclusion*

In Madera County Indian children are in State-administered foster family homes at a per capita rate 2.0 times (200 percent) greater than the State-wide rate for non-Indians in California.

## XX. MARIN COUNTY

In Marin County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.\* There are 171 Indian children under twenty-one years old in Marin County.†

## XXI. MENDOCINO COUNTY

In Mendocino County, according to statistics from the California Department of Health, there were eight Indian children in State-administered foster family homes in 1974.\* There are 642 Indian children under twenty-one years old in Mendocino County.† Thus, one out of every 80.3 Indian children is in a foster family home.

*Conclusion*

In Mendocino County Indian children are in State-administered foster family homes at a per capita rate 4.2 times (420 percent) greater than the State-wide rate for non-Indians in California.

## XXII. MERCED COUNTY

In Merced County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.\* There are 159 Indian children in Merced County.† Thus, one out of 159 Indian children is in a foster family home.

*Conclusion*

In Merced County Indian children are in State-administered foster family homes at a per capita rate 2.1 times (210 percent) greater than the State-wide rate for non-Indians in California.

## XXIII. MODOC COUNTY

In Modoc County, according to statistics from the California Department of Health, there were seven Indian children in State-administered foster family homes in 1974.\* There are 78 Indian children in Modoc County.† Thus, one out of every 11.1 Indian children is in a foster family home.

*Conclusion*

In Modoc County Indian children are in State-administered foster family homes at a per capita rate 30.3 times (3,030 percent) greater than the State-wide rate for non-Indians in California.

## XXIV. MONO COUNTY

In Mono County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.\* There are 85 Indian children under twenty-one years old in Mono County.† Thus, one out of 85 Indian children is in a foster family home.

*Conclusion*

In Mono County Indian children are in State-administered foster family homes at a per capita rate 4.0 times (400 percent) greater than the State-wide rate for non-Indians in California.

## XXV. MONTEREY COUNTY

In Monterey County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.\* There are 510 Indian children under twenty-one years old in Monterey County.†

## XXVI. NAPA COUNTY

In Napa County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.\* There are 96 Indian children under twenty-one years old in Napa County.† Thus, one out of 96 Indian children is in a foster family home.

*Conclusion*

In Napa County Indian children are in State-administered foster family homes at a per capita rate 3.5 times (350 percent) greater than the State-wide rate for non-Indians in California.

## XXVII. NEVADA COUNTY

In Nevada County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.\* There are 50 Indian children under twenty-one years old in Nevada County.†

## XXVIII. ORANGE COUNTY

In Orange County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.\* There are 1,756 Indian children under twenty-one years old in Orange County.† Thus, one out of every 585 Indian children is in a foster family home.

*Conclusion*

In Orange County, Indian children are in State-administered foster family homes at a per capita rate 0.6 times (60 percent) the State-wide rate for non-Indians in California.

\*AATA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970: 6, 7.

\*AATA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970: 6, 7.

## XXIX. PLACER COUNTY

In Placer County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1914.\* There are 185 Indian children under twenty-one years old in Placer County.† Thus, one out of 185 Indian children is in a foster family home.

*Conclusion*

In Placer County Indian children are in State-administered foster family homes at a per capita rate 1.8 times (180 percent) the State-wide rate for non-Indians in California.

## XXX. PLUMAS COUNTY

In Plumas County, according to statistics from the California Department of Health, there were five Indian children in State-administered foster family homes in 1974.\* There are 137 Indian children under twenty-one years old in Plumas County.† Thus, one out of every 27.4 Indian children is in a foster family home.

*Conclusion*

In Plumas County Indian children are in State-administered foster family homes at a per capita rate 12.3 times (1,230 percent) greater than the State-wide rate for non-Indians in California.

## XXXI. RIVERSIDE COUNTY

In Riverside County, according to statistics from the California Department of Health, there were six Indian children in State-administered foster family homes in 1974.\* There are 1,309 Indian children under twenty-one years old in Riverside County.† Thus, one out of every 218 Indian children is in a foster family home.

*Conclusion*

In Riverside County Indian children are in State-administered foster family homes at a per capita rate 1.5 times (150 percent) the Statewide rate for non-Indians in California.

## XXXII. SACRAMENTO COUNTY

In Sacramento County, according to statistics from the California Department of Health, there were nine Indian children in State-administered foster family homes in 1974.\* There are 1,196 Indian children under twenty-one years old in Sacramento County.† Thus, one out of every 132.9 Indian children is in a foster family home.

*Conclusion*

In Sacramento County Indian children are in State-administered foster family homes at a per capita rate 2.5 times (250 percent) greater than the State-wide rate for non-Indians in California.

## XXXIII. SAN BENITO COUNTY

In San Benito County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.\* There are 24 Indian children under twenty-one years old in San Benito County.†

## XXXIV. SAN BERNARDINO COUNTY

In San Bernardino County, according to statistics from the California Department of Health, there were four Indian children in State-administered foster family homes in 1974.\* There are 1,548 Indian children under twenty-one years old in San Bernardino County.† Thus, one out of every 387 Indian children is in a foster family home.

*Conclusion*

In San Bernardino County Indian children are in State-administered foster family homes at a per capita rate 0.9 times (90 percent) the State-wide rate for non-Indians in California.

\*AATA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970; 6, 7.

## XXXV. SAN DIEGO COUNTY

In San Diego County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.\* There are 2,634 Indian children under twenty-one years old in San Diego County.† Thus, one out of every 878 Indian children are in foster family homes.

*Conclusion*

In San Diego County Indian children are in State-administered foster family homes at a per capita rate 0.4 times (40 percent) the State-wide rate for non-Indians in California.

## XXXVI. SAN FRANCISCO COUNTY

In San Francisco County, according to statistics from the California Department of Health, there were 11 Indian children in State-administered foster family homes in 1974.\* There are 546 Indian children under twenty-one years old in San Francisco County.† Thus, one out of every 118.1 Indian children is in a foster family home.

*Conclusion*

In San Francisco County Indian children are in State-administered foster family homes at a per capita rate 2.9 times (290 percent) greater than the State-wide rate for non-Indians in California.

## XXXVII. SAN JOAQUIN COUNTY

In San Joaquin County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.\* There are 546 Indian children under twenty-one years old in San Joaquin County.† Thus, one out of every 182 Indian children is in a foster family home.

*Conclusion*

In San Joaquin County Indian children are in State-administered foster family homes at a per capita rate 1.8 times (180 percent) the State-wide rate for non-Indians in California.

## XXXVIII. SAN LUIS OBISPO COUNTY

In San Luis Obispo County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.\* There are 232 Indian children under twenty-one years old in San Luis Obispo County.†

## XXXIX. SAN MATEO COUNTY

In San Mateo County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.\* There are 600 Indian children under twenty-one years old in San Mateo County.†

## XL. SANTA BARBARA COUNTY

In Santa Barbara County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.\* There are 452 Indian children under twenty-one years old in Santa Barbara County.†

## XLI. SANTA CLARA COUNTY

In Santa Clara County, according to statistics from the California Department of Health, there were 15 Indian children in State-administered foster family homes in 1974.\* There are 1,814 Indian children under twenty-one years old in Santa Clara County.† Thus, one out of every 120.9 Indian children is in a foster family home.

\*AATA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970; 6, 7.

*Conclusion*

In Santa Clara County Indian children are in State-administered foster family homes at a per capita rate 2.8 times (280 percent) greater than the State-wide rate for non-Indians in California.

## XIII. SANTA CRUZ COUNTY

In Santa Cruz County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.\* There are 161 Indian children under twenty-one years old in Santa Cruz county.† Thus, one out of 161 Indian children is in a foster family home.

*Conclusion*

In Santa Cruz County Indian children are in State-administered foster family homes at a per capita rate 2.1 times (210 percent) greater than the State-wide rate for non-Indians in California.

## XLIII. SHASTA COUNTY

In Shasta County, according to statistics from the California Department of Health, there were 13 Indian children in State-administered foster family homes in 1974.\* There are 592 Indian children under twenty-one year old in Shasta County.† Thus, one out of every 45.4\* Indian children is in a foster family home.

*Conclusion*

In Shasta County Indian children are in State-administered foster family homes at a per capita rate 7.4 times (740 percent) greater than the State-wide rate for non-Indians in California.

## XLIV. SIERRA COUNTY

In Sierra County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.\* There are 17 Indian children under twenty-one years old in Sierra County.†

## XLV. SISKIYOU COUNTY

In Siskiyou County, according to statistics from the California Department of Health there were 11 Indian children in State-administered foster family homes in 1974.\* There are 434 Indian children under twenty-one years old in Siskiyou County.† Thus, one out of every 39.5 Indian children is in a foster family home

*Conclusion*

In Siskiyou County Indian children are in State-administered foster family homes at a per capita rate 8.5 times (850 percent) greater than the State-wide rate for non-Indians in California.

## XLVI. SOLANO COUNTY

In Solano County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.\* There are 470 Indian children under twenty-one years old in Solano County.† Thus, one out of 470 Indian children is in a foster family home.

*Conclusion*

In Solano County Indian children are in State-administered foster family homes at a per capita rate 0.7 times (70 percent) the State-wide rate for non-Indians in California.

## XLVII. SONOMA COUNTY

In Sonoma County, according to statistics from the California Department of Health, there were 18 Indian children in State-administered foster family homes in 1974.\* There are 727 Indian children under twenty-one years old in Sonoma County.† Thus, one out of every 40.4 Indian children is in a foster family home.

\*AAIA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970; 6, 7.

*Conclusion*

In Sonoma County Indian children are in State-administered foster family homes at a per capita rate 8.3 times (830 percent) greater than the State-wide rate for non-Indians in California.

## XLVIII. STANISLAUS COUNTY

In Stanislaus County, according to statistics from the California Department of Health, there were five Indian children in State-administered foster family homes in 1974.\* There are 307 Indian children under twenty-one years old in Stanislaus County.† Thus, one out of every 61 Indian children is in a foster family home.

*Conclusion*

In Stanislaus County Indian children are in State-administered foster family homes at a per capita rate 5.5 times (550 percent) greater than the State-wide rate for non-Indians in California.

## XLIX. SUTTER COUNTY

In Sutter County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.\* There are 94 Indian children under twenty-one years old in Sutter County.† Thus, one out of every 31.3 Indian children is in a foster family home.

*Conclusion*

In Sutter County Indian children are in State-administered foster family homes at a per capita rate 10.8 times (1,080 percent) greater than the State-wide rate for non-Indians in California.

## L. TEHAMA COUNTY

In Tehama County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.\* There are 137 Indian children under twenty-one years old in Tehama County.† Thus, one out of 137 Indian children is in a foster family home.

*Conclusion*

In Tehama County Indian children are in State-administered foster family homes at a per capita rate 2.5 times (250 percent) greater than the State-wide rate for non-Indians in California.

## LI. TULARE COUNTY

In Tulare County, according to statistics from the California Department of Health, there were 15 Indian children in State-administered foster family homes in 1974.\* There are 613 Indian children under twenty-one years old in Tulare County.† Thus, one out of every 40.9 Indian children is in a foster family home.

*Conclusion*

In Tulare County Indian children are in State-administered foster family homes at a per capita rate 8.2 times (820 percent) greater than the State-wide rate for non-Indians in California.

## LII. TUOLUMNE COUNTY

In Tuolumne County, according to statistics from the California Department of Health, there were two Indian children in State-administered foster family homes in 1974.\* There are 246 Indian children under twenty-one years old in Tuolumne County.† Thus, one out of every 123 Indian children is in a foster family home.

*Conclusion*

In Tuolumne County Indian children are in State-administered foster family homes at a per capita rate 2.7 times (270 percent) greater than the State-wide rate for non-Indians in California.

\*AAIA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970; 6, 7.



## LIII. VENTURA COUNTY

In Ventura County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.\* There are 515 Indian children under twenty-one years old in Ventura County.† Thus, one out of 515 Indian children is in a foster family home.

*Conclusion*

In Ventura County Indian children are in State-administered foster family homes at a per capita rate 0.7 times (70 percent) the State-wide rate for non-Indians in California.

## LIV. YOLO COUNTY

In Yolo County, according to statistics from the California Department of Health, there was one Indian Child in a State-administered foster family home in 1974.\* There are 213 Indian children under twenty-one years old in Yolo County.† Thus, one out of 213 Indian children is in a family foster home.

*Conclusion*

In Yolo County Indian children are in State-administered foster family homes at a per capita rate 1.6 times (160 percent) the State-wide rate for non-Indians in California.

## LV. YUBA COUNTY

In Yuba County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.\* There are 94 Indian children under twenty-one years old in Yuba County.†

## LVI-LVIII. COLUSA, MARIPOSA AND TRINITY COUNTIES

The California Department of Health was unable to supply any foster care data for Colusa, Mariposa and Trinity counties.\* There are 278 Indian children under twenty-one years old in these three counties.\*†

\*AAIA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970; 6, 7.

## IDAHO INDIAN ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 302,170 under twenty-one year olds in the State of Idaho.<sup>1</sup>
2. There are 3,808 under twenty-one year old American Indians in the State of Idaho.<sup>2</sup>
3. There are 298,902 non-Indians under twenty-one years old in the State of Idaho.

## I. ADOPTION

In the State of Idaho, according to the Idaho Department of Health and Welfare, there were an average of 14 public agency adoptions per year of American Indian children from 1973-1975.<sup>3</sup> This data base is too small to allow realistic projection of the total number of Indian children in adoptive care. We can say though that during 1973-1975 1.1 percent of Idaho Indian children were placed for adoption.

During 1973-1975, according to the Idaho Department of Health and Welfare, there were an average of 109 public agency adoptions per year of non-Indian children in Idaho.<sup>4</sup> Thus, during 1973-1975, 0.1 percent of Idaho non-Indian children were placed for adoption.

*Conclusion*

Based on the three-year period 1973-1975, and not including any private agency placements, Indian children were placed for adoption at a per capita rate 11 times (1,100 percent) greater than that for non-Indian children; 88 percent of the Indian children placed in adoption by public agencies in Idaho in 1975 were placed in non-Indian homes.<sup>5</sup>

## II. FOSTER CARE

According to statistics from the Idaho Department of Health and Welfare, there were 296 Indian children in foster care in Fiscal Year 1976.<sup>6</sup> This represents one out of every 12.9 Indian children in the State. By comparison there were 3,615 non-Indian children in foster care during Fiscal Year 1976,<sup>7</sup> representing one out of every 82.7 non-Indian children in the State.

*Conclusion*

There are therefore, by proportion, 6.4 times (640 percent) as many Indian children as non-Indian children in foster care in Idaho.

## III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Since we are unable to estimate the total number of Indian children currently in adoptive care in Idaho, it is not possible either to estimate the total number of Indian children receiving adoptive and foster care. The foster care statistics alone, and the adoption data we do have, make it unmistakably clear

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970. Volume I, Characteristics of the Population, Part 14, "Idaho" (U.S. Government Printing Office: Washington, D.C.: 1973), pp. 14-43.

<sup>2</sup> *Ibid.*, pp. 14-43 (Table 19), pp. 14-265 (Table 139). Indian people comprise 54 percent of the total non-white population according to Table 139. According to Table 19 there are 7,051 non-whites under twenty-one, 7,051 times, 54 equals 3,808.

<sup>3</sup> Telephone interview with Ms. Shirley Wheatley, Adoptions Coordinator, Idaho Department of Health and Welfare, July 23, 1976. A total of 41 Indian children were placed for adoption by the Idaho Department of Health and Welfare during these three years.

<sup>4</sup> *Ibid.* A total of 328 non-Indian children were placed for adoption by the Idaho Department of Health and Welfare during these three years.

<sup>5</sup> *Ibid.*

<sup>6</sup> Telephone interview with Ms. Ruth Peffey, Bureau of Research and Statistics, Idaho Department of Health and Welfare, July 23, 1976.

<sup>7</sup> *Ibid.*

that Indian children are removed from their families at rates far exceeding those for non-Indian children.

The above figures are based only on the statistics of the Idaho Department of Health and Welfare and do not include private agency placements. They are therefore minimum figures.

#### IDAHO APPENDIX

#### County-by-County Analysis of Idaho Foster Care Statistics

##### I. BENEWAH, BONNER, BOUNDARY, KOOTENAI AND SHOSHONE COUNTIES

In Benewah, Bonner, Boundary, Kootenai and Shoshone counties, according to statistics from the Idaho Department of Health and Welfare, there were 33 Indian children in State-administered foster care in Fiscal Year 1976.<sup>1</sup> There are 446 Indian children under twenty-one years old in these five counties.<sup>2</sup> Thus one in every 13.5 Indian children is in foster care.

##### Conclusion

In Benewah, Bonner, Boundary, Kootenai and Shoshone counties Indian children are in State-administered foster care at a per capita rate 6.1 times (610 percent) greater than the Statewide rate for non-Indians in Idaho.

##### II. CLEARWATER, IDAHO, LATAH, LEWIS AND NEZ PERCE COUNTIES

In Clearwater, Idaho, Latah, Lewis and Nez Perce counties, according to statistics from the Idaho Department of Health and Welfare, there were 62 Indian children in State-administered foster care in Fiscal Year 1976.<sup>3</sup> There are 827 Indian children under twenty-one years old in these five counties.<sup>4</sup> Thus one in every 13.3 Indian children is in foster care.

##### Conclusion

In Clearwater, Idaho, Latah, Lewis and Nez Perce counties Indian children are in State-administered foster care at a per capita rate 6.2 times (620 percent) greater than the Statewide rate for non-Indians in Idaho.

##### III. ADAMS, CANYON, GEM, OWYHEE, PAYETTE AND WASHINGTON COUNTIES

In Adams Canyon, Gem, Owyhee, Payette and Washington counties, according to statistics from the Idaho Department of Health and Welfare, there were 20 Indian children in State-administered foster care in Fiscal Year 1976.<sup>5</sup> There are 298 Indian children under twenty-one years old in these six counties.<sup>6</sup> Thus one in every 14.9 Indian children is in foster care.

##### Conclusion

In Adams, Canyon, Gem, Owyhee, Payette and Washington counties Indian children are in State-administered foster care at a per capita rate 5.6 times (560 percent) greater than the Statewide rate for non-Indians in Idaho.

<sup>1</sup> Letter and table ("Foster Care by Region") from Ms. Ruth Pefley, Research Analyst, Idaho Department of Health and Welfare, July 27, 1976. These counties comprise Region I of the Idaho Department of Health and Welfare.

<sup>2</sup> The total Indian population of Benewah, Bonner, Boundary, Kootenai and Shoshone counties is 739. [U.S. Bureau of the Census, Census of Population: 1970 Supplementary Report PC(S1)-104, "Race of the Population by County: 1970" (U.S. Government Printing Office: Washington, D.C.: 1975), pp. 12-13.] Assuming that the age breakdown of the Indian population of Benewah, Bonner, Boundary, Kootenai and Shoshone counties is similar to the State-wide age breakdown of the Indian population in Idaho, 60.3 percent are under twenty-one years old. (There are 3,808 under twenty-one year old American Indians in Idaho out of a total Indian population of 6,315. See footnote 2 to the Idaho statistics, and the U.S. Census Bureau references cited therein.) 739 times .603 equals 446 total Indian population under twenty-one years of age in these five counties. The same formula is used to determine the Indian under twenty-one year old population in the other Idaho counties.

<sup>3</sup> Ms. Ruth Pefley, op. cit. These counties comprise Region II of the Idaho Department of Health and Welfare.

<sup>4</sup> "Race of the Population by County," loc. cit.

<sup>5</sup> Ms. Ruth Pefley, op. cit. These counties comprise Region III of the Idaho Department of Health and Welfare.

<sup>6</sup> "Race of the Population by County," loc. cit.

#### IV. ADA, BOISE, ELMORE AND VALLEY COUNTIES

In Ada, Boise, Elmore and Valley counties, according to statistics from the Idaho Department of Health and Welfare, there were 17 Indian children in State-administered foster care in Fiscal Year 1976.<sup>7</sup> There are 243 Indian children under twenty-one years old in these four counties.<sup>8</sup> Thus one in every 14.3 Indian children is in foster care.

##### Conclusion

In Ada, Boise, Elmore and Valley counties Indian children are in State-administered foster care at a per capita rate 5.8 times (580 percent) greater than the State-wide rate for non-Indians in Idaho.

##### V. BLAINE, CAMAS, CASSIA, GOODING, JEROME, LINCOLN, MINIDOKA, AND TWIN FALLS COUNTIES

In Blaine, Camas, Cassia, Gooding, Jerome, Lincoln, Minidoka and Twin Falls counties, according to statistics from the Idaho Department of Health and Welfare, there were 19 Indian children in State-administered foster care in Fiscal Year 1976.<sup>9</sup> There are 236 Indian children under twenty-one years old in these eight counties.<sup>10</sup> Thus one in every 12.4 Indian children is in foster care.

##### Conclusion

In Blain, Camas, Cassia, Gooding, Jerome, Lincoln, Minidoka and Twin Falls counties Indian children are in State-administered foster care at a per capita rate 6.7 times (670 percent) greater than the State-wide rate for non-Indians in Idaho.

##### VI. BANNOCK, BEAR LAKE, BINGHAM, CARIBOU, FRANKLIN, ONEIDA, AND POWERS COUNTIES

In Bannock, Bear Lake, Bingham, Caribou, Franklin, Oneida, and Power counties, according to statistics from the Idaho Department of Health and Welfare, there were 128 Indian children in State-administered foster care in Fiscal Year 1976.<sup>11</sup> There are 1,647 Indian children under twenty-one years old in these seven counties.<sup>12</sup> Thus one in every 12.9 Indian children is in foster care.

##### Conclusion

In Bannock, Bear Lake, Bingham, Caribou, Franklin, Oneida and Power counties Indian children are in State-administered foster care at a per capita rate 6.4 times (640 percent) greater than the State-wide rate for non-Indians in Idaho.

##### VII. BONNEVILLE, BUTTE, CLARK, CUSTER, FREMONT, JEFFERSON, LEMHI, MADISON AND TETON COUNTIES

In Bonneville, Butte, Clark, Custer, Fremont, Jefferson, Lemhi, Madison and Teton counties, according to statistics from the Idaho Department of Health and Welfare, there were 17 Indian children in State-administered foster care in Fiscal Year 1976.<sup>13</sup> There are 335 Indian children under twenty-one years old in these nine counties.<sup>14</sup> Thus one in every 19.7 Indian children is in foster care.

Thus one in every 19.7 Indian children is in foster care.

##### Conclusion

In Bonneville, Butte, Clark, Custer, Fremont, Jefferson, Lemhi, Madison and Teton counties Indian children are in State-administered foster care at a per capita rate 4.2 times (420%) greater than the State-wide rate for non-Indians in Idaho.

<sup>7</sup> Ms. Ruth Pefley, op. cit. These counties comprise Region IV of the Idaho Department of Health and Welfare.

<sup>8</sup> "Race of the Population by County," loc. cit.

<sup>9</sup> Ms. Ruth Pefley, op. cit. These counties comprise Region V of the Idaho Department of Health and Welfare.

<sup>10</sup> "Race of the Population by County," loc. cit.

<sup>11</sup> Ms. Ruth Pefley, op. cit. These counties comprise Region VI of the Idaho Department of Health and Welfare.

<sup>12</sup> "Race of the Population by County," loc. cit.

<sup>13</sup> Ms. Ruth Pefley, op. cit. These counties comprise Region VII of the Idaho Department of Health and Welfare.

<sup>14</sup> "Race of the Population by County"; loc. cit.

## APPENDIX: HISTORICAL NOTE TO THE MAINE FOSTER CARE STATISTICS

## MAINE INDIAN ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 396,110 under twenty-one year olds in Maine.<sup>1</sup>
2. There are 1,084 under twenty-one-year-old American Indians in the State of Maine.<sup>2</sup>
3. There are 395,026 non-Indians under twenty-one in Maine.

## I. ADOPTION

In the State of Maine, according to the Maine Department of Human Services, there was an average of two public agency adoptions per year of Indian children during 1974-1975.<sup>3</sup> This data base is too small to allow realistic projection of the total number of Indian children in adoptive care. We can say though that during 1974-1975 0.4 percent of Maine Indian children were placed for adoption.

During 1974-1975, according to the Maine Department of Human Services, an average of 1,057 non-Indian children were placed for adoption in Maine.<sup>4</sup> Thus, during 1974-1975, 0.3 percent of Maine non-Indian children were placed for adoption.

*Conclusions*

Based on limited data, and not including any private agency placements, Indian and non-Indian children are placed for adoption by public agencies at approximately similar rates.

## II. FOSTER CARE

According to statistics from the Maine Department of Human Services, in 1975 there were 82 Indian children in foster homes.<sup>5</sup> This represents one out of every 13.2 Indian children in the State. By comparison there were 1,568 non-Indian children in foster homes in 1975,<sup>6</sup> representing one out of every 251.9 non-Indian children in the State.

*Conclusion*

By rate, therefore, Indian children are placed in foster homes 19.1 times (1,910%) more often than non-Indians in Maine. As of 1973, the last year for which a breakdown is available, 64 percent of the Indian children in foster care were in non-Indian homes.<sup>7</sup>

## III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Since we are unable to estimate the total number of Indian children currently in adoptive care in Maine, it is not possible either to estimate the total number of Indian children receiving adoptive and foster care. The foster care statistics alone make it unmistakably clear that Indian children are removed from their families at rates far exceeding those for non-Indian children.

<sup>1</sup> U.S. Bureau of the Census, 1970 Census of the Population, Volume I: Characteristics of the Population, Part 21: "Maine" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 19, p. 21-43.

<sup>2</sup> *Ibid.*, p. 21-43 (Table 19), p. 21-257 (Table 139). Indian people comprise 35 percent of the total non-white population according to Table 139. According to Table 19 there are 3,098 non-whites under twenty-one. 3,098 times 35 percent equals 1,084.

<sup>3</sup> Telephone interviews with Ms. Freda Plumley, Substitute Care Consultant, Maine Department of Human Services, June 29-30, 1976. Letter from Ms. Plumley, July 13, 1976.

<sup>4</sup> Telephone interviews with Ms. Freda Plumley, op. cit. Cf. National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1974," DHEW Publication No. (SRS) 76-03259, NCSS Report E-10 (1974), April 1976, Table 1, "Children for whom adoption petitions were granted," p. 7.

<sup>5</sup> Telephone interviews with Ms. Freda Plumley, op. cit.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

## I. 1969

In 1969, according to statistics from the Maine Department of Human Services, there were 82 Indian children in foster homes.<sup>1</sup> This represented one out of every 13.2 Indian children in the State. By comparison, there were 2,099 non-Indian children in foster homes in 1969,<sup>2</sup> representing one out of every 188.2 non-Indian children in the State.

*Conclusion*

In 1969, Indian children were placed in foster homes at a rate 14.3 times (1,430%) greater than that for non-Indians in the State of Maine.

## II. 1972

In 1972, according to statistics from the Maine Department of Human Services, there were 136 Indian children in foster homes.<sup>3</sup> This represented one out of every eight Indian children in the State. By comparison, there were 1,918 non-Indian children in foster homes in 1972,<sup>4</sup> representing one of every 206 non-Indian children in the State.

*Conclusion*

By rate, therefore, Indian children are in foster care at a per capita rate 25.8 times (2,580%) greater than that for non-Indians in the State of Maine.

## III. 1972—AROOSTOOK COUNTY

Aroostook County (home of the Micmac and Malecite tribes accounted for more than half of the Indian foster care placements in 1972. In Aroostook County alone, according to statistics from the Maine Department of Human Services, there were 73 Indian children in foster care in 1972.<sup>5</sup> This represented one out of every 3.3 Indian children in Aroostook county.<sup>6</sup>

*Conclusion*

In Aroostook County in 1972 Indian children were placed in foster homes at a rate 62.4 times (6,240 percent) greater than the State-wide rate for non-Indians.

## IV. 1973

In 1973, according to statistics from the Maine Department of Human Services, there were 104 Indian children in foster homes.<sup>7</sup> This represented one out of every 10.4 Indian children in the State. By comparison, there were 1,861 non-Indian children in foster homes in 1973,<sup>8</sup> representing one out of every 212.3 non-Indian children in the State.

*Conclusion*

In 1973, Indian children were placed in foster homes at a rate 20.4 times (2,040 percent) greater than that for non-Indians in the State of Maine.

<sup>1</sup> Telephone interviews with Ms. Freda Plumley, Substitute Care Consultant, Maine Department of Human Services, June 29-30, 1976. Letter from Ms. Plumley, July 13, 1976. The years included in this historical note are the last years for which the Maine Department of Human Services is able to supply statistics.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* 1972 was the only year for which the Maine Department of Human Services was able to supply a county-by-county breakdown of Indian foster care placements.

<sup>6</sup> The total Indian population of Aroostook County is 436 (U.S. Bureau of the Census, Census of Population: 1970 Supplementary Report PC(S1)-104, "Race of the Population by County: 1970" (U.S. Government Printing Office: Washington, D.C.: 1975), p. 22.) Assuming that the age breakdown of the Indian population of Aroostook County is similar to the state-wide age breakdown of the Indian population in Maine, 55.3 percent under twenty-one years old. (There are 1,084 under twenty-one year old American Indians in Maine out of a total Indian population of 1,961. See footnote 2 to the Maine statistics, and the U.S. Census Bureau references cited therein.) 436 times 55.3 percent equals 241 total Indian population under twenty-one years of age in Aroostook County.

<sup>7</sup> Statistics from Ms. Freda Plumley, op. cit.

<sup>8</sup> *Ibid.*

NOTE. The Maine Indian community undertook concerted action in 1972-73 concerning the massive numbers of Indian children being placed in foster care. The drop in foster care rates reflects the notable progress brought about by Maine Indian people.

The current rates reflect how much still needs to be done.

In February 1973 the Maine Advisory Committee to the United States Commission on Civil Rights held hearings into the issue. Two of the recommendations made by the Maine Advisory Committee were:

1. That Maine's Department of Health and Welfare identify and secure Federal funds to upgrade potential Indian foster homes for Indian children, and that Maine's Department of Health and Welfare upgrade the homes which it built on the Passamaquoddy Reservation.

2. That the U.S. Commission on Civil Rights initiate a national Indian foster care project to determine if there is massive deculturation of Indian children.<sup>9</sup>

<sup>9</sup> Maine Advisory Committee to the United States Commission on Civil Rights, *Federal and State Services and the Maine Indian* (Washington, D.C.: U.S. Commission on Civil Rights: 1975), p. 89.

## MICHIGAN INDIAN ADOPTION AND FOSTER CARE STATISTICS

### Basic Facts

1. There are 3,727,438 under twenty-one year olds in the State of Michigan.<sup>1</sup>
2. There are 7,404 under twenty-one year old American Indians in the State of Michigan.<sup>2</sup>
3. There are 3,720,034 non-Indians under twenty-one in the State of Michigan.

### I. ADOPTION

In the State of Michigan, according to the Michigan Department of Social Services<sup>3</sup> and 12 private child placement agencies in Michigan,<sup>4</sup> there were 62 Indian children placed in adoptive homes during 1973. Using State figures reported to the National Center for Social Statistics of the U.S. Department of Health, Education and Welfare,<sup>5</sup> 63 percent (or 39) are under one year of age when placed. Another 20 percent (or 12) are one year to less than six years old when placed; 13 percent (or eight) are six years, but less than twelve when placed; and 4 percent (or three) are twelve years and over.<sup>6</sup> Using the formula then that: 39 Indian children per year are placed in adoption for at least 17 years, 12 Indian children are placed in adoption for a minimum average of 14 years, eight Indian children are placed in adoption for an average of nine years, and three Indian children are placed in adoption for an average of three years; there are 912 Indian children under twenty-one years old in adoption at any one time in the State of Michigan. This represents one out of every 8.1 Indian children in the State.

There were 8,302 non-Indians under twenty-one years old placed in adoptive homes in Michigan in 1973.<sup>7</sup> Using the same formula as above, there are 122,860 non-Indians in adoptive homes in Michigan, or one out of every 30.3 non-Indian children.

#### Conclusion

There are therefore by proportion 3.7 times (370 percent) as many Indian children as non-Indian children in adoption in Michigan.

<sup>1</sup> U.S. Bureau of the Census, *Census of Population: 1970, Volume I, Characteristics of the Population, Part 24, "Michigan"* (U.S. Government Printing Office: Washington, D.C.: (1973), pp. 24-65.

<sup>2</sup> U.S. Bureau of the Census, *Census of Population: 1970: Subject Reports, Final Report PC(2)-1F, "American Indians"* (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 8.

<sup>3</sup> Letter from R. Bernard Houston, Director, Michigan Department of Social Services, February 23, 1973.

<sup>4</sup> Letter from Bethany Christian Home, N.E. Grand Rapids (4 children); Catholic Social Services of the Diocese of Grand Rapids (11 children); Catholic Social Services, Pontiac (1 child); Child and Family Services of Michigan, Inc., Alpena (2 children), Brighton (5 children), Farmington (5 children), Fort Huron (2 children); Child and Family Services of the Upper Peninsula, Marquette (1 child); Family and Child Care Service, Traverse City (1 child); Clarence D. Fischer (1 child); Michigan Children's and Family Service, Traverse City (1 child); Regular Baptist Children's Home (2 children).

<sup>5</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1974," DHEW Publication No. (SRS) 76-03259, NCSS Report E-10 (1974), April 1976, Table 10, "Children adopted by unrelated petitioners by age at time of placement, by state, 1974," p. 16. (Absolute numbers converted into percentages for purposes of this report.)

<sup>6</sup> The median age at time of placement of children adopted by unrelated petitioners in 1974 in Michigan was 5.4 months. *Ibid.*, p. 15.

<sup>7</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1973," DHEW Publication No. (SRS) 76-03259, NCSS Report E-10 (1973), July 1975, Table 1, "Children for whom adoption petitions were granted in 41 reporting States," p. 4.

## II. FOSTER CARE

According to statistics from the Michigan Department of Social Services<sup>8</sup> and seven private child placement agencies<sup>9</sup> there were 82 Indian children in foster homes in 1973. This represents one out of every 90 Indian children in the State. By comparison there were 5,801 non-Indian children in foster homes,<sup>10</sup> representing one out of every 641 non-Indian children in the State.

*Conclusion*

By rate therefore Indian children are placed in foster homes 7.1 times (710 percent) more often than non-Indian children in the State of Michigan.

## III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures a total of 994 under twenty-one year old Indian children are either in foster homes or adoptive homes in the State of Michigan. This represents one out of every 7.4 Indian children. Similarly, for non-Indians in the State, 128,661 under twenty-one year olds are either in foster care or adoptive care, representing one in every 28.9 non-Indian children.

*Conclusion*

By rate therefore Indian children are removed from their homes and placed in adoptive care or foster care 3.9 times (390 percent) more often than non-Indian children in the State of Michigan.

<sup>8</sup> Letter from R. Bernard Houston, op. cit.

<sup>9</sup> Letters from Bethany Christian Home, N.E. Grand Rapids (16 children); Catholic Social Services of the Diocese of Grand Rapids (3 children); Child and Family Services of the Upper Peninsula, Marquette (1 child); Detroit Baptist Children's Home, Royal Oak (2 children); Family and Child Care Service, Traverse City (5 children); Family and Children Services of the Kalamazoo Area (2 children); Michigan Children's and Family Services, Traverse City (2 children).

<sup>10</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Children Served by Public Welfare Agencies and Voluntary Child Welfare Agencies and Institutions March 1971," DHEW Publication No. (SRS) 73-03258, NCSS Report E-9 (3/71), April 27, 1973. Table 8, "Children receiving social services from public welfare agencies and voluntary child welfare agencies and institutions."

## MINNESOTA INDIAN ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 1,585,186 under twenty-one year olds in Minnesota.<sup>1</sup>
2. There are 12,672 under twenty-one year old American Indians in Minnesota.<sup>2</sup>
3. There are 1,572,514 non-Indians under twenty-one years old in Minnesota.

## I. ADOPTION

In the State of Minnesota, according to the Minnesota Department of Public Welfare, there was an average of 103 adoptions of Indian children per year from 1964-1975.<sup>3</sup> Using the State's own age-at-adoption figures reported to the National Center for Social Statistics of the U.S. Department of Health, Education and Welfare,<sup>4</sup> we can estimate that 65 percent (or 67) are under one year of age when placed. Another 9 percent (or nine) are one year to less than two years old when placed; 14% (or 15) are two years, but less than six years old when placed; 10 percent (or ten) are six years, but less than twelve when placed; and 2 percent (or two) are twelve years and over.<sup>5</sup> Using the formula then that: 67 Indian children per year are placed in adoption for at least 17 years, nine Indian children are placed in adoption for an average of 16.5 years, 15 Indian children are placed in adoption for an average of 14 years, ten Indian children are placed in adoption for an average of nine years, and two children are placed for adoption for an average of three years; there are 1,594 Indian under twenty-one year olds in adoption at any one time in the State of Minnesota. This represents one out of every 7.9 Indian children in the State.

Using the same formula for non-Indians (there was an average of 3,271 non-Indian children adopted per year from 1964-1975),<sup>6</sup> there are 50,543 under twenty-one year old non-Indians in adoption in Minnesota. This represents one out of every 31.1 non-Indian children in the State.

*Conclusion*

There are therefore by proportion 3.9 times (390 percent) as many Indian children as non-Indian children in adoptive homes in Minnesota. 97.5 percent of the Indian children for whom adoption decrees were granted in 1974-1975 were placed with a non-Indian adoptive mother.<sup>7</sup>

## II. FOSTER CARE

In the State of Minnesota, according to the Minnesota Department of Public Welfare, there were 737 Indian children in foster family homes in December

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 25, "Minnesota" (U.S. Government Printing Office: Washington, D.C.: 1973), pp. 25-68.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 8.

<sup>3</sup> Minnesota Department of Public Welfare, "Annual Report Adoptions 1974-1975" (Research and Statistics Division: November 1975). Table XV-A, "Decrees granted 1964-65 through 1974-75 by race," p. 20.

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1974," DHEW Publication No. (SRS) 76-03259, NCSS Report E-10 (1974), April 1976. Table 10, "Children adopted by unrelated petitioners by age at time of placement by State, 1974," p. 16. (Absolute numbers converted into percentages for purposes of this report.)

<sup>5</sup> The median age of children adopted by unrelated petitioners in 1974 in Minnesota was 5.3 months. *Ibid.*, p. 15.

<sup>6</sup> "Annual Report Adoptions 1974-1975," loc. cit.

<sup>7</sup> *Ibid.*, p. 23. Table XVIII-A, "Decrees granted 1974-75 by type of adoption and race of child and race of adoptive mother."

1972.<sup>8</sup> This represents one out of every 17.2 Indian children. By comparison, there were 5,541 non-Indian children in foster family homes,<sup>9</sup> representing one out of every 283.8 non-Indian children in the State.

#### Conclusion

There are therefore by proportion 16.5 times (1,650 percent) as many Indian children as non-Indian children in foster family homes in Minnesota.

### III. COMBINED ADOPTIVE CARE AND FOSTER CARE

Using the above figures, a total of 2,331 under twenty-one year old Indian children are either in foster family homes or adoptive homes in the State of Minnesota. This represents one out of every 5.4 Indian children. Similarly for non-Indians in the State 56,084 under twenty-one year olds are either in foster family homes or adoptive care, representing one in every 28 non-Indian children.

#### Conclusion

By per capita rate Indian children are removed from their homes and placed in adoptive care or foster family care 5.2 times (520 percent) more often than non-Indian children in the State of Minnesota.

<sup>8</sup> Minnesota Department of Public Welfare, "A Special Report: Racial Characteristics of Children Under Agency Supervision as of December 31, 1972" (Research and Statistics Division: November 1973). Table C, "Living Arrangement by Race of All Children," p. 3. In this report, the Minnesota Department of Public Welfare itself states: "A larger proportion of Indian children [receiving child-welfare services from counties and private agencies] were in foster family homes (25.2 percent) than were children of any other race." Ibid., p. 4.

<sup>9</sup> Ibid., p. 3.

## MONTANA INDIAN ADOPTION AND FOSTER CARE STATISTICS

### Basic Facts

1. There are 289,573 under twenty-one-year-olds in Montana.<sup>1</sup>
2. There are 15,124 under twenty-one-year-old American Indians in Montana.<sup>2</sup>
3. There are 274,449 non-Indians under twenty-one in Montana.

### I. ADOPTION

In the State of Montana, according to the Montana Department of Social and Rehabilitation Services, there were an average of 33 public agency adoptions of Indian children per year from 1973-1975.<sup>3</sup> Using federal age-at-adoption figures,<sup>4</sup> 83 percent (or 28) are under one year of age when placed; another 13 percent (or four) are one year to less than six years old when placed; and 3 percent (or one) are six years, but less than twelve years old when placed.<sup>5</sup> Using the formula then that: 28 Indian children per year are placed in adoption for at least 17 years, four Indian children are placed in adoption for a minimum average of 14 years, and one Indian child is placed in adoption for an average of nine years; there are 541 Indians under twenty-one year olds in adoption at any one time in the State of Montana. This represents one in every 30 Indian children in the State.

Using the same formula for non-Indians (there were an average of 117 public agency adoptions of non-Indians per year from 1973-1975),<sup>6</sup> there are 1,898 non-Indians under twenty-one years old in adoptive homes at any one time; or one out of every 144.6 non-Indian children.

#### Conclusion

There are therefore by proportion 48 times (480 percent) as many Indian children as non-Indian children in adoptive homes in Montana; 87 percent of the Indian children placed in adoption by public agencies in Montana from 1973-1975 were placed in non-Indian homes.<sup>7</sup>

### II. FOSTER CARE

In Montana, according to the Montana Department of Social and Rehabilitation Services, there were 188 Indian children in State-administered foster care during June 1976.<sup>8</sup> This represents one out of every 80.4 Indian children in the State. In addition the Billings Area Office of the U.S. Bureau of Indian Affairs reported 346 Indian children in BIA foster care in 1974, the last year for which statistics have been compiled.<sup>9</sup> When these children are added to the State

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 28, "Montana" (U.S. Government Printing Office: Washington, D.C.: 1973), p. 28-35.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1P, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 9.

<sup>3</sup> Telephone interview with Mrs. Betty Bay, Adoption Consultant, State of Montana Social and Rehabilitation Services, July 20, 1976.

<sup>4</sup> National Center for Social Statistics (U.S. Department of Health, Education, and Welfare, "Adoptions in 1971." DHEW Publication No. (SRS) 73-03259, NCSS Report E-10 (1971), May 23, 1973, Table 6, "Children adopted by unrelated petitioners: Percentage distribution by age at time of placement, by type of placement, 1971."

<sup>5</sup> 1% of the adoptions involve children twelve years and older. Ibid.

<sup>6</sup> Telephone interview with Mrs. Betty Bay, July 20, 1976.

<sup>7</sup> Ibid.

<sup>8</sup> Letter from Ms. Jeri Davis, Research Specialist, Bureau of Statistics and Research, State of Montana Social and Rehabilitation Services, July 12, 1976.

<sup>9</sup> Division of Social Services, U.S. Bureau of Indian Affairs, "Fiscal year 1974—Child Welfare (Unduplicated Case Count by Areas)" Table, p. 1.

figures, we can estimate that there are a total of 534 Indian children in foster care at any one time in Montana, representing one out of every 28.3 Indian children in the State. By comparison, there were 755 non-Indian children in State-administered foster care during June 1976,<sup>10</sup> representing one out of every 363.5 non-Indian children in the State.

*Conclusion*

By rate therefore Indian children are in foster care at a per capita rate 12.8 times (1,280 percent) greater than that for non-Indian children in Montana.

III. COMBINED ADOPTIVE CARE AND FOSTER CARE

Using the above figures, a total of 1,075 under twenty-one-year-old Indian children are either in foster homes or adoptive homes in the State of Montana. This represents one in every 14.1 Indian children. Similarly, for non-Indians in the State 2,653 under twenty-one year olds are either in foster care or adoptive care, representing one out of every 103.4 non-Indian children.

*Conclusion*

By rate Indian children are removed from their homes and placed in adoptive care or foster care 7.3 times (730 percent) more often than non-Indian children in the State of Montana.

The above figures are based only on the statistics of the Montana Department of Social and Rehabilitation Services and do not include private agency placements. They are therefore minimum figures.

<sup>10</sup> Letter from Ms. Jeri Davis, *op. cit.*

NEVADA ADOPTION AND FOSTER CARE STATISTICS

Basic Facts

1. There are 191,657 under twenty-one-year-olds in Nevada.<sup>1</sup>
2. There are 3,739 under twenty-one-year-old American Indians in Nevada.<sup>2</sup>
3. There are 187,918 under twenty-one-year-old non-Indians in Nevada.

I. ADOPTION

In Nevada, according to the Nevada State Division of Welfare, there were an average of seven public agency adoptions of Indian children per year in 1974-1975.<sup>3</sup> This data base is too limited to permit an estimate of the total number of Indian children in adoption in Nevada. However, it does indicate that during 1974-1975 adoption petitions were granted for a yearly average of one out of every 534.1 Indian children in the State.

Using the same formula for non-Indians (there were an average of 345 public agency adoptions of non-Indians in Nevada in 1974-1975),<sup>4</sup> adoption petitions were granted for one out of every 555.5 non-Indian children in the State.

*Conclusion*

Based on limited data, by per capita rate therefore, Indian children are adopted approximately as often as non-Indian children in Nevada.

II. FOSTER CARE

In Nevada, according to the Nevada State Division of Welfare, there were 48 Indian children in foster care in June 1976.<sup>5</sup> In addition, the Inter-Tribal Council of Nevada reported 25 Indian children in foster care.<sup>6</sup> This combined total (73) represents one in every 51.2 Indian children. By comparison, there were 527 non-Indian children in foster care,<sup>7</sup> representing one in every 356.6 non-Indian children in the State.

*Conclusion*

By per capita rate, therefore, Indian children are placed in foster care 7.0 times (700 percent) as often as non-Indian children in Nevada.

III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Since we are unable to estimate the total number of Indian children currently in adoptive care in Nevada, it is not possible either to estimate the total number of Indian children receiving adoptive and foster care. The foster care statistics alone make it unmistakably clear that Indian children are removed from their families at rates far exceeding those for non-Indian children.

<sup>1</sup> U.S. Bureau of the Census, 1970 Census of the Population, Volume I: Characteristics of the Population, Part 30: "Nevada" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 19, p. 30-36.

<sup>2</sup> *Ibid.*, p. 30-36 (Table 19), p. 30-207 (Table 139). Indian people comprise 18.8 percent of the total non-white population according to Table 139. According to Table 19 there are 19,889 non-whites under twenty-one.  $19,889 \times 18.8 \text{ percent} = 3,739$ .

<sup>3</sup> Telephone interview with Mr. Ira Gunn, Chief of Research and Statistics, Nevada State Division of Welfare, July 15, 1976. The 1974 adoption figures are also available in: National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1974," DHEW Publications No. (SRS) 76-03259, NCSS Report E-10 (1974), April 1976, Table 3, "Children adopted by unrelated petitioners," p. 9. (All of the Indian children placed for adoption by the Nevada State Division of Welfare in 1974 were adopted by unrelated petitioners.)

<sup>4</sup> Telephone interview with Mr. Ira Gunn, July 15, 1976.

<sup>5</sup> Letter from Mr. Ira Gunn, August 2, 1976.

<sup>6</sup> Telephone interview with Mr. Efraim Estrada, Chief, Field Services, Inter-Tribal Council of Nevada (NITC), August 5, 1976. NITC reported a total of 42 Indian children in foster care, of whom 17 were in foster homes (mostly non-Indian) under a BIA contract with the State. These 17 have been subtracted from the total to avoid duplication of State figures.

<sup>7</sup> Telephone interview with Mr. Ira Gunn, July 15, 1976.

## III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Since we are unable to estimate the total number of Indian children currently in adoptive care in New Mexico, it is not possible either to estimate the total number of Indian children receiving adoptive and foster care. The foster care statistics alone, and the adoption data we do have, make it unmistakably clear that Indian children are removed from their families at rates disproportionate to their percentage of the population.

## NEW MEXICO INDIAN ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 461,535 under twenty-one-year-olds in the State of New Mexico.<sup>1</sup>
2. There are 41,316 under twenty-one-year-old American Indians in the State of New Mexico.<sup>2</sup>
3. There are 420,219 non-Indians under twenty-one in the State of New Mexico.

## I. ADOPTION

In the State of New Mexico, according to the New Mexico Department of Health and Social Services, there were 13 American Indian children placed for adoption by public agencies in Fiscal Year 1976.<sup>3</sup> This data base is too small to allow realistic projection of the total number of Indian children in adoptive care. We can say though that during Fiscal Year 1976, 0.003 percent of New Mexico Indian children were placed for adoption by public agencies.

During fiscal year 1976, according to the New Mexico Department of Health and Social Services, there were 77 non-Indian children placed for adoption by public agencies.<sup>4</sup> Thus during FY 1973, 0.02 percent of New Mexico non-Indian children were placed for adoption by public agencies.

*Conclusion*

Based on limited data, and not including any private agency placements, Indian children were placed for adoption by public agencies in fiscal year 1976 at a per capita rate 1.5 times (150 percent) the rate for non-Indian children.

## II. FOSTER CARE

In the State of New Mexico, according to statistics from the New Mexico Department of Health and Social Services, there were 142 Indian children in foster homes in June 1976.<sup>5</sup> In addition the Navajo and Albuquerque area offices of the U.S. Bureau of Indian Affairs report a combined total of 145 Indian children in foster homes in New Mexico.<sup>6</sup> Combining the State and BIA figures, there were 287 Indian children in foster homes in June 1976. This represents one out of every 144 Indian children in the State. By comparison there were 1,225 non-Indian children in foster care in June 1976,<sup>7</sup> representing one out of every 343 non-Indian children.

*Conclusion*

By per capita rate Indian children are placed in foster care 2.4 times (240 percent) as often as non-Indian children in New Mexico.

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 33, "New Mexico" (U.S. Government Printing Office: Washington, D.C.: 1973), p. 33-34.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 10.

<sup>3</sup> Telephone interview with Ms. Heidi Illanes, Assistant Adoption Director, New Mexico Department of Health and Social Services, July 23, 1976.

<sup>4</sup> *Ibid.*

<sup>5</sup> Telephone interview with Ms. Pat Diers, Social Services Agency, New Mexico Department of Health and Social Services, July 26, 1976.

<sup>6</sup> The BIA Navajo Area Office reported 18 Indian children in foster care in New Mexico during April 1976 (Telephone interview with Mr. Steve Lacy, Child Welfare Specialist, Navajo Area Office, July 26, 1976.) The BIA Albuquerque Area Office reported 172 Indian children in foster homes in New Mexico during June 1976. (Telephone interview with Ms. Betty Dillman, Division of Social Services, Albuquerque Area Office, July 28, 1976). Of the 190 children the BIA had in foster homes in New Mexico, 45 were under a BIA contract with the State under which the BIA reimburses the State for foster care expenses. These 45 children have been subtracted from the BIA total, 190-45=145.

<sup>7</sup> Telephone interview with Ms. Pat Diers, *op. cit.*



Basic Facts

1. There are 6,726,515 under twenty-one-year-olds in the State of New York.<sup>1</sup>
2. There are 10,627 under twenty-one-year-old American Indians in the State of New York.<sup>2</sup>
3. There are 6,715,868 non-Indians under twenty-one in the State of New York.

I. ADOPTION

In the State of New York, according to the New York Board of Social Welfare, there were 12 Indian children placed for adoption as of June 1976.<sup>3</sup> This data base is too small to allow realistic projection of the total number of Indian children in adoptive care. We can say, though, that as of June 1976, 0.1 percent of New York Indian children were placed for adoption.

As of March 1976, according to the New York State Board of Social Welfare, 1,807 non-Indian children were placed for adoption in New York.<sup>4</sup> Thus, as of March 1976, 0.03% of New York non-Indian children were placed for adoption.

Conclusion

Based on limited data, Indian children are placed for adoption at a per capita rate 3.3 times (330%) the rate for non-Indian children in New York.

II. FOSTER CARE

According to statistics from the New York State Board of Social Welfare, there were 142 Indian children in foster (family) boarding homes in June 1976.<sup>5</sup> This represents one out of every 74.8 Indian children in the State. By comparison there were 30,170 non-Indian children in foster (family) boarding homes in March 1976,<sup>6</sup> representing one out of every 222.6 non-Indian children in the State.

Conclusion

By per capita rate therefore Indian children are placed in foster homes 3.0 times (300 percent) as often as non-Indian children in New York.

An estimated 96.5% of the Indian children in foster (family) boarding homes are placed in non-Indian homes.<sup>7</sup>

III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Since we are unable to estimate the total number of Indian children currently in adoptive care in New York, it is not possible either to estimate the total number of Indian children receiving adoptive and foster care. The foster care statistics

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 34, Section 1, "New York" (U.S. Government Printing Office: Washington, D.C.: 1973), p. 34-75.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 10.

<sup>3</sup> Letter and computer print-out from Mr. Bernard S. Bernstein, Director, Bureau of Children's Services, New York State Board of Social Welfare, July 16, 1976.

<sup>4</sup> Telephone interview with Mr. Bernard S. Bernstein, New York State Board of Social Welfare, July 21, 1976.

<sup>5</sup> Letter and computer print-out from Mr. Bernard S. Bernstein, *op. cit.*

<sup>6</sup> Telephone interview with Mr. Bernard S. Bernstein, *op. cit.*

<sup>7</sup> This estimate is based on telephone interviews from July 22-27, 1976 with Department of Social Services personnel in Cattaraugus, Erie, Niagara and Onondaga counties. 115 out of a total of 135 Indian children under public care in foster (family) boarding homes in June 1976 were placed in these four counties—and approximately 111 of such placements were in non-Indian homes.

In addition to those Indian children in foster care or adoptive care, 7,428 Indian children in New Mexico are away from home and their families most of the year attending boarding schools operated by the U.S. Bureau of Indian Affairs.<sup>8</sup> An additional 1,324 Indian children in New Mexico live in BIA-operated dormitories while attending public schools.<sup>9</sup> These children properly belong in any computation of children separated from their families. Adding the 8,752 Indian children in federal boarding schools or dormitories in New Mexico to those in foster care alone, there are a minimum (excluding adoptions) of 9,039 Indian children separated from their families. This represents one in every 4.6 Indian children in New Mexico.

Conclusion

By per capita rate therefore Indian children are separated from their families to be placed in foster care or boarding schools 74.6 times (7,460 percent) more often than non-Indian children in New Mexico.

<sup>8</sup> Office of Indian Education Programs, U.S. Bureau of Indian Affairs, "Fiscal Year 1974 Statistics Concerning Indian Education" (Lawrence, Kansas: Haskell Indian Junior College: 1975), pp. 12-13.

<sup>9</sup> *Ibid.*, pp. 22-23.

alone, and the adoption data we do have, make it unmistakably clear that Indian children are removed from their families at rates far exceeding those for non-Indian children.

NOTE. A report on the numbers of American Indian children in adoption in New York State would be incomplete without mentioning those Indian children placed by the Indian Adoption Project, a cooperative effort of the U.S. Bureau of Indian Affairs and the Child Welfare League of America. From 1958-1967, the nine full years of operation by the Indian Adoption Project, 74 Indian children, mostly from Arizona and South Dakota, were placed for adoption in New York.<sup>1</sup>

#### NEW YORK APPENDIX

#### Analysis of Upstate New York Counties With Greater Than 1,000 Total Indian Population

##### I. CATTARAUGUS COUNTY

In Cattaraugus County, according to statistics from the New York State Board of Social Welfare, there were 23 Indian children in foster (family) boarding homes in June 1976.<sup>2</sup> There are 548 Indian children under twenty-one years old in Cattaraugus County.<sup>3</sup> Thus one out of every 23.8 Indian children is in a foster (family) boarding home.

##### Conclusion

In Cattaraugus County Indian children are in foster (family) boarding homes at a per capita rate 9.4 times (940 percent) greater than the State-wide rate for non-Indians in New York.

##### II. ERIE COUNTY

In Erie County, according to statistics from the New York State Board of Social Welfare, there were 53 Indian children in foster (family) boarding homes in June 1976.<sup>3</sup> There are 1,654 Indian children under twenty-one years old in Erie County.<sup>4</sup> Thus one out of every 31.2 Indian children is in a foster (family) boarding home.

##### Conclusion

In Erie County Indian children are in foster (family) boarding homes at a per capita rate 7.1 times (710 percent) greater than the State-wide rate for non-Indians in New York.

##### III. FRANKLIN COUNTY

In Franklin County, according to statistics from the New York State Board of Social Welfare, there were five Indian children in foster (family) boarding homes in June 1976.<sup>3</sup> There are 696 Indian children under twenty-one years old in Franklin county.<sup>4</sup> Thus one out of every 139.2 Indian children is in a foster (family) boarding home.

##### Conclusion

In Franklin County Indian children are in foster (family) boarding homes at a per capita rate 1.6 times (160 percent) the State-wide rate for non-Indians in New York.

<sup>1</sup> David Fanshel, *Far From the Reservation: The Transracial Adoption of American Indian Children* (Metuchen, N.J.: The Scarecrow Press, Inc.: 1972), pp. 34-35. The Indian Adoption Project placed a total of 395 American Indian children for adoption in 26 states and Puerto Rico, virtually always with non-Indian families.

<sup>2</sup> Letter and computer print-out from Mr. Bernard S. Bernstein, Director, Bureau of Children's Services, New York State Board of Social Welfare, July 16, 1976.

<sup>3</sup> 41.6% of the New York Indian population is under twenty-one years old. [U.S. Bureau of the Census, Census of Population: 1970; Subject Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 10.] The total Indian population of Cattaraugus County is 1,318. [U.S. Bureau of the Census, Census of Population: 1970 Supplementary Report PC(S1)-104, "Race of the Population by County: 1970" (Washington D.C.: U.S. Government Printing Office: 1975), p. 32.]  $1,318 \times .416 = 548$ . The same formula is used to determine the Indian under twenty-one year old population in the other New York counties.

<sup>4</sup> Mr. Bernard S. Bernstein, *op. cit.*

<sup>5</sup> "Race of the Population by County: 1970," *op. cit.*, p. 32.

#### IV. MONROE COUNTY

In Monroe County, according to statistics from the New York State Board of Social Welfare, there were four Indian children in foster (family) boarding homes in June 1976.<sup>5</sup> There are 520 Indian children under twenty-one years old in Monroe County.<sup>6</sup> Thus one out of every 130 Indian children is in a foster (family) boarding home.

##### Conclusion

In Monroe County Indian children are in foster (family) boarding homes at a per capita rate 1.7 times (170 percent) the State-wide rate for non-Indians in New York.

#### V. NIAGARA COUNTY

In Niagara County, according to statistics from the New York State Board of Social Welfare, there were 12 Indian children in foster (family) boarding homes in June 1976.<sup>5</sup> There are 749 Indian children under twenty-one years old in Niagara County.<sup>6</sup> Thus one out of every 62.4 Indian children is in a foster (family) boarding home.

##### Conclusion

In Niagara County Indian children are in foster (family) boarding homes at a per capita rate 3.6 times (360 percent) greater than the State-wide rate for non-Indians in New York.

#### VI. ONONDAGA COUNTY

In Onondaga County, according to statistics from the New York State Board of Social Welfare, there were 27 Indian children in foster (family) boarding homes in June 1976.<sup>5</sup> There are 942 Indian children under twenty-one years old in Onondaga County.<sup>6</sup> Thus one out of every 34.9 Indian children is in a foster (family) boarding home.

##### Conclusion

In Onondaga County Indian children are in foster (family) boarding homes at a per capita rate 6.4 times (640 percent) greater than the State-wide rate for non-Indians in New York.

<sup>5</sup> Mr. Bernard S. Bernstein, *op. cit.*

<sup>6</sup> "Race of the Population by County: 1970," *op. cit.*, p. 33.

## NORTH DAKOTA ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 261,998 under twenty-one year olds in the State of North Dakota.<sup>1</sup>
2. There are 8,186 under twenty-one-year-old American Indians in the State of North Dakota.<sup>2</sup>
3. There are 253,812 non-Indians under twenty-one in the State of North Dakota.

## I. ADOPTION

In the State of North Dakota, according to the Social Service Board of North Dakota, there were 16 Indian children placed for adoption in 1975.<sup>3</sup> Using State figures reported to the National Center for Social Statistics of the U.S. Department of Health, Education and Welfare,<sup>4</sup> we can estimate that 86 percent (or 14) are under one year of age when placed. One child is between one and two years old; and one child is between two and six years old.<sup>5</sup> Using the formula then that: 14 Indian children are placed in adoption for at least 17 years, one Indian child is placed in adoption for 16.5 years, and one Indian child is placed in adoption for 14 years; there are an estimated 269 Indian children in adoption in North Dakota. This represents one out of every 30.4 Indian children in the State.

Using the same formula for non-Indians (there were 178 non-Indian children placed for adoption in North Dakota in 1975),<sup>6</sup> there are an estimated 2,943 under twenty-one-year-old non-Indians in adoption in North Dakota. This represents one out of every 86.2 non-Indian children in the State.

*Conclusion*

There are, therefore, by proportion 2.8 times (280 percent) as many Indian children as non-Indian children in adoptive homes in North Dakota; 75 percent of the Indian children placed for adoption in 1975 were placed in non-Indian homes.<sup>7</sup>

## II. FOSTER CARE

In the State of North Dakota, according to the Social Services Board of North Dakota, there were 218 Indian children in foster care in May 1976.<sup>8</sup> This represents one out of every 37.6 Indian children in the State. In addition, there were 78 North Dakota Indian children receiving foster care from the U.S. Bureau of

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 36, "North Dakota" (U.S. Government Printing Office: Washington, D.C.: 1973), p. 36-38.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 12.

<sup>3</sup> Telephone interview with Mr. Donald Schmid, Administrator, Child Welfare Services, Social Services Board of North Dakota, July 21, 1976. These children were placed by three private agencies that do virtually all the adoptions in North Dakota. The Social Services Board rarely, if ever, handles adoptions.

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1974," DHEW Publication No. (SRS) 76-03259, NCSS Report E-10 (1974), April 1976, Table 10, "Children adopted by unrelated petitioners by age at time of placement, by State, 1974," p. 16. (Absolute numbers converted into percentages for purposes of this report.)

<sup>5</sup> 3% of the children are between six and twelve years old; and 1% are twelve or older. (*Ibid.*). The median age for children placed in adoption in North Dakota was two months. *Ibid.*, p. 15.

<sup>6</sup> Telephone interview with Mr. Donald Schmid, *op. cit.* (See footnote 3.)

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

Indian Affairs in May 1976.<sup>9</sup> The combined total of 296 Indian children in foster care represents one out of every 27.7 Indian children in the State. By comparison there were 455 non-Indian children in foster care in May 1976,<sup>10</sup> representing one out of every 557.8 non-Indian children.

*Conclusion*

There are therefore by proportion 20.1 times (2,010 percent) as many Indian children as non-Indian children in foster care in North Dakota.

## III. COMBINED ADOPTIVE CARE AND FOSTER CARE

Using the above figures, a total of 565 under twenty-one-year-old Indian children are either in foster homes or adoptive homes in the State of North Dakota. This represents one out of every 14.5 Indian children. Similarly for non-Indians in the State 3,398 under twenty-one year olds are either in foster care or adoptive care, representing one out of every 74.7 non-Indian children.

*Conclusion*

By per capita rate Indian children are removed from their homes and placed in adoptive care or foster care 5.2 times (520 percent) more often than non-Indian children in the State of North Dakota.

<sup>9</sup> Telephone interviews with Mr. Roger Lonnevik and Ms. Beverly Haug, Division of Social Services, U.S. Bureau of Indian Affairs Aberdeen Area Office, July 20-21, 1976. The BIA had 114 North Dakota Indian children in foster care in May 1976. As of April 1976 (the last month for which the BIA has statistics—BIA indicates that the numbers do not fluctuate significantly from month to month), 36 Indian children were in foster care administered by the State, but paid for by the BIA. 114-36=78.

<sup>10</sup> Telephone interview with Mr. Donald Schmid, *op. cit.*

## OKLAHOMA INDIAN ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 974,937 under twenty-one-year-olds in the State of Oklahoma.<sup>1</sup>
2. There are 45,489 under twenty-one-year-old American Indians in the State of Oklahoma.<sup>2</sup>
3. There are 929,448 non-Indians under twenty-one in the State of Oklahoma.

## I. ADOPTION

In the State of Oklahoma, according to the Oklahoma Public Welfare Commission, there were 69 Indian children placed in adoptive homes in 1972.<sup>3</sup> Using federal age-at-adoption figures,<sup>4</sup> 83 percent (or 57) are under one year of age when placed. Another 13 percent (or nine) are one year to less than six years old when placed; 3 percent (or two) are six years, but less than twelve years old when placed; and 1 percent (or 1) are twelve years of age and older. Using the formula then that: 57 Indian children per year are placed in adoption for at least 17 years, nine Indian children are placed in adoption for a minimum average of 14 years, two Indian children are placed in adoption for an average of nine years, and one Indian child is placed for adoption for an average of three years; there are an estimated 1,116 Indian children in adoption in Oklahoma. This represents one out of every 40.8 Indian children in the State.

Using the same formula for non-Indians (there were 317 non-Indian children placed in adoptive homes in 1972),<sup>5</sup> there are an estimated 5,144 under twenty-one year old non-Indians in adoption in Oklahoma. This represents one out of every 180.7 non-Indian children in the State.

*Conclusion*

There are therefore by proportion 44 times (440 percent) as many Indian children as non-Indian children in adoptive homes in Oklahoma.

## II. FOSTER CARE

In the State of Oklahoma, according to the Oklahoma Public Welfare Commission, there were 335 Indian children in State-administered foster care in August 1972.<sup>6</sup> In addition, there were two Oklahoma Indian children receiving foster care from the U.S. Bureau of Indian Affairs in 1972.<sup>7</sup> The combined total of 337 Indian children in foster care represents one out of every 135 Indian children in the State. By comparison there were 1,757 non-Indian children in foster care,<sup>8</sup> representing one out of every 529 non-Indian children.

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 38, "Oklahoma" (U.S. Government Printing Office: Washington, D.C.: 1973), p. 38-48.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 12.

<sup>3</sup> Letter from L. E. Rader, Director of Institutions, Social and Rehabilitative Services, Oklahoma Public Welfare Commission, May 2, 1974.

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1971," DHEW Publication No. (SRS) 73-03259, NCSS Report E-10 (1971), May 23, 1973, Table 6, "Children adopted by unrelated petitioners: Percentage distribution by age at time of placement, by type of placement, 1971."

<sup>5</sup> Letter from L. E. Rader, *op. cit.*

<sup>6</sup> *Ibid.*

<sup>7</sup> Division of Social Services, U.S. Bureau of Indian Affairs, "Fiscal year 1972—Child Welfare—Unduplicated Case Count [by States]" (Table).

<sup>8</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Children Served by Public Welfare Agencies and Voluntary Child Welfare Agencies and Institutions March 1971," DHEW Publication No. (SRS) 73-03258; NCSS Report E-9 (March 1971), April 27, 1973, Table 8.

*Conclusion*

There are therefore by proportion 3.9 times (390 percent) as many Indian children as non-Indian children in foster care in Oklahoma.

## III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures, a total of 1,453 under twenty-one-year-old Indian children are either in foster care or adoptive homes in the State of Oklahoma. This represents one out of every 31.3 Indian children. Similarly for non-Indians in the State 6,901 under twenty-one year olds are either in foster care or adoptive care, representing one out of every 134.7 non-Indian children.

*Conclusion*

By per capita rate Indian children are removed from their homes and placed in adoptive care or foster care 4.3 times (430 percent) more often than non-Indian children in the State of Oklahoma.

The above figures are based only on the statistics of the Oklahoma Public Welfare Commission and do not include private agency placements. They are therefore minimum figures.

## OREGON ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 807,211 under twenty-one year olds in the State of Oregon.<sup>1</sup>
2. There are 6,839 under twenty-one-year-old American Indians in the State of Oregon.<sup>2</sup>
3. There are 800,372 non-Indians under twenty-one in the State of Oregon.

## I. ADOPTION

In the State of Oregon, according to the Oregon Children's Services Division, there were 26 American Indian children placed in adoptive homes during fiscal year 1975.<sup>3</sup> Using the State's own figures reported to the National Center for Social Statistics of the U.S. Department of Health, Education and Welfare,<sup>4</sup> 61 percent (or 16) were under one year of age when placed. Another 8 percent (or two) were between one and two years old; 17 percent (or five) were between two and six years old; and 12 percent (or three) were between six and twelve years old.<sup>5</sup> Using the formula then that: 16 Indian children are placed in adoption for at least 17 years, two Indian children are placed in adoption for an average of 16.5 years, five Indian children are placed in adoption for an average of 14 years, and three are placed in adoption for an average of nine years; there are 402 Indian children under twenty-one years old in adoption at any one time in the State of Oregon. This represents one out of every 17 Indian children in the State.

Using the same formula for non-Indians (2,742 non-Indian children were placed in adoptive homes during Fiscal Year 1975),<sup>6</sup> there are 41,716 non-Indian children in adoption at any one time in the State of Oregon. This represents one out of every 19.2 non-Indian children in the State.

*Conclusion*

There are therefore by proportion 1.1 times (110 percent) as many Indian children as non-Indian children in adoption in Oregon.

## II. FOSTER CARE

According to statistics from the Oregon Children's Services Division, there were 247 Indian children in foster care as of June 1976.<sup>7</sup> This represents one out of every 27.7 Indian children in the State. By comparison there were 3,502 non-Indian children in foster care as of April 1976,<sup>8</sup> representing one out of every 228.5 non-Indian children in the State.

*Conclusion*

By rate therefore Indian children are placed in foster homes 8.2 times (820 percent) more often than non-Indian children in the State of Oregon.

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 39, "Oregon" (U.S. Government Printing Office: Washington, D.C.: 1973), p. 39-47.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 13.

<sup>3</sup> AAI child-welfare survey questionnaire completed by Mr. George Boyles, Manager, Research and Statistics, Oregon Children's Services Division, July 16, 1976.

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1974," DEEW Publication No. (SRS) 76-03259, NCSS Report E-10 (1974), April 1976, Table 10, "Children adopted by unrelated petitioners by age at time of placement, by State, 1974," p. 16. (Absolute numbers converted into percentages for purposes of this report.)

<sup>5</sup> 2% of the children were twelve years of age or older. The median age at time of placement of children adopted by unrelated petitioners in 1974 in Oregon was 3.9 months. *Ibid.*

<sup>6</sup> Questionnaire completed by Mr. George Boyles, *op. cit.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

## III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures, a total of 649 Indian children are either in foster homes or in adoptive homes in the State of Oregon. This represents one in every 10.5 Indian children. Similarly, for non-Indians in the State, 45,218 under twenty-one year olds are either in foster care or adoptive care, representing one in every 17.7 non-Indian children.

*Conclusion*

By rate therefore Indian children are removed from their homes and placed in adoptive care or foster care 1.7 times (170 percent) as often as non-Indian children in Oregon. The similarity in adoption rates in Oregon dominates the combined rates given above, and leads to a combined rate of Indian children removed from their families that is—in comparison to other States with significant Indian populations—relatively low. This may be deceptive. It is likely that the vast majority of Indian adoptions reported by the Children's Services Division involve children adopted by unrelated petitioners. This report compares that figure with the total number of related and unrelated adoptions in Oregon. Of that total, 72 percent involve children adopted by related petitioners.<sup>1</sup> Were the adoption comparison to be made only on the basis of unrelated adoptions, the comparative rate for Indian adoptions and the combined rate for adoptive and foster care, would be several times higher than indicated here.

## OREGON: APPENDIX

## County-by-County Analysis of Oregon Foster Care Statistics

## I. BAKER COUNTY

In Baker County, according to statistics from the Oregon Children's Services Division, there was one Indian child in foster care in January 1975.<sup>2</sup> There are 16 Indian children under twenty-one years old in Baker County.<sup>3</sup> Thus one out of 16 Indian children is in foster care.

*Conclusion*

In Baker county Indian children are in foster care at a per capita rate 14.3 times (1,430 percent) greater than the State-wide rate for non-Indians in Oregon.

## II. BENTON COUNTY

In Benton County, according to statistics from the Oregon Children's Services Division, there were two Indian children in foster care in January 1975.\* There are 75 Indian children under twenty-one years old in Benton County.† Thus one out of every 38 Indian children is in foster care.

*Conclusion*

In Benton County Indian children are in foster care at a per capita rate 6.0 times (600 percent) greater than the State-wide rate for non-Indians in Oregon.

## III. CLACKAMAS COUNTY

In Clackamas County, according to statistics from the Oregon Children's Services Division, there were seven Indian children in foster care in January 1975.\* There are 304 Indian children under twenty-one years old in Clackamas County.†

Thus one out of every 43.4 Indian children is in foster care.

<sup>1</sup> "Adoptions in 1974," *op. cit.* Table 1, "Children for whom adoption petitions were granted," p. 7.

<sup>2</sup> AAI child-welfare survey questionnaire completed by Mr. George Boyles, Manager of Research and Statistics, Oregon Children's Services Division, July 16, 1976.

<sup>3</sup> 51.8% of the Oregon Indian population is under twenty-one years old. [U.S. Bureau of the Census, Census of Population: 1970; Subject Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 13.] The total Indian population of Baker County is 31. [U.S. Bureau of the Census, Census of the Population: 1970 Supplementary Report PC(S1)-104, "Race of the Population by County," 1970 (Washington, D.C.: U.S. Government Printing Office: 1975), p. 38.]  $31 \times 51.8 = 16$ . The same formula is used to determine the Indian under twenty-one year old population in the other Oregon counties.

\* AAI Questionnaire, *op. cit.*

† Race of the Population by County: *op. cit.* 1970; 6, 7.

*Conclusion*

In Clackamas County Indian children are in foster care at a per capita rate 5.3 times (530 percent) greater than the State-wide rate for non-Indians in Oregon.

## IV. CLATSOP COUNTY

In Clatsop County, according to statistics from the Oregon Children's Services Division, there were four Indian children in foster care in January 1975.\* There are 64 Indian children under twenty-one years old in Clatsop County.† Thus one out of every 16 Indian children is in foster care.

*Conclusion*

In Clatsop County Indian children are in foster care at a per capita rate 14.3 times (1,430 percent) greater than the State-wide rate for non-Indians in Oregon.

## V. COLUMBIA COUNTY

In Columbia County, according to statistics from the Oregon Children's Services Division, there was one Indian child in foster care in January 1975.\* There are 46 Indian children under twenty-one years old in Columbia County.† Thus one out of 46 Indian children is in foster care.

*Conclusion*

In Columbia County Indian children are in foster care at a per capita rate 5.0 times (500 percent) greater than the State-wide rate for non-Indians in Oregon.

## VI. COOS COUNTY

In Coos County, according to statistics from the Oregon Children's Services Division, there was one Indian child in foster care in January 1975.\* There are 188 Indian children under twenty-one years old in Coos County.†

## VII. CROOK COUNTY

In Crook County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 47 Indian children under twenty-one years old in Crook County.†

## VIII. CURRY COUNTY

In Curry County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 93 Indian children under twenty-one years old in Curry County.†

## IX. DESCHUTES COUNTY

In Deschutes County, according to statistics from the Oregon Children's Services Division, there were four Indian children in foster care in January 1975.\* There are 48 Indian children under twenty-one years old in Deschutes County.† Thus one out of every 12 Indian children is in foster care.

*Conclusion*

In Deschutes County Indian children are in foster care at a per capita rate 19.0 times (1,900 percent) greater than the State-wide rate for non-Indians in Oregon.

## X. DOUGLAS COUNTY

In Douglas County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 214 Indian children under twenty-one years in Douglas County.†

## XI. GILLIAM COUNTY

In Gilliam County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are five Indian children under twenty-one years old in Gilliam County.†

\*AAIA Questionnaire, *op. cit.*

†Race of the Population by County: *op. cit.* 1970; 6, 7.

## XII. GRANT COUNTY

In Grant County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 15 Indian children under twenty-one years old in Grant County.†

## XIII. HARNEY COUNTY

In Harney County, according to statistics from the Oregon Children's Services Division, there were five Indian children in foster care in January 1975.\* There are 66 Indian children under twenty-one years old in Harney County.† Thus one out of every 13 Indian children is in foster care.

*Conclusion*

In Harney County Indian children are in foster care at a per capita rate 17.6 times (1,760 percent) greater than the State-wide rate for non-Indians in Oregon.

## XIV. HOOD RIVER COUNTY

In Hood River County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 58 Indian children under twenty-one years old in Hood River County.†

## XV. JACKSON COUNTY

In Jackson County, according to statistics from the Oregon Children's Services Division, there was one Indian child in foster care in January 1975.\* There are 224 Indian children under twenty-one years old in Jackson County.† Thus one out of 224 Indian children is in foster care.

*Conclusion*

In Jackson County Indian children are in foster care at a per capita rate identical to the State-wide rate for non-Indians in Oregon.

## XVI. JEFFERSON COUNTY

In Jefferson County, according to statistics from the Oregon Children's Services Division, there were 21 Indian children in foster care in January 1975.\* There are 686 Indian children under twenty-one years old in Jefferson County.† Thus one out of every 33 Indian children is in foster care.

*Conclusion*

In Jefferson County Indian children are in foster care at a per capita rate 6.9 times (690 percent) greater than the State-wide rate for non-Indians in Oregon.

## XVII. JOSEPHINE COUNTY

In Josephine County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 122 Indian children under twenty-one years old in Josephine County.†

## XVIII. KLAMATH COUNTY

In Klamath County, according to statistics from the Oregon Children's Services Division, there are 32 Indian children in foster care in January 1975.\* There are 736 Indian children under twenty-one years old in Klamath County.† Thus one out of every 23 Indian children is in foster care.

*Conclusion*

In Klamath County Indian children are in foster care at a per capita rate 9.9 times (990%) greater than the State-wide rate for non-Indians in Oregon.

## XIX. LAKE COUNTY

In Lake County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 35 Indian children under twenty-one years old in Lake County.†

†Race of the Population by County: 1970, *op. cit.*

\*AAIA Questionnaire, *op. cit.*

## XX. LANE COUNTY

In Lane County, according to statistics from the Oregon Children's Services Division, there were three Indian children in foster care in January 1975.\* There are 396 Indian children under twenty-one years old in Lane County.† Thus one out of every 132 Indian children is in foster care.

*Conclusion*

In Lane County Indian children are in foster care at a per capita rate 1.7 times (170%) the State-wide rate for non-Indians in Oregon.

## XXI. LINCOLN COUNTY

In Lincoln County, according to statistics from the Oregon Children's Services Division, there was one Indian child in foster care in January 1975.\* There are 165 Indian children under twenty-one years old in Lincoln County.† Thus one out of 165 Indian children is in foster care.

*Conclusion*

In Lincoln County, Indian children are in foster care at a per capita rate 1.4 times (140 percent) the State-wide rate for non-Indians in Oregon.

## XXII. LINN COUNTY

In Linn County, according to statistics from the Oregon Children's Services Division, there was one Indian child in foster care in January 1975.\* There are 148 Indian children under twenty-one years old in Linn County.† Thus one out of 148 Indian children is in foster care.

*Conclusion*

In Linn County Indian children are in foster care at a per capita rate 1.5 times (150%) the State-wide rate for non-Indians in Oregon.

## XXIII. MALHEUR COUNTY

In Malheur County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 43 Indian children under twenty-one years old in Malheur County.†

## XXIV. MARION COUNTY

In Marion County, according to statistics from the Oregon Children's Services Division, there were 20 Indian children in foster care in January 1975.\* There are 429 Indian children under twenty-one years old in Marion County.† Thus one out of every 21 Indian children is in foster care.

*Conclusion*

In Marion County Indian children are in foster care at a per capita rate 10.9 times (1,090%) greater than the State-wide rate for non-Indians in Oregon.

## XXV. MORROW COUNTY

In Morrow County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 15 Indian children under twenty-one years old in Morrow County.†

## XXVI. POLK COUNTY

In Polk County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 143 Indian children under twenty-one years old in Polk County.†

## XXVII. SHERMAN COUNTY

In Sherman County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 12 Indian children under twenty-one years old in Sherman County.†

\*AIA Questionnaire *op. cit.*  
†Race of the Population by County: 1970, *op. cit.*

## XXVIII. TILLAMOOK COUNTY

In Tillamook County, according to statistics from the Oregon Children's Services Division, there was one Indian child in foster care in January 1975.\* There are 61 Indian children under twenty-one years old in Tillamook County.† Thus one out of 61 Indian children is in foster care.

*Conclusion*

In Tillamook County Indian children are in foster care at a per capita rate 3.7 times (370 percent) greater than the State-wide rate for non-Indians in Oregon.

## XXIX. UMATILLA COUNTY

In Umatilla County, according to statistics from the Oregon Children's Services Division, there were 23 Indian children in foster care in January 1975.\* There are 506 Indian children under twenty-one years old in Umatilla County.† Thus one out of every 22 Indian children is in foster care.

*Conclusion*

In Umatilla County Indian children are in foster care at a per capita rate 10.4 times (1,040 percent) greater than the State-wide rate for non-Indians in Oregon.

## XXX. UNION COUNTY

In Union County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 44 Indian children under twenty-one years old in Union County.†

## XXXI. WALLOWA COUNTY

In Wallowa County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are six Indian children under twenty-one years old in Wallowa County.†

## XXXII. WASCO COUNTY

In Wasco County, according to statistics from the Oregon Children's Services Division, there were six Indian children in foster care in January 1975.\* There are 248 Indian children under twenty-one years old in Wasco County.† Thus one out of every 41 Indian children is in foster care.

*Conclusion*

In Wasco County Indian children are in foster care at a per capita rate 5.6 times (560 percent) greater than the State-wide rate for non-Indians in Oregon.

## XXXIII. WASHINGTON COUNTY

In Washington County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are 183 Indian children under twenty-one years old in Washington County.†

## XXXIV. WHEELER COUNTY

In Wheeler County, according to statistics from the Oregon Children's Services Division, there were no Indian children in foster care in January 1975.\* There are two Indian children under twenty-one years old in Wheeler County.†

## XXXV. YAMHILL COUNTY

In Yamhill County, according to statistics from the Oregon Children's Services Division, there was one Indian child in foster care in January 1975.\* There are 173 Indian children under twenty-one years old in Yamhill County.† Thus one out of 173 Indian children is in foster care.

*Conclusion*

In Yamhill County Indian children are in foster care at a per capita rate 1.3 times (130 percent) the State-wide rate for non-Indians in Oregon.

\*AIA Questionnaire, *op. cit.*  
†Race of the Population by County: 1970, *op. cit.*

## XXXVI. MULTNOMAH COUNTY

In Multnomah County, according to statistics from the Oregon Children's Services Division, there were 38 Indian children in foster care in January 1975.\* There are 1,385 Indian children in Multnomah County.† Thus one out of every 36.4 Indian children is in foster care.

*Conclusion*

In Multnomah County Indian children are in foster care at a per capita rate 6.3 times (630 percent) the State-wide rate for non-Indians in Oregon.

\*AATA Questionnaire, *op. cit.*

†Race of the Population by County: 1970, *op. cit.*

## SOUTH DAKOTA ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 279,136 under twenty-one year olds in South Dakota.<sup>1</sup>
2. There are 18,322 under twenty-one year old American Indians in South Dakota.<sup>2</sup>
3. There are 260,814 non-Indians under twenty-one in South Dakota.

## I. ADOPTION

In the State of South Dakota, according to the South Dakota Department of Social Services, there were an average of 63 adoptions per year of American Indian children from 1970-1975.<sup>3</sup> Using South Dakota's own age-at-adoption figures reported to the National Center for Social Statistics of the U.S. Department of Health, Education, and Welfare,<sup>4</sup> 81 percent (or 51) are under one year of age when placed. Another 6 percent (or four) are one year to less than two years old when placed; 7 percent (or four) are two years to less than six years old when placed; 4 percent (or three) are between six and twelve years old; and 2 percent (or one) are twelve years and over.<sup>5</sup> Using the formula then that: 51 Indian children per year are placed in adoption for at least 17 years, four Indian children are placed in adoption for 16.5 years, four Indian children are placed in adoption for an average of 14 years, three Indian children are placed in adoption for an average of nine years, and one Indian child is placed in adoption for an average of three years; there are 1,019 Indians under twenty-one year olds in adoption at any one time in the State of South Dakota. This represents one out of every 18 Indian children in the State.

Using the same formula for non-Indians (there were an average of 561 adoptions per year of non-Indian children from 1970-1975)<sup>6</sup> there are 9,073 non-Indian children in adoptive homes in South Dakota, or one out of every 28.7 non-Indian children.

*Conclusion*

There are therefore by proportion 1.6 times (160 percent) as many Indian children as non-Indian children in adoption in South Dakota.

## II. FOSTER CARE

According to statistics from the South Dakota Department of Social Services, there were 521 Indian children in State-administered foster care in October 1974.<sup>7</sup> In addition, there were 311 South Dakota Indian children receiving

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 48, "South Dakota" (Washington, D.C.: U.S. Government Printing Office: 1973), p. 43-47.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973); Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 14.

<sup>3</sup> Telephone interviews with Dr. James Marquart, Office on Children and Youth, South Dakota Department of Social Services, July 19-20, 1976.

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education, and Welfare, "Adoptions in 1974," DHEW Publication No. (SRS) 76-03259, NCSS Report E-10 (1974), April 1976, Table 10, "Children adopted by unrelated petitioners by age at time of placement, by State, 1974," p. 18. (Absolute numbers converted into percentages for purposes of this report.)

<sup>5</sup> The median age at time of placement of children adopted by unrelated petitioners in 1974 in South Dakota was 2.5 months. *Ibid.*, p. 15.

<sup>6</sup> Telephone interview with Dr. James Marquart, *op. cit.*

<sup>7</sup> *Ibid.*



foster care from the U.S. Bureau of Indian Affairs in October 1974.<sup>8</sup> The combined total of 832 Indian children in foster care represents one out of every 22 Indian children in the State. By comparison there were 530 non-Indian children in State-administered foster care in October 1974,<sup>9</sup> representing one out of every 492.1 non-Indian children.

#### Conclusion

There are therefore by proportion 22.4 times (2,240 percent) as many Indian children as non-Indian children in foster care in South Dakota.

### III. COMBINED ADOPTIVE CARE AND FOSTER CARE

Using the above figures, a total of 1,851 under twenty-one year old Indian children are either in foster homes or adoptive homes in the State of South Dakota. This represents one out of every 9.9 Indian children. Similarly for non-Indians in the State 9,603 under twenty-one year olds are either in foster care or adoptive care, representing one out of every 27.2 non-Indian children.

#### Conclusion

By per capita rate Indian children are removed from their homes and placed in adoptive care or foster care 2.7 times (270 percent) more often than non-Indian children in the State of South Dakota.

<sup>8</sup> Telephone interviews with Mr. Roger Lonnevik and Ms. Beverly Haug, Division of Social Services, U.S. Bureau of Indian Affairs Aberdeen Area Office, July 20-21, 1976. The BIA had 358 South Dakota Indian children in foster care in October 1974. 47 Indian children were in foster care administered by the State, but paid for by the BIA. 358-47=311.

<sup>9</sup> Telephone interviews with Dr. James Marquart, *op. cit.*

## UTAH INDIAN ADOPTION AND FOSTER CARE STATISTICS

### Basic Facts

1. There are 488,924 under twenty-one year olds in Utah.<sup>1</sup>
2. There are 6,690 under twenty-one year old American Indians in Utah.<sup>2</sup>
3. There are 482,234 non-Indians under twenty-one years old in Utah.

### I. ADOPTION

In the State of Utah, according to the Utah Department of Social Services, there were 20 Indian children placed for adoption in 1975.<sup>3</sup> Using the State's own age-at-adoption figures reported to the National Center for Social Statistics of the U.S. Department of Health, Education, and Welfare,<sup>4</sup> we can estimate that 86 percent (or 17) are under one year of age when placed. One child is between one and two years old; one child is between two and six years old; and one child is between six and twelve years old.<sup>5</sup> Using the formula then that: 17 Indian children are placed in adoption for at least 17 years, and three Indian children are placed in adoption for a minimum average of 13 years, there are 328 Indians under twenty-one years old in adoption in Utah. This represents one out of every 20.4 Indian children in the State.

Using the same formula for non-Indians (there were 428 non-Indian children placed for adoption in Utah in 1975),<sup>6</sup> there are 7,040 under twenty-one year old non-Indians in adoption in Utah. This represents one out of every 68.5 non-Indian children in the State.

#### Conclusion

There are therefore by proportion 3.4 times (340 percent) as many Indian children as non-Indian children in adoptive homes in Utah.

### II. FOSTER CARE

In the State of Utah, according to the Utah Department of Social Services, there were 249 Indian children in foster care in May 1976.<sup>7</sup> This represents one out of every 26.9 Indian children in the State. By comparison, there were 1,197 non-Indian children in foster care in May 1976,<sup>8</sup> representing one out of every 402.9 non-Indian children in the State.

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 46, "Utah" (Washington, D.C.: U.S. Government Printing Office: 1973), p. 46-39.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973). Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 15.

<sup>3</sup> Telephone interview with Mr. Dick Wheelock, Research Analyst, Utah Department of Social Services, July 14, 1976.

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1974," DHEW Publication No. (SRS) 76-03259, NCSS Report E-10 (1974), April 1976. Table 10, "Children adopted by unrelated petitioners by age at time of placement, by State, 1974," p. 16. (Absolute numbers converted into percentages for purposes of this report.) The ages and percentages are: under one year, 86 percent; between one and two, 3 percent; between two and six, 5 percent; between six and twelve, 5 percent; twelve and older, 1 percent. Multiplying the total number of adoptions in 1975 by these percentages and rounding off to the nearest whole number yields the figures that follow in the body of this report.

<sup>5</sup> The median age for children placed in adoption in Utah is less than one month. *Ibid.*, p. 15.

<sup>6</sup> Telephone interview with Mr. Dick Wheelock, Research Analyst, Utah Department of Social Services, July 14, 1976.

<sup>7</sup> Letter from Ms. Mary Lines, MSW, Program Specialist, Utah Department of Social Services, July 2, 1976.

<sup>8</sup> *Ibid.* Confirmed by telephone interview with Mr. Dick Wheelock, Utah Department of Social Services, July 14, 1976.

**Conclusion**

There are therefore by proportion 15 times (1,500 percent) as many Indian children as non-Indian children in foster care in Utah. 88% of the Indian children in foster care are in non-Indian homes.<sup>1</sup>

### III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures, a total of 577 under twenty-one year old Indian children are either in foster homes or adoptive homes in the State of Utah. This represents one in every 11.6 Indian children. Similarly for non-Indians in the State 8,237 under twenty-one year olds are either in foster care or adoptive care, representing one in every 58.5 non-Indian children.

**Conclusion**

By rate Indian children are removed from their homes and placed in adoptive care or foster care 5 times (500 percent) more often than non-Indian children in the State of Utah.

### APPENDIX

#### County-by-County Analysis of Utah Foster Care Statistics

##### I. BOX ELDER, CACHE AND RICH COUNTIES

In Box Elder, Cache, and Rich counties, according to statistics from the Utah Department of Social Services, there were 14 Indian children in State-administered foster care in May 1976.<sup>1a</sup> There are 437 Indian children under twenty-one years old in these three counties.<sup>2</sup> Thus one in every 31.2 Indian children is in foster care.

**Conclusion**

In Box Elder, Cache and Rich counties Indian children are in State-administered foster care at a per capita rate 12.9 times (1,290 percent) greater than the State-wide rate for non-Indians in Utah.

##### II. DAVIS, MORGAN AND WEBER COUNTIES

In Davis, Morgan and Weber counties, according to statistics from the Utah Department of Social Services, there were nine Indian children in State-administered foster care in May 1976.<sup>3</sup> There are 573 Indian children under twenty-one years old in these three counties.<sup>4</sup> Thus one in every 63.7 Indian children is in foster care.

**Conclusion**

In Davis, Morgan and Weber counties Indian children are in State-administered foster care at a per capita rate 6.3 times (630 percent) greater than the State-wide rate for non-Indians in Utah.

##### III. SALT LAKE AND TOOELE COUNTIES

In Salt Lake and Tooele counties, according to statistics from the Utah Department of Social Services, there were 13 Indian children in State-administered foster care in May 1976.<sup>5</sup> There are 1,205 Indian children under twenty-one

years old in these two counties.<sup>6</sup> Thus one in every 92.7 Indian children is in foster care.

**Conclusion**

In Salt Lake and Tooele counties Indian children are in State-administered foster care at a per capita rate 4.3 times (430 percent) greater than the State-wide rate for non-Indians in Utah.

##### IV. SUMMIT, UTAH AND WASATCH COUNTIES

In Summit, Utah and Wasatch counties, according to statistics from the Utah Department of Social Services, there were 15 Indian children in State-administered foster care in May 1976.<sup>7</sup> There are 397 Indian children under twenty-one years old in these three counties.<sup>8</sup> Thus one in every 26.5 Indian children is in foster care.

**Conclusion**

In Summit, Utah and Wasatch counties Indian children are in State-administered foster care at a per capita rate 15.2 times (1,520 percent) greater than the State-wide rate for non-Indians in Utah.

##### V. JUAB, MILLARD, PIUTE, SANPETE, SEVIER, AND WAYNE COUNTIES

In Juab, Millard, Piute, Sanpete, Sevier and Wayne counties, according to statistics from the Utah Department of Social Services, there were 21 Indian children in State-administered foster care in May 1976.<sup>9</sup> There are 158 Indian children under twenty-one years old in these six counties.<sup>10</sup> Thus one in every 7.5 Indian children is in foster care.

**Conclusion**

In Juab, Millard, Piute, Sanpete, Sevier and Wayne counties Indian children are in State-administered foster care at a per capita rate 53.7 times (5,370 percent) greater than the State-wide rate for non-Indians in Utah.

##### VI. BEAVER, GARFIELD, IRON, KANE AND WASHINGTON COUNTIES

In Beaver, Garfield, Iron, Kane, and Washington counties, according to statistics from the Utah Department of Social Services, there were 19 Indian children in State-administered foster care in May 1976.<sup>11</sup> There are 276 Indian children under twenty-one years old in these five counties.<sup>12</sup> Thus one in every 14.5 Indian children is in foster care.

**Conclusion**

In Beaver, Garfield, Iron, Kane, and Washington counties Indian children are in State-administered foster care at a per capita rate 27.8 times (2,780 percent) greater than the State-wide rate for non-Indian in Utah.

##### VII. DAGGETT, DUCHESNE AND UINTAH COUNTIES

In Daggett, Duchesne and Uintah counties, according to statistics from the Utah Department of Social Services, there were 73 Indian children in State-administered foster care in May 1976.<sup>13</sup> There are 1,059 Indian children under twenty-one years old in these three counties.<sup>14</sup> Thus one in every 14.5 Indian children is in foster care.

<sup>1</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

<sup>2</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* These counties comprise District III of the Utah Department of Social Services.

<sup>3</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

<sup>4</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* These counties comprise District IV of the Utah Department of Social Services.

<sup>5</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

<sup>6</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* These counties comprise District V of the Utah Department of Social Services.

<sup>7</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

<sup>8</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* These counties comprise District VI of the Utah Department of Social Services.

<sup>9</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

<sup>10</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* These counties comprise District II-A of the Utah Department of Social Services.

<sup>11</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

<sup>12</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* These counties comprise District II-B of the Utah Department of Social Services.

<sup>13</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

<sup>1</sup> Letter from Ms. Mary Lines, MSW, *op. cit.*

<sup>2a</sup> Letter from Ms. Mary Lines, MSW, Program Specialist, Utah Department of Social Services, July 2, 1976. These counties comprise District I of the Utah Department of Social Services.

<sup>3</sup> 63.4 percent of the Utah Indian population is under twenty-one years old. [U.S. Bureau of the Census, Census of Population: 1970; Subject Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 15.] The total Indian population of Box Elder, Cache and Rich counties is 690. [U.S. Bureau of the Census, Census of Population: 1970 Supplementary Report PC(S1)-104, "Race of the Population by County: 1970" (Washington, D.C.: U.S. Government Printing Office: 1975), p. 47.] 690 times .634 equals 437. The same formula is used to determine the Indian under twenty-one year old population in the other Utah counties.

<sup>4</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* These counties comprise District II-A of the Utah Department of Social Services.

<sup>5</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

<sup>6</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* These counties comprise District II-B of the Utah Department of Social Services.

*Conclusion*

In Daggett, Duchesne and Uintah counties Indian children are in State-administered foster care at a per capita rate 27.8 times (2,780 percent) greater than the State-wide rate for non-Indian children.

## VIII. CARBON, EMERY AND GRAND COUNTIES

In Carbon, Emery and Grand counties, according to statistics from the Utah Department of Social Services, there were four Indian children in State-administered foster care in May 1976.<sup>15</sup> There are 37 Indian children under twenty-one years old in these three counties.<sup>16</sup> Thus one in every 9.3 Indian children is in foster care.

*Conclusion*

In Carbon, Emery and Grand counties Indian children are in State-administered foster care at a per capita rate 43.3 times (4,330 percent) greater than the State-wide rate for non-Indians in Utah.

## IX. SAN JUAN COUNTY

In San Juan County, according to statistics from the Utah Department of Social Services, there were 81 Indian children in State-administered foster care in May 1976.<sup>17</sup> There are 3,005 Indian children under twenty-one years old in the County.<sup>18</sup> Thus one in every 37.1 Indian children is in foster care.

*Conclusion*

In San Juan County, Indian children are in State-administered foster care at a per capita rate 10.9 times (1,090 percent) greater than the Statewide rate for non-Indians in Utah.

<sup>15</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* These three counties comprise District VII-A of the Utah Department of Social Services.

<sup>16</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

<sup>17</sup> Letter from Ms. Mary Lines, MSW, *op. cit.* San Juan County comprises District VII-B of the Utah Department of Social Services.

<sup>18</sup> "Race of the Population by County: 1970," *op. cit.*, p. 47.

## WASHINGTON INDIAN ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 1,351,455 under twenty-one year olds in the State of Washington.<sup>1</sup>
2. There are 15,980 under twenty-one year old American Indians in the State of Washington.<sup>2</sup>
3. There are 1,335,475 non-Indians under twenty-one in the State of Washington.

## I. ADOPTION

In the State of Washington, according to the Washington Department of Social and Health Services, 48 Indian children were placed for adoption by public agencies in 1972.<sup>3</sup> Using State figures reported to the National Center for Social Statistics of the U.S. Department of Health, Education and Welfare,<sup>4</sup> we can estimate that 69 percent (or 33) are under one year of age when placed; Another 21 percent (or ten) are one year to less than six years old when placed; 8 percent (or four) are six years, but less than twelve when placed; and 2 percent (or one) are twelve years and over.<sup>5</sup> Using the formula then that: 33 Indian children are placed in adoption for at least 17 years, ten Indian children are placed in adoption for a minimum average of 14 years, four Indian children are placed in adoption for an average of nine years, and one Indian child is placed for adoption for an average of three years; there are an estimated 740 Indian children in adoption in Washington. This represents one out of every 21.6 Indian children in the State.

Using the same formula for non-Indians (213 non-Indian children were placed for adoption by public agencies in Washington in 1972),<sup>6</sup> there are an estimated 3,294 under twenty-one year old non-Indians in adoption in Washington. This represents one out of every 405.4 non-Indian children.

*Conclusion*

There are therefore by proportion 18.8 times (1,880 percent) as many Indian children as non-Indian children in adoptive homes in Washington; 69 percent of the Indian children placed for adoption in 1972 were placed in non-Indian homes.<sup>7</sup>

## II. FOSTER CARE

According to statistics from the Washington Department of Social and Health Services there were 558 Indian children in foster homes in February 1973.<sup>8</sup> This represents one out of every 28.6 Indian children in the State. By comparison there were 4,873 non-Indian children in foster homes in February 1973,<sup>9</sup> representing one out of every 274.1 non-Indian children.

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 49, "Washington" (U.S. Government Printing Office: Washington, D.C.: 1973), p. 49-43.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 16.

<sup>3</sup> Letter and AAIA child-welfare survey questionnaire submitted by Dr. Robert J. Shearer, Assistant Secretary, Social Services Division, Washington Department of Social and Health Services, April 4, 1973.

<sup>4</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1974," DHEW Publication No. (SRS) 76-03259, NCSS Report E-10 (1974), April 1976, Table 10, "Children adopted by unrelated petitioners by age at time of placement, by State, 1974," p. 16. (Absolute numbers converted into percentages for purposes of this report.)

<sup>5</sup> The median age at time of placement of children adopted by unrelated petitioners in 1974 in Washington was 3.6 months. *Ibid.*, p. 15.

<sup>6</sup> Dr. Robert J. Shearer, *op. cit.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

*Conclusion*

By per capita rate therefore Indian children are placed in foster homes 9.6 times (960 percent) as often as non-Indian children in the State of Washington.

## III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures, a total of 1,298 under twenty-one year old Indian children are either in foster homes or adoptive homes in the State of Washington. This represents one out of every 12.3 Indian children. Similarly for non-Indians in the State, 8,167 under twenty-one year olds are either in foster homes or adoptive homes, representing one out of every 163.5 non-Indian children.

*Conclusion*

By per capita rate Indian children are removed from their homes and placed in adoptive homes or foster homes 13.3 times (1,330 percent) more often than non-Indian children in the State of Washington.

## WISCONSIN INDIAN ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 1,824,713 under twenty-one year olds in the State of Wisconsin.<sup>1</sup>
2. There are 10,176 under twenty-one-year-old American Indians in the State of Wisconsin.<sup>2</sup>
3. There are 1,814,537 non-Indians under twenty-one in Wisconsin.

## I. ADOPTION

In the State of Wisconsin, according to the Wisconsin Department of Health and Social Services, there were an average of 48 Indian children per year placed in non-related adoptive homes by public agencies from 1966-1970.<sup>3</sup> Using the State's own figures,<sup>4</sup> 69 percent (or 33) are under one year of age when placed. Another 11 percent (or five) are one or two years old; 9 percent (or four) are three, four, or five years old; and 11 percent (or six) are over the age of five. Using the formula then that : 33 Indian children per year are placed in adoption for at least 17 years; five Indian children are placed in adoption for a minimum average of 16 years; four Indian children are placed in adoption for an average of 14 years; and six Indian children are placed in adoption for six years; there are an estimated 733 Indian children under twenty-one years old in nonrelated adoptive homes at any one time in the State of Wisconsin. This represents one out of every 13.9 Indian children in the State.

Using the same formula for non-Indians (an average of 473 non-Indian children per year were placed in non-related adoptive homes by "public agencies from 1966-1970),<sup>5</sup> there are an estimated 7,288 non-Indians under twenty-one years old in non-related adoptive homes in Wisconsin. This represents one out of every 249 non-Indian children in the State.

*Conclusion*

There are therefore by proportion 17.9 times (1,790 percent) as many Indian children as non-Indian children in non-related adoptive homes in Wisconsin.

## II. FOSTER CARE

In the State of Wisconsin, according to the Wisconsin Department of Health and Social Services, there were 545 Indian children in foster care in March 1973.<sup>6</sup> This represents one out of every 18.7 Indian children. By comparison, there were 7,266 non-Indian children in foster care in March 1973,<sup>7</sup> representing one out of every 250 non-Indian children.

*Conclusion*

There are therefore by proportion 13.4 times (1,340 percent) as many Indian children as non-Indian children in foster care in the State of Wisconsin.

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 51, "Wisconsin" (U.S. Government Printing Office: Washington, D.C.: 1973), p. 51-60.

<sup>2</sup> U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 16.

<sup>3</sup> Letter and statistics from Mr. Frank Newgent, Administrator, Division of Family Services, Wisconsin Department of Health and Social Services, April 25, 1973.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Children Served by Public Welfare Agencies and Voluntary Child Welfare Agencies and Institutions, March 1973," DHEW Publication No. (SRS) 76-03253, NCSS Report E-9 (3/73), November 1975, Table 4, p. 10.

## III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures, a total of 1,278 under twenty-one year old American Indian children are either in foster care or adoptive homes in the State of Wisconsin. This represents one out of every 8 Indian children. A total of 14,554 non-Indian children are in foster care or adoptive homes, representing one out of every 124.7 non-Indian children.

*Conclusion*

By per capita rate Indian children are removed from their homes and placed in adoptive homes or foster care 15.6 times (1,560 percent) more often than non-Indian children in the State of Wisconsin.

The Wisconsin statistics do not include adoption placements made by private agencies, and therefore are minimum figures.

## WYOMING ADOPTION AND FOSTER CARE STATISTICS

## Basic Facts

1. There are 137,339 under twenty-one year olds in Wyoming.<sup>1</sup>
2. There are 2,832 under twenty-one year old American Indians in Wyoming.<sup>2</sup>
3. There are 134,507 non-Indians under twenty-one in Wyoming.

## I. ADOPTION

In the State of Wyoming, according to the Wyoming State Division of Social Services, there were an average of six adoptions per year of Indian children from 1972-1975.<sup>3</sup> This data base is too small to allow realistic projection of the total number of Indian children in adoptive care. We can say though that during 1972-1975, 0.8 percent of Wyoming Indian children were placed for adoption.

During 1972-1975, according to the Wyoming State Division of Social Services, an average of 73 non-Indian children were placed for adoption in Wyoming.<sup>4</sup> Thus, during 1972-1975, 0.2 percent of Wyoming non-Indian children were placed for adoption.

*Conclusion*

Based on the four year period 1972-1975, Indian children were placed for adoption at a per capita rate four times (400%) greater than that for non-Indians.

## II. FOSTER CARE

According to statistics from the Wyoming State Division of Social Services, there were 24 Indian children in foster care in June 1976.<sup>5</sup> An additional 74 Indian children were in foster care administered by the U.S. Bureau of Indian Affairs.<sup>6</sup>

The combined total of 98 represents one out of every 28.9 Indian children in the State. By comparison, there were 446 non-Indian children in foster care in May 1976,<sup>7</sup> representing one out of every 301.6 non-Indian children.

*Conclusion*

There are therefore by proportion 10.4 times (1,040 percent) as many Indian children as non-Indian children in foster care in Wyoming; 57 percent of the children in State-administered foster family care are in non-Indian homes.<sup>8</sup> 51 percent of the children in BIA-administered foster family care are in non-Indian homes.<sup>9</sup>

<sup>1</sup> U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 52, "Wyoming" (U.S. Government Printing Office: Washington, D.C.: 1973), p. 52-30.

<sup>2</sup> *Ibid.*, p. 52-30 (Table 19), p. 52-189 (Table 139). Indian people comprise 59.2 percent of the total non-white population according to Table 139. According to Table 19 there are 4,783 non-whites under twenty-one. 4,783 times .592 equals 2,832.

<sup>3</sup> Telephone interview with Mr. John Steinberg, Director of Adoptions, Wyoming State Division of Social Services, July 15, 1976. A total of 22 Indian children were placed for adoption during these four years.

<sup>4</sup> *Ibid.* A total of 293 non-Indian children were placed for adoption during these four years.

<sup>5</sup> Telephone interview with Ms. Janet Shriner, Foster Care Consultant, Wyoming State Division of Social Services, July 20, 1976. Twenty-three of these children were in foster family homes, and one in a residential treatment center.

<sup>6</sup> Telephone interview with Mr. Clyde W. Hobbs, Superintendent, Wind River Indian Agency, July 22, 1976. Of these children, 47 were in foster family homes, and 27 in group homes. The tribal breakdown was: Shoshone, 12; Arapahoe, 39; Non-enrolled, 23. The BIA figures are as of July 1976.

<sup>7</sup> Telephone interview with Ms. Janet Shriner, *op. cit.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Telephone interview with Mr. Clyde W. Hobbs, *op. cit.*

## III. U.S. BUREAU OF INDIAN AFFAIRS BOARDING SCHOOLS

In addition to the above figures, 134 Wyoming Indian children between the ages of fifteen and eighteen were away from their homes attending BIA boarding schools in other states. These children, all from the Wind River Reservation, spent at least part of the 1975-1976 school year in boarding schools in California, New Mexico, Oklahoma, South Dakota, and Utah.<sup>10</sup>

## IV. COMBINED ADOPTIVE CARE AND FOSTER CARE

Since we are unable to estimate the total number of Indian children currently in adoptive care in Wyoming, it is not possible either to estimate the total number of Indian children receiving adoptive and foster care. The foster care statistics alone make it unmistakably clear that Indian children are removed from their homes at rates far exceeding those for non-Indian children.

## NOTE ON FEDERAL BOARDING SCHOOLS

In addition to those Indian children removed from their families to be placed in adoptive care, foster care, or special institutions, thousands of Indian children (many as young as five-ten years old) are placed in U.S. Bureau of Indian Affairs boarding schools. Enrollment in BIA boarding schools and dormitories is not based primarily on the educational needs of the children; it is chiefly a means of providing substitute care. The standards for taking children from their homes for boarding school placement are as vague and as arbitrarily applied as are standards for Indian foster care placements.

The table below presents a state-by-state breakdown of the number of Indian children living in dormitories while they attend BIA boarding schools.

State:	BIA boarding school students
Alaska -----	664
Arizona -----	10,977
California -----	714
Mississippi -----	197
Nevada -----	517
New Mexico -----	7,428
North Dakota -----	481
Oklahoma -----	1,973
Oregon -----	549
South Dakota -----	1,207
Utah -----	1,093
Total -----	25,800
Indian children living in dormitories operated by the BIA for children attending public schools -----	3,384
Total -----	29,184

These children should be included in any compilation of Indian children away from their families.

Source: Office of Indian Education Programs, U.S. Bureau of Indian Affairs, "Fiscal Year 1974: Statistics Concerning Indian Education" (Lawrence, Kans.: Haskell Indian Junior College: 1975), pp. 12-15, 22-23.

<sup>10</sup> *Ibid.*

## APPENDIX C

## JURISDICTION OVER INDIAN HUNTING AND FISHING ACTIVITY

(Prepared for American Indian Policy Review Commission Task Force on Federal, State, and Tribal Jurisdiction by David H. Getches)

The law of Indian hunting and fishing rights is an actively developing area of Indian law. Several cases now in litigation may affect the conclusions reached in this paper and thus we have tried to indicate where the law is unsettled or likely to have further definition in the near future. It should be noted that generalizations in this area must be carefully viewed, as the nature and extent of Indian rights based on treaty turn upon the specific terms of the particular treaty.

We discuss in the following pages, first on-reservation, and then off-reservation, hunting and fishing rights, and the extent of state, federal and tribal regulation of those rights in each situation. Aboriginal rights are treated in a third section, although the law is especially sparse in that area. The recommendations in the final section are not for substantive legislation, but rather to facilitate enforcement and recognition of treaty rights through litigation and to identify federal actions which interfere with established Indian rights.

## ON-RESERVATION HUNTING AND FISHING RIGHTS

## State Regulation

Indian reservations are the exclusive domain of the tribe or tribes for which they are established. As such, state laws generally have no application to Indians on the reservation. These principles are well established and do not apply merely to Indian hunting and fishing activity, but to virtually all attempts of a state to control or regulate on-reservation activities by Indians. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). That policy was first articulated by Chief Justice John Marshall in the seminal case of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The *Worcester* case recognized the sovereign status of Indian tribes as being inconsistent with the exercise of state power within lands reserved for them. This sovereignty, limited by the United States' power to deal exclusively with the tribes in extinguishing their property rights, was recognized by virtue of treaties entered into between the United States and the tribes. The embodiment of Indian rights in treaties is the factor which protects those rights from regulation, invasion, qualification by the states as a result of Article VI of the United States Constitution, the supremacy clause, which states:

"That all treaties made or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution Laws of any State to the Contrary notwithstanding."

The supremacy clause, of course, applies fully to Indian treaties as it does to international treaties. *E.g., United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876).

Because of the anomalous nature of Indian sovereignty and the panoply of Congressional acts which have had the effect of modifying sovereign powers of tribes, the analysis of modern courts has tended "away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973).

Although the question of state jurisdiction is not dealt with in the typical treaty, the courts have construed the creation of a reservation to preclude ex-

tensions of state law to Indians on the reservation.<sup>1</sup> See, e.g., *McClanahan v. Arizona Tax Commission*, *supra*, 411 U.S. at 174-75. Silence as to such matters in treaties cannot be construed to extend jurisdiction. Courts have fashioned certain axioms of treaty construction which would preclude such an implication. Treaties must be interpreted as the Indians would have understood them (*United States v. Winans*, 198 U.S. 370, 380-81 (1908)), doubtful expressions must be resolved in favor of Indian parties (*Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)) and the treaties must be construed liberally in favor of the Indians (*Tulee v. Washington*, 315 U.S. 681, 684-85 (1942)). Thus, when analyzing Indian treaties, in absence of express treatment of the question, the exercise of state power must be pre-empted by the creation of a reservation pursuant to federal law for the use and occupation of Indians.

Lands reserved in a treaty are, of course, the property of the Indians. The extent of those property rights is determined by the same rules of construction summarized above. Accordingly, courts have insisted that rights be specifically given up before they find that the Indians no longer retain them. This is the doctrine of reserved rights which was first articulated by the United States Supreme Court in an early fishing rights decision, *United States v. Winans*, *supra*, 198 U.S. at 381:

"[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."

Based on this doctrine, the courts have concluded that tribal hunting and fishing rights are preserved by treaties which are silent on the subject. *E.g.*, *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

Questions have arisen about the extent of impliedly reserved fishing rights where a reservation of land is bordered by waters in which those rights are claimed. In that situation the court has looked to the circumstances in which the reservation was created to determine whether the purpose of making the reservation was to include rights to utilize adjacent waters. In *Alaska Pacific Fisheries v. United States*, *supra*, the Supreme Court found that reservation of "the body of lands known as Annette islands" included the adjacent fishing ground as well as the upland because "[t]he Indians could not sustain themselves from use of the upland alone. The use of the adjacent fishing grounds was equally essential. . . . The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation." 248 U.S. at 89.

As with rights to the land itself, and to water, timber, etc., hunting and fishing rights are property rights of the particular tribe. Any destruction or diminishment of those rights would be a taking within the meaning of the Fifth Amendment to the Constitution and would entitle the tribe to compensation. *E.g.*, *Menominee Tribe v. United States*, 318 F.2d 998 (Ct. Cl. 1967), *affirmed* 391 U.S. 404 (1968); *Hynes v. Grimes Packing Company*, 377 U.S. 86, 105 (1949); *see Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied* 369 U.S. 818 (1962).

The United States by reason of the relationship created in its dealings with Indians has an obligation to protect property rights secured to the tribes. That relationship is one of trusteeship or guardianship which binds the United States to deal fairly and protectively with all Indian rights. Subjection of those rights to state regulation or qualification decreases their value and effectively is a taking. *Cf. Choate v. Trapp*, 224 U.S. 665 (1912). Consequently, the courts will not imply such takings but insist upon a clear congressional statement before finding that hunting and fishing rights have been extinguished or diminished. Even termination legislation designed to extinguish federal supervision of the federal trust relationship with an Indian tribe has been held not to destroy treaty hunting and fishing rights absent an express statement to that effect. The Supreme Court stated in *Menominee Tribe v. United States*, *supra*:

"We find it difficult to believe that Congress, without explicit statement, would subject the United States to claim for compensation by destroying property rights conferred by treaty."

<sup>1</sup> Where treaty rights are referred to in this paper they include rights established by a treaty, an act of Congress, an agreement or executive order. The validity and the force of each method of creating reservations and preserving other rights is well established. See Wilkinson and Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth'—How Long a Time Is That?," 63 Calif. L. Rev. 601, 615-16.

91 U.S. at 413. *Accord, Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied* 419 U.S. 1019 (1974). Indian hunting and fishing rights, then, are shielded from state control or regulation by the status of the reservation, but in addition, the right when embodied in a treaty, act or agreement (either expressly or by implication) provides a further ground for excluding state jurisdiction in that the right and its exemption from state control constitute a property right which cannot be taken away without express congressional act and appropriate compensation.

The conclusion which can be summarized from the foregoing discussion and authorities is that whenever an Indian reservation is created, hunting and fishing rights attach within reservation boundaries and, unless specifically limited by the treaty, they belong exclusively to the tribe and they may be exercised free of the application of state law. The courts have considered this right in many contexts and universally have held that on-reservation hunting and fishing activity is exempt from any state regulation. *E.g.*, *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied* 330 U.S. 827 (1946); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971); *Klamath and Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore. 1956); *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557 (1930); *State v. Edwards*, 188 Wash. 467, 62 P.2d 1094 (1936); *Arnett v. Five Gill Nets*, 48 Cal. App.3d, 121 Cal. Rptr. 906 (1975), *cert. denied*, 44 U.S.L.W. 3545 (March 29, 1976); *Elser v. Gill Net No. 1*, 245 Cal. App.2d 30, 54 Cal. Rptr. 568 (1966).

It is immaterial that some of the land in an Indian reservation has passed out of Indian title and into non-Indian ownership. The principle that Indian hunting and fishing rights may be exercised free from state regulation still obtains. Thus, in *Lecch Lake Bank of Chippewa Indians v. Herbst*, *supra*, an act of Congress which was by its terms "a complete extinguishment of the Indian title" based upon an agreement between the United States and the Indians in which the Indians agreed to "grant, cede, and relinquish and convey . . . all our rights, title and interest in and to the land" did not abrogate the Indians' unrestricted hunting and fishing rights on the reservation. 334 F. Supp. at 1003. This holding is consistent with the definition of "Indian country" for jurisdiction purposes found in the federal criminal statutes which extends to all land within reservations and allotments "notwithstanding the issuance of any patent, and, including rights-of-way. . . ." 18 U.S.C. § 1151.

Enactment of Public Law 280 and its application in several states has had no impact upon the ability of Indians to exercise their fishing and hunting rights free of state regulation within their reservations. Title 18, U.S.C. § 1162 codifies the criminal sections of Public Law 280. Subsection (b) is a saving clause in which it is stated that:

"[n]othing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

The courts have held that Public Law 280 states have no jurisdiction to regulate on-reservation hunting and fishing rights. *E.g.*, *Klamath and Modoc Tribes v. Maison*, *supra*; *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 F/G No. 72-3199 (9th Cir. Feb. 2, 1976).

#### Federal Regulation

The few courts to consider the question have indicated that regulation of on-reservation hunting and fishing by the Federal Government will not be permitted. In *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925), the court held that regulations promulgated by the Commissioner of Indian Affairs and the Secretary of the Interior concerning on-reservation fishing were beyond their authority in that they were not authorized under the treaty. A federal tax on the exercise of the treaty fishing right within the waters of a reservation was found unlawful in *Strom v. Commissioner*, 6 Tax Ct. 621 (1946).

It has been held that even where a treaty subsequent to the Indian treaty outlawed hunting of migratory birds it does not alter the Indians' right to hunt on the reservation. *United States v. Cutler*, 37 F. Supp. 724 (D. Ida. 1941). Similarly, in *United States v. White*, 508 F.2d 453 (8th Cir. 1947), it was held that the Bald Eagle Protection Act was inapplicable to an Indian hunter within the boundaries of a reservation who took an eagle in violation of the act. The court found that the statute did not adequately express an intention to abrogate Indian hunt-

ing rights and that this intention could not be implied into a general congressional enactment because the subject of Indian property interests is traditionally left to tribal self-government.

It is clear that Congress has the power to abrogate Indian treaties all or in part. *E.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). An abrogation of hunting and fishing rights will not be found absent a clear indication of congressional intent, however. *Menominee Tribe v. United States*, *supra*. But a proper exercise of congressional power can provide the necessary authority for the Executive to promulgate regulations governing Indian on-reservation fishing. *Mettlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). *Tribal Regulation*.

It is beyond doubt that tribes have the sovereign authority to regulate, restrict, and license hunting and fishing within their reservations. The exclusiveness of a tribe's jurisdiction over members within the reservation has only been diminished insofar as a treaty or a federal statute so provides. Many, if not most, tribes with substantial fish and game resources regulate the exercise of such rights. *See, e.g., Hobbs, "Indian Hunting and Fishing Rights,"* 32 Geo. Wash. L. Rev. 504, 523, nn. 100-101. On a number of occasions the Department of the Interior Solicitor has concluded that a tribe may adopt ordinances to preserve and protect its reservation hunting and fishing rights. Sol. Op. M-36638 (May 16, 1962). Typically these ordinances are enforced through a system of tribal enforcement officers and courts. These are the exclusive entities having any jurisdiction over purported violations. *See State v. McClure*, 127 Mont. 534, 268 P. 2d 629 (1954). Statutes removing or diminishing the right of a tribe to exercise sovereign powers within the reservation would effect a taking of property compensable by the United States.

Consistent with a tribe's sovereignty over its own territory, it can enforce its regulations relating to hunting and fishing as against non-members of the tribe as well as members. *See Quechan Tribe of Indians v. Rowe*, *supra*. Similarly, the tribe possesses exclusive authority to license non-Indians to hunt and fish within the reservation. *Colville Tribe v. State of Washington*, 412 F. Supp. 651 (April 14, 1976).

Some state courts have reached the questionable conclusion that tribes lack jurisdiction over non-Indians hunting and fishing on the reservation. *E.g., State v. Danielson*, 427 P. 2d 689 (Mont. 1967); *see also, In re Crosby*, 149 P. 989 (Nev. 1915). A California court has taken a middle ground, holding that where a non-member Indian goes on a reservation to hunt and fish, state game laws apply to him but that permission to fish on the reservation given by authorities of the tribe on whose reservation he is fishing is a complete defense. *Donahue v. Justice Court*, 15 Cal. App. 2d 557, 93 Cal. Rptr. 310 (1971). It was suggested in the *Leech Lake* case, *supra*, that exclusivity of an Indian tribe's rights to regulate fishing of Indians and non-Indians within the reservation depends upon the types of congressional acts which manifest the relationships between the tribe and the United States. 334 F. Supp. at 1006. In that case, virtually all of the federal legislation had allowed virtually all of the reservation to pass into non-Indian ownership.

Because of a paucity of cases and some conflict, particularly among state courts, there may still be a question in some states as to the propriety of application and enforcement of state fish and game laws as to non-Indians within Indian reservations. Tribes may be limited as to how far their fish and game ordinances apply because of provisions in their own constitutions which limit their jurisdiction to members or to Indians, and there may be treaties or legislation which limit their powers or allow the importation of state laws. But generally it appears that the trend, and certainly a better view, is that tribal laws apply to Indians and non-Indians alike who are hunting and fishing within the boundaries of a Indian reservation. This application would lead to the exclusion of state laws except when the tribe itself requires that non-Indians comply with state regulations as they have in some situations. *See, e.g., Quechan Tribe v. Rowe*, — F.2d —, No. 72-3199 (9th Cir., Feb. 2, 1976).

That Congress contemplated non-Indian hunting and fishing activities within reservation boundaries only upon the condition that tribal consent has been obtained is evidenced by 18 U.S.C. § 1165. This law makes it illegal for a non-Indian to go within the boundaries of an Indian reservation for the purpose of hunting or fishing unless he or she has the consent of the tribe. While the provision does not seek to bring non-Indians under the aegis of any federal regulatory scheme, it puts muscle in the requirement that non-Indians comply with

tribal requirements of licensing and other regulations upon which consent to hunting and fishing might be conditioned.

#### OFF-RESERVATION HUNTING AND FISHING

Although there has been little contest over the applicability of jurisdictional principles within the boundaries of Indian reservations, jurisdiction over Indians exercising hunting and fishing rights secured by federal treaty or agreement while outside reservation boundaries has been an area of intensive litigation. States have inherent authority to regulate the taking of fish and game within their boundaries. *Geer v. Connecticut*, 161 U.S. 519 (1896). Usually state law can be applied to Indians who are outside the reservation, but there can be no such application if it would "impair a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Accordingly, a federal treaty may override state power to regulate the taking of game. *Missouri v. Holland*, 252 U.S. 416 (1920).

To determine when and to what extent state regulatory power over off-reservation Indian hunting and fishing is preempted by treaties it is, of course, essential to examine the specific terms of the particular treaty or other federal law. Typically, a treaty cedes a land area to the United States, retaining a defined parcel for a reservation. Also reserved in many treaties is a right to continue hunting or fishing on lands other than those retained.

Some of the most commonly reserved off-reservation rights are found in treaties with Indians of the Northwest. Those treaties often reserve a right to fish "at usual and accustomed places" which is "in common with the citizens of the territory." *See, e.g., Treaty with the Yakimas*, 12 Stat. 951. Hunting rights have been referred to as "the privilege of hunting... on open and unclaimed lands." *E.g., Treaty of Medicine Creek*, 10 Stat. 1132. Or the right may be "on unclaimed lands in common with citizens." *E.g., Treaty with the Walla-Wallas*, 12 Stat. 945. Other treaties have acknowledged that Indians have "the right to hunt on the unoccupied lands of the United States so long as the game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts." *E.g., Treaty with the Eastern Band Shoshone and Bannock*, 15 Stat. 673.

Off-reservation hunting and fishing rights have been an important subject of litigation also in the Great Lakes region. Treaties there have been less explicit. One treaty provides that Indians residing in the territory ceded by the treaty "shall have the right to hunt and fish therein, until otherwise ordered by the President." Chippewa Treaty of 1854, 10 Stat. 1109. And because of the great importance to Indians of the Great Lakes of fishing, it has been held that a treaty which says merely that certain lands adjacent to a lake will be set aside "for the use of the Chippewas of Lake Superior" includes fishing rights in the lake even though it is outside reservation boundaries. *State v. Gurnoe*, 53 Wis 2d 390, 192 N.W.2d 892 (1972).

How a court will construe an off-reservation treaty hunting or fishing right with respect to the extent of that right or the jurisdiction of a state to regulate it necessarily turns on the construction of the language used. The rules of treaty construction discussed above at pp. 3-4 are especially important in dealing with off-reservation rights. Proper construction often demands extensive reference to historical and anthropological evidence to determine the intent and understanding of the Indians at the time of the treaty. *See, e.g., United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied—U.S.—*(1976); *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969); *State v. Gurnoe*, *supra*; *State v. Tinno*, 94 Ida. 759, 497 P.2d 1386 (1972). *Cf. United States v. Winans*, *supra*.

The following analysis of established regulatory jurisdiction over off-reservation hunting and fishing rights relates to particular cases. It should be read with the understanding that the principles in those cases are to be applied in light of the language and circumstances of the particular treaties.

#### State Regulation

By far the most extensively litigated off-reservation rights have been fishing rights at "usual and accustomed places" secured to Indians "in common with the citizens of the territory." It has been held by the United States Supreme Court that this phrase permits the right of the Indians to be regulated by the state where such regulation is reasonable, necessary for conservation, and does not



discriminate against Indians. *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) (*Puyallup I*). In subsequent proceedings in the same case, the Court made it clear that only state regulations which have been shown to be necessary to prevent destruction of the fish resource fit the "necessary for conservation" standard. *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*).

Whatever apparent practical wisdom may have motivated the decisions in the *Puyallup* cases, allowing the exercise of state police power over a federally reserved right seems inconsistent with the principle that Indian rights stemming from federal treaties are immune from state regulation because of the supremacy clause. Further, the holding is difficult to reconcile with axioms of treaty construction, as Indians hardly could understand that their treaty rights would be subjected to control by some non-Indian entity, indeed one that was not then even in existence—the state. It also seems inconsistent with the Court's own requirement in *Puyallup I* that the treaty right cannot be "qualified or conditioned by the State." 391 U.S. at 399.

Remarkably, the Supreme Court in *Puyallup I* cited no case or other authority specifically holding that Indian treaty rights can be regulated by the state. Instead, a few cases in which *dicta* to that effect appeared were cited. The Court simply reached the conclusion based on its inability to find any reason that the rights could not be regulated, stating: "And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State." 391 U.S. at 398. The lack of foundation for the Supreme Court's extension of state power over federally secured rights has been strongly criticized. See *United States v. Washington*, *supra*, 384 F. Supp. at 334-39; and Johnson, "The State v. Indian Off-reservation Fishing: United States Supreme Court Error," 47 Wash. L. Rev. 212 (1972). It would appear that the Court was heavily influenced by an improvident stipulation in the case that Indian fishing "would virtually exterminate the salmon and steelhead fish runs" if it were allowed to continue free of state regulation. 391 U.S. at 403 n.15. Whatever questions might be raised as to the correctness of the *Puyallup* decisions allowing state regulation, it is the law of the land.

The *Puyallup* cases reaffirm an earlier decision of the Court based on the same treaty language which indicated that Indian rights were more extensive than those of the average citizen and any holding to the contrary would be "an impotent outcome to negotiations and the convention, which seem to promise and give the word of the nation for more." *United States v. Winans*, *supra*, 198 U.S. at 380. The Court had also recognized that the right of the Indians to fish could not be conditioned upon the purchase of a state license. *Tulee v. Washington*, *supra*. While allowing state regulation of "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like," the Supreme Court restricts the type of regulations to which Indians may be subjected to those which are required to conserve the resource. Thus, regulations applicable to Indians are not judged by the normal standards which govern applicability of state laws to citizens without treaty rights. Instead they are held to the higher, "necessary for conservation" standard. 391 U.S. at 401 n.14. And consequently, regulations which are applicable to both Indians and non-Indians, such as those restricting all net fishing for steelhead, are discriminatory as to Indians. *Puyallup II*, *supra*.

Other recent cases have applied the *Puyallup* rules, refining the concepts to give the states and the tribes guidance in their application. *Sohappy v. Smith*, *supra*: *United States v. Washington*, *supra*. *Sohappy* indicated that in order for a state regulation to be necessary for conservation, it must be the least restrictive which can be imposed consistent with assuring that enough fish escape harvest in order to spawn, that state regulatory agencies must deal with Indian treaty fishing as a separate and distinct subject from fishing by others, and that Indian interests must be considered just as the interests of sport and commercial fishermen are considered. The court rejected the notion that "conservation" includes state goals beyond assuring that the continued existence of the fish resource would not be imperiled. Regulations based on state policies concerned with allocation and use of the fish resource, not merely its perpetuation, are therefore inapplicable to Indian treaty fishermen.

In *United States v. Washington*, the district court followed *Sohappy* and went farther in delineating the circumstances under which the states might regulate the Indian treaty fishing right off the reservation. Conservation was defined as

allowing state regulation only where the state measures are required for the perpetuation of a particular species of fish which cannot be achieved by restricting non-Indian fishing. In addition, the court found that the tribes themselves have the power to regulate their members' treaty fishing. If tribes meet certain conditions and qualifications designed to demonstrate capability to promulgate and enforce fishing regulations, the state may not regulate their treaty rights at all, although the tribe must adopt and enforce any state conservation measure which it has shown to the court to be necessary for conservation. The state may regulate the fishing of all other tribes any time that it demonstrates to the court in advance that such a regulation is necessary for conservation. The advance showing is not necessary in cases of emergency.

It has been held by one court that Indian fishing inconsistent with tribal regulations is outside the protection of the "in common" treaty right and thus is subject to state law. *State v. Gowdy*, 462 P.2d 461 (Or. App. 1969).

The Ninth Circuit Court of Appeals in affirming the district court decision in *United States v. Washington* provided a cogent, after-the-fact explanation of why state conservation regulations should be applicable to Indians exercising an "in common" treaty right. The court analogized the relationship of treaty Indians and other fishermen a cotenancy. The agreement of the Indians to allow the non-Indians to fish "in common with" them thus means that neither party can destroy the subject matter of the treaty and the state can interfere with the Indians' right to fish when it is necessary to prevent destruction of a particular species.

Unless and until the Supreme Court modifies the *Puyallup* rule allowing state regulation of Indian treaty rights which may be exercised "in common with" non-Indians, the rule undoubtedly will be applicable to off-reservation rights to hunt and fish which are couched in that language or other language nearly identical to it. The court has recently shown its intent to apply the rule to an agreement providing for an Indian hunting right on lands given up by the Indians "in common with all other persons." *Antoine v. Washington*, 420 U.S. 194 (1975).

*Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967) utilized the "necessary for conservation" standard as the measure of permissible state regulation of an off-reservation "privilege of hunting . . . on unclaimed lands in common with citizens." Another pre-*Puyallup* case required that state regulation of Indian treaty fishing under the "in common with" language to be indispensable to accomplishing the conservation objective. *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963).

Where the off-reservation right is not qualified by language indicating that Indians intended to share it with non-Indians, the allowance of state regulation loses its rationale. Thus, in *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), the Idaho Supreme Court held that a treaty with the Nez Perce Indians reserving the right to hunt upon "open and unclaimed land" entitled them to hunt on land owned by the federal government and other land not settled and occupied by whites under possessory rights or patent "without limitation, restriction or burden" imposed by state regulations.

More recently, and after the *Puyallup* decisions, the same court construing a Shoshone-Bannock treaty "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," found that like the right in the Nez Perce treaty, it was "unequivocal" and "unqualified". *State v. Tinno*, *supra*. Based on the Indians' understanding at the time of the treaty, the court found that the hunting right expressed in the treaty included fishing activity. The court, however, seemed to soften the earlier decision in *Arthur* by suggesting that state regulation of the fishing right might be possible upon a showing of necessity for conservation. The court neither expressly overruled *Arthur* nor stated that had the state shown necessity for conservation it would have upheld the regulation. The court said:

"It would appear that if *qualified* treaty fishing rights received this kind of special protection . . . the exercise of an unqualified treaty right to fish . . . certainly cannot be regulated by the state unless it clearly proves regulation of the treaty Indians fishing in question to be necessary for preservation of the fishery." (497 P.2d at 1393.)

The Tinno court did not really have to reach the question of whether the *Puyallup* rule *must* be applied but rather seems to be reasoning *a fortiori*. The

concurring opinion of Justice McQuade criticizes this aspect of the decision, insisting that "[n]othing in *Puyallup* requires deviation from *Arthur* in deciding this case." 497 P.2d at 1396.

The Supreme Court of Michigan also has recognized the distinction between the off-reservation rights considered in *Puyallup* and its progeny and other rights, not subject to the same qualification. A Chippewa treaty provided that the Indians who "reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President." The court found that this off-reservation right rendered invalid the game regulations of the state as to Indians covered by the treaty. *People v. Jondreau*, 384 Mich. 539, 185 N.W.2d 375 (1971). A lower Michigan court has ruled that "the right of hunting on the land ceded" found in an 1835 Chippewa and Ottawa Treaty subjected the Indians to state regulations which are "necessary to prevent a substantial depletion of the fish supply." *People v. LeBlanc*, 55 Mich. App. 684, 223 N.W.2d 305 (1974). On appeal, the Indian defendant has argued that the site of his arrest was not in the ceded area but is within the Bay Mills Indian Reservation, but that if the court finds it to be off the reservation, that the *Puyallup* rule ought not to be applied to this unqualified treaty right. The case awaits decision.

Because of the savings clause in Public Law 280, the conclusions as to the limits of state jurisdiction over off-reservation rights are the same in both P.L. 280 and non-Public Law 280 states. *E.g.*, *State v. Gurnoe*, *supra*.

#### Federal Regulation

The Federal Government has acted in at least one instance to provide regulations for off-reservation treaty fishing. In 1967 the Secretary of the Interior promulgated regulations that appear at 25 C.F.R. Part 256. Those regulations twice have been reformulated but never have been fully implemented. The regulations provide merely for identification cards for Indians, identification of fishing equipment and a framework for later issuance of substantive regulations to govern the exercise of treaty fishing rights.

We have indicated above that the Secretary has been held to lack power to regulate treaty rights on the reservation. It would seem to follow that he could not regulate them outside the reservation without enabling legislation. *See* Hobbs, "Indian Hunting and Fishing Rights II," 37 G. Wash. L. Rev. 1251, 1266 n.87. The authority of the Secretary to enact off-reservation treaty fishing regulations in absence of legislation has not been tested. It is reasonable to predict that if there were such a test, the result would track decisions regarding a state's power to regulate the same rights. Thus, where a right is specifically to be shared between Indians and non-Indians, as is the case with the "in common with" rights, federal regulations may be upheld, while rights not subject to such qualification would not be. Congress has given the President power to prescribe regulations to carry out provisions of acts and treaties relating to Indian affairs. 25 U.S.C. § 9; *U.S. v. Clapox*, 35 F. 575 (D. Ore. 1888). Under this authority the Secretary could make any regulations which are in fulfillment of the treaty purposes. Under the *Puyallup* reasoning as expanded by the *United States v. Washington* co-tenancy analogy, it would appear that the Secretary clearly could promulgate regulations necessary to preserve the resource which is to be shared as between Indians and non-Indians according to treaty terms. *Compare, The James G. Swan*, 50 F. 108 (D. Wash. 1892).

Some treaties by their terms may furnish a basis for the Executive to promulgate regulations. For instance, it has been suggested that the phrase "until otherwise ordered by the President" following definition of the hunting and fishing right in the Chippewa Treaty of 1854 would empower the President to "issue an order limiting or extinguishing the hunting and fishing rights of the Indian." *People v. Jondreau*, *supra*, 185 N.W. 2d at 381. It certainly would seem that any such order would have to be consistent with the purposes of the treaty as understood by the Indians at the time they entered into it. The conclusion of the Michigan court is probably correct but should be limited to situations in which regulations can be demonstrated to fulfill treaty purposes. *Compare, Rockbridge v. Lincoln*, 499 F.2d 567 (9th Cir. 1971).

#### Tribal Regulation

The discussion of the limits on state regulation carries the clear implication that the appropriate regulator of fish and game taking pursuant to treaty rights is the Indian tribe which holds the right. In *Settler v. Lameer*, 507 F.2d

231 (9th Cir. 1974), it was decided that Indians' off-reservation treaty fishing rights include a right to regulate. It was specifically held that a tribe with an off-reservation right "in common with the citizens of the territory" has authority to arrest and prosecute tribal members outside the reservation for violation of tribal fishing regulations. The holding was supported by evidence as to the Indians' understanding and customary practices concerning control of members at the time of the treaty. The fact that continued Indian self-regulation was comprehended by the treaty enables the tribe today to exercise its regulatory power at "usual and accustomed places" outside reservation boundaries. This does not infringe on the state's sovereignty because the tribe's regulatory power is protected by the supremacy clause of the constitution.

We have indicated in the section concerning state regulation of off-reservation rights that the court in *United States v. Washington* also validated the power of the tribes to regulate their members' treaty fishing outside reservations at usual and accustomed fishing sites. If tribes meet certain qualifications and conditions fashioned by the court, the state is enjoined from any regulation whatsoever. While as a matter of law under *Puyallup* the state possesses at least concurrent jurisdiction to prevent damage to the resource, a remedy was developed which assured such responsible tribal management that any state control could be precluded. *See United States v. Washington*, *supra*, 520 F.2d at 686. It was also provided in the injunction that a qualified tribe must adopt and enforce as its own any state regulation shown to the court to be necessary for conservation. Failure to do so could be a ground for stripping the tribe of its self-regulating status.

The sphere of permissible state regulatory power over Indian treaty fishing probably is greatest in the case of the "in common with" treaty language. What the exact limits of state vis-a-vis tribal rights are must be determined by reference to the treaty language and evidence as to treaty purposes and the understanding of the parties. Accordingly, the question of whether there is any concurrent state regulatory power and the extent of it would depend on those factors.

Although the conclusion in *State v. Gowdy*, *supra*, that Indian fishing in violation of tribal regulations subjects that fishing to state regulation appears to be basically correct, it should be pointed out that Indian regulation, as non-Indian regulation, takes account of many goals which are not strictly related to conservation (e.g., allocation of fishing opportunity and fishing sites. *See Settler v. Lameer*, *supra*, 507 F.2d at 237). And violation of a tribal regulation which is not necessary for conservation should not open an Indian guilty of such infraction to the full range of state regulatory power.

#### ABORIGINAL FISHING RIGHTS

An area which has received almost no consideration by the courts is Indian hunting and fishing outside Indian reservation boundaries which is not embodied in any treaty. Most Indian rights which are found in treaties are aboriginal rights that have been preserved by mention of the rights in the treaty, with language preserving them all or in part, or by absence of any language giving up the rights. Because any analysis of Indian treaties is necessarily based upon the notion of reserved rights—that anything not given up is retained, the total absence of a treaty would argue for a continuation of aboriginal rights as they always were.

The relationship of the United States to Indians—one of having an exclusive right to deal with the Indians and to extinguish their rights—was first articulated in the case of *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). That case makes it clear that the United States succeeded to the sovereign rights of the "discovering" nations who first came to the New World, but that sovereignty was subject to a right of occupancy, or aboriginal title, of the Indians. 21 U.S. at 596. The Supreme Court has recently said of these principles of aboriginal title:

"It very early became accepted doctrine in this Court that although fee title to the lands occupied by the Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal

rights to Indian lands became the exclusive province of the federal law. Indian title recognized to be only a right of occupancy was extinguishable only by the United States."

*Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974)

The exclusive right of extinguishing aboriginal property rights of Indians was reflected in the Indian Nonintercourse Acts, now codified in the current form at 25 U.S.C. § 177. It would appear, then, that the supremacy clause to the United States Constitution, operating via 25 U.S.C. § 177 which embodies the preemptive right of the United States to deal with Indians, would preclude the exercise of any state authority over presently existing aboriginal rights.

In *State v. Quigley*, 52 Wash.2d 234, 324 P.2d 827 (1958), the Washington Supreme Court held that an Indian did not possess aboriginal rights which excluded the exercise of state power to regulate his hunting. In that case, the Indian failed to show that his aboriginal right continued unextinguished. He had been arrested on lands he had purchased from a non-Indian. The *Quigley* panel was of the view that Indian title had been extinguished, although there was no express statutory or other clear manifestation of extinguishment. The case is questionable for this reason. Further, the court failed to distinguish between an extinguishment of title as to land and the right to hunt on such land. Court of Claims cases have made clear that the two rights are severable and distinct.

Even though aboriginal title to land may have been extinguished by a tribe's acceptance of compensation for the government's unauthorized taking of lands, that would not necessarily extinguish aboriginal hunting and fishing rights unless they were specifically dealt with in resolving the Indians' claim against the government. The Interior Department Solicitor is of the opinion that this is the case with the Kootenai Tribe of Idaho which received compensation for lands taken mistakenly from that tribe which never participated in a treaty with the United States.

Memorandum from Associate Solicitor to Commissioner of Indian Affairs, dated October 29, 1975. The same opinion deals with the question of to what extent a state might regulate the exercise of their aboriginal rights. It points out that there is no sound authority permitting state jurisdiction over the rights, as they would appear to be protected by the supremacy clause. But in the case of *Kake v. Egan*, 369 U.S. 60 (1962), the Court held that the aboriginal fishing rights of Alaska Natives were not exclusive, and certain federal regulations could not exempt them from Alaska's anti-fish trap law without appropriate legislation. The Court acknowledged that the aboriginal fishing rights of the Indians' is property over which Alaska had disclaimed jurisdiction in its statehood enabling act, but that the enabling act did not mandate exclusive federal jurisdiction over such matters. It seems to allow state regulation based on the "migratory habits of salmon" which would make the presence of fishing traps "no merely local matter."

*Kake* was actually concerned with the extent of permissible federal power to regulate and permit Indian fishing. It does not appear that the basis for the preemptive impact of aboriginal rights over the exercise of state regulatory power was fully considered. Furthermore, the anomalous situation of Alaska Natives was in a state of considerable uncertainty at the time of the *Kake* decision: it has now been resolved by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* The Supreme Court of Idaho will soon be deciding the question of whether and to what extent a state may regulate the exercise of aboriginal hunting rights of the Kootenai Tribe. *State v. Coffee*, No. 12040.

#### RECOMMENDATIONS

1. It is not recommended that any specific legislation be enacted relative to jurisdiction over Indian hunting and fishing rights. The subject is politically charged in some areas, such as the Northwest. In the present milieu the legislative process would be encumbered by emotionalism and pressures from special interests. Already a vocal non-Indian minority is calling for congressional abrogation of Indian treaty hunting and fishing rights in the wake of a few court decisions upholding those rights. Abrogation probably would be personally distasteful to much of Congress and the public because of the moral and legal questions involved. The price of compensating Indians for extinguishment of the rights would be staggering. Congress has considered the subject before in the context of Washington Indian rights and has elected not to act. H.R.J. Res.

698, 87th Cong., 2d Sess. (1962); H.R.J. Res. 48, 88th Cong., 1st Sess. (1963); S.J. Res. 170 & 171, 88th Cong., 2d Sess. (1964).

2. Courts, not Congress, are forums for resolving unsettled questions in the area. The law is not simple or fully developed and would benefit from clarification, particularly as to off-reservation rights. But rights vary considerably from place to place and would have to be dealt with on an *ad hoc* basis rather than in sweeping legislation. Courts are competent to discern the jurisdictional attributes of off-reservation treaty hunting and fishing rights by reference to the language and circumstances of the treaties involved. Principles to guide judicial treaty construction are well established. Reference to rules of federal supremacy, as modified by the *Puyallup* rule, provides the necessary guideposts for judicial analysis in the area.

3. To facilitate litigation to determine and enforce treaty rights, provision should be made for tribes to recover their attorney's fees and expenses of suit. Presumably a lawsuit should only be necessary when the parties—typically a state and a tribe—have been unable to resolve their differences short of invoking the aid of the courts. The history of litigation concerning Indian treaty hunting and fishing rights in the Northwest is long and tortured. Indians have spent many years and untold sums of money litigating and relitigating rights under age-old treaties. In the meantime, the rights have been rendered nugatory because state police power prevents Indians from hunting or fishing pending the outcome of the current legal battle. A concurring judge in the Ninth Circuit Court of Appeals opinion in *United States v. Washington*, *supra*, recognized the problem:

"The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten."

To place the burden of enforcing Indian rights where the responsibility for their denial lies, Congress should enact legislation entitling an Indian tribe to recover its attorney's fees and other expenses when it is successful in such a suit. Without statutory authorization or special circumstances it appears that federal courts are powerless to make such awards. See *Alaska Pipeline Service v. Wilderness Society*, 421 U.S. 24, 44 L.Ed.2d 141 (1975). Examples abound of such congressional action when important federal rights are vindicated by private litigants. 44 L.Ed.2d at 155 n.33. The possibilities are many, but one approach would be to amend 28 U.S.C. § 1362 (federal question jurisdiction for tribal plaintiffs). It might read:

"A court may award attorney's fees and other expenses against any litigant to an Indian tribe which is successful in an action under this section to enforce or prevent infringement of its property or other rights protected or secured by a federal treaty, act, agreement or executive order."

4. It is recommended that, independent of the question of jurisdiction over treaty hunting and fishing rights, Congress be wary of legislation which would indirectly result in intrusion upon Indian rights or resources. For instance, authorization of a dam to be built on a river may not appear at first to involve Indian rights. However, if the impact is to prevent the exercise of Indian off-reservation treaty rights by destroying access to usual and accustomed fishing places or damaging fish habitat and thus reducing numbers of fish available to Indians, a direct clash with treaty rights is presented. Such projects are vulnerable to challenge as in violation of the treaty unless Congress specifically terminates treaty rights with appropriate compensation. See, e.g., *Umatilla Tribe v. Froelke*, U.S.D.C., D. Ore. Civil No. 72-211 (final judgment 8/17/73) (Challenge to construction of dams which would flood fishing sites and interfere with fish migration. Settled on stipulated judgment.)

While compensating a tribe for loss of fishing opportunity as a result of a federal project is a lawful way to deal with the matter, (see *Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied* 369 U.S. 818 (1962)), far more desirable from the Indian standpoint would be development means to protect the rights and minimize impacts on them from federal projects. Perhaps the ultimate solution lies in developing a review procedure similar to that under Section 102(C) of the National Environmental Policy Act, 43 U.S.C. § 4332, which would require investigation and research into possible infringements on Indian rights inherent in any proposed major federal action.

## APPENDIX D

## A PROPOSAL FOR CLARIFYING THE TAX STATUS OF INDIANS

(Prepared for American Indian Policy Review Commission Task Force on Federal, State, and Tribal Jurisdiction by Daniel H. Israel)

## A. Federal Taxation of Indians and Indian Property

In resolving questions concerning the extent of federal taxing jurisdiction over Indians and Indian property, it is generally accepted that federal tax statutes apply to Indians and Indian property unless such taxation is inconsistent with specific rights reserved either by treaty or federal statute. Thus, while the United States has recognized that Indian tribes are not taxable entities, Rev. Rule 67-284, 1967-2 Cum. Bull. 55, the courts have taken a case-by-case approach to determine whether general federal taxing status should apply in a given case to an Indian or to Indian property. In *Choteau v. Burnett*, 283 U.S. 691 (1931) and in *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935), the Court ruled that federal income statutes were designed to apply to each individual resident of the United States and to all income from whatever source, including income earned by an Indian. Nevertheless, the Court in *Squire v. Capoman*, 351 U.S. 1 (1956), exempted income derived directly from a trust allotment because of the prohibition in the allotment act against taxation and because of a provision in the applicable treaty reserving the land from taxation. The allotment exemption was followed in and with the states in which they are located. On numerous occasions their jurisdictional problems have involved various attempts by the United States and the states to tax Indians and Indian property.

The unique tax status of Indians is central to the special legal and social relationship which the United States has created for Indians and their reservations. The tax aspects of this relationship limit the United States and the states from imposing their taxes against Indians and Indian reservations in the same broad manner that they normally tax persons and property within their jurisdictions. The purpose of this paper is to summarize the existing tax relationships between Indians and the United States and the states, and to formulate congressional legislation which would clarify the Indian tax status in two areas which require special consideration.

## I. A SUMMARY OF THE TAX STATUS OF INDIANS

Indian tribes were once characterized as distinct, independent, political communities. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). While the legal status of Indian tribes has undergone many changes since this characterization, it remains clear today that Indian tribes are "unique aggregations possessing attributes of sovereignty over their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). As distinct political bodies with attributes of sovereignty, Indian tribes have long had problems in their governmental relationships both with the United States *Stevens v. Commissioner*, 452 F.2d 741 (9th Cir. 1971), involving the federal taxability of income earned from allotments which had been acquired by gift or exchange from other Indians, but it was not followed in *Holt v. Commissioner*, 364 F.2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967), involving the federal taxability of income earned by a member of an Indian tribe from leased tribal lands. *Big Eagle v. United States*, 300 F.2d 765 (Ct. Cl. 1962). *United States v. Hallam*, 304 F.2d 620 (10th Cir. 1962). *Commissioner v. Walker*, 362 F.2d 261 (9th Cir. 1964), and Rev. Rule 67-284, which spells out in detail the position of the Internal Revenue Service on exemptions of Indian income from federal taxation, each analyze under various circumstances whether an Indian exemption exists to limit federal tax liability.

## B. State Taxation of Indians and Indian Property

In resolving questions concerning the extent of state jurisdiction over reservation Indians, it has been held that the sovereignty of Indian tribes, although no longer the sole determining factor, must still be considered because it provides a background against which the applicable treaties and federal statutes must be read. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973). Given the existing federal relationship between Indian tribes and the United

States, state taxation over reservation Indians or property can only be sustained if authorized by an act of Congress. Moreover, such authorization must be specific and precise for the Supreme Court recognizes that there is a "special area of state taxation" which requires a narrow construction to be given to the scope and extent of state taxation authority. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *McClanahan v. Arizona State Tax Commission*, and *Moe v. Confederated Salish and Kootenai Tribes*, —U.S.—, 96 S.Ct. 1634 (1976).

Currently before the Supreme Court is *Bryan v. Itasca County*, —U.S.—, 96 S.Ct. 2102 (June 14, 1976) which will determine whether Congress in enacting Public Law 280, 28 U.S.C. § 1360 and 18 U.S.C. § 1162, conferred state taxing authority over reservation Indians and reservation property. Presumably, a favorable outcome in *Bryan* will mean that Public Law 280 reservations will be treated no differently than non-Public Law 280 reservations—in the alternative, if the outcome is unfavorable, Indians and non-trust property on Public Law 280 reservations will be subject to comprehensive state taxation.

Court decisions have confirmed that the states lack the authority to tax either Indian income earned on a reservation or Indian real and personal property located on a reservation, whether held in trust or not. *McClanahan v. Arizona Tax Commission*; *Moe v. Salish and Kootenai Tribes*, 44 USLW 4535, April 27, 1976. *United States v. Rickert*, 188 U.S. 432 (1903).

The scope of state taxing authority over Indians and Indian property located off the reservation is similar to the scope of federal taxing power over Indians where ever located. Thus, Indians and their property are exempt only if a federal statute or treaty specifically provides for an exemption. *Mescalero Apache Tribe v. Jones*.

A retail trading business subject to federal control and supervision operating on an Indian reservation, whether owned by an Indian or non-Indian, is not subject to state taxation on its business transactions with Indians. *Moe v. Salish and Kootenai Tribes*; *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). In *Moe*, the Court authorized the State of Montana to require an Indian retailer to collect a tax imposed on a non-Indian purchaser of cigarettes and in doing so distinguished the case from the state tax which was improperly asserted against the federally licensed trader, not the purchaser, in *Warren Trading Post*. In the circumstances of the *Moe* case, the Supreme Court was unwilling to strike down that portion of the state law which required the Indian retailer to collect the tax for the state, because the Court found that the burden imposed on the Indian retailer of collecting the tax did not significantly interfere with the right of the reservation Indians to exercise governmental authority on the reservation free of state interference.

State taxation of non-Indians engaging in businesses dealing with Indian property has been upheld either because an express act of Congress authorized the tax [see, e.g., *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936); cf. *Santa Rita Oil & Gas Co. v. Board of Equalization*, 101 Mont. 268, 54 P. 2d 117 (1936)], or because it was found that the state tax would not significantly interfere with the right of reservation Indians to govern themselves. See, e.g., *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), cert. denied 405 U.S. 933 (1972); *Moe v. Salish and Kootenai Tribes*, 44 USLW 4535, April 27, 1976.

An important unresolved aspect of the Indian tax status involves state attempts at taxing on-reservation business ventures entered into jointly between Indians and non-Indians. This area of Indian taxation, more than any other, should be clarified in order to allow tribes and individual Indians to make business and development decisions with a reasonable degree of certainty as to their tax consequences. Thus, where a reservation venture is owned and operated in part by an Indian (or tribe) and in part by a non-Indian, the current state of the law may result in state taxation over only the non-Indian portion. Presumably the Indian portion of the business assets, inventory and income would be exempt because Congress has not specifically authorized state taxation. However, the non-Indian portion would be taxable in the absence of either an act of Congress prohibiting the tax or a finding that the state taxation significantly interferes with the right of reservation Indians to govern themselves. As discussed below, the establishment of tribal taxes for assertion against such ventures will demonstrate most directly that the state taxes interfere unlawfully with the exercise of tribal

self-government. See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, — U.S. —, 96 S.Ct. 943 (1976).

### C. Taxation by Indian Tribes

Ample authority exists for tribes to impose taxes on Indians and non-Indians with their reservations. *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 80 (8th Cir. 1956); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906); *Morris v. Hitchcock*, 21 App. D.C. 556 (1903), *aff'd*, 194 U.S. 384 (1904). Even though such authority has existed for years, tribes are just now beginning to realize the need to impose tribal taxes over reservation ventures in order to support increasing tribal governmental activity.

However, the assertion of tribal taxation alone will not assist tribes in expanding their governmental revenues. A second step is necessary to allow tribal governments to realize a full and fair share of reservation income. That second step is to eliminate double taxation by ousting state taxing authority. The value of tribal taxation is significantly diminished if state taxation is not at the same time prevented, for it is clearly not in the interest of Indian tribes to have Indian and non-Indian businesses on their reservations subjected to both state and tribal taxation. Such a result will inevitably deter non-Indian financial and management involvement which is badly needed on many reservations.

Establishing the primary tax authority of Indian tribes could be achieved through litigation which demonstrates that the state tax creates an unacceptable double tax burden on reservation taxpayers and hence significantly interferes with the primary right of reservation Indians to govern themselves. However, a preferred approach would be for Congress to enact a bill confirming the primary taxing authority of Indian tribes over reservation business ventures. Such a bill is proposed in Part II of this paper.

The main legal restraint on tribal taxation is found in the general limitations on tribal governmental action imposed by the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.* At least two separate problems exist: First is whether the equal protection provisions in the Indian Civil Rights Act require that any tribal tax be applied indiscriminately as between Indians and non-Indians. Second is whether a tribally imposed tax on non-Indians who have no power to vote and influence tribal government policies violates the right of non-Indians to due process under law. The equal protection problems can be avoided by utilizing tribal taxes which although authorizing taxes over Indians and non-Indians are so designed that the impact on less affluent Indian taxpayers is minimized. This can be achieved by imposing exemptions which would affect the level of taxation or by authorizing credits for tribal members in furtherance of tribal governmental policies benefiting tribal members.

The second concern, namely potential due process problems raised by the inability of non-Indians to participate directly in formulating tribal governmental decisions, can be ameliorated in part by establishing a governmental agency such as a tax commission which could include non-Indians as members or which could implement tribal council taxing authorizations through a procedure for rulemaking which would allow public comment and input from both Indians and non-Indians alike.

## II. CLARIFYING THE TAX STATUS OF INDIANS THROUGH CONGRESSIONAL LEGISLATION

Because nearly all of the law determining the scope of federal and state taxing authority over Indians and Indian reservations has been developed by court decisions, there are necessarily certain aspects of the tax status of Indians which could be clarified by congressional legislation. Such legislation could rely on the existing patterns of law for its foundation and could provide the tribes, the United States, and the states a degree of certainty and predictability which has not heretofore existed.

The first need for clarification deals with the status of Indian tribes as governmental units under federal tax law. This problem is well on its way to being corrected—the result of two bills presently before Congress. The Indian Tribal Government Tax Status Act (S. 2664, H.R. 16058, 94th Cong., 1st Sess. 1975) attempts to provide Indian tribes with the same privileges granted generally to state and local governments. Thus, the Act would exclude from federal taxation interest on bonds issued by Indian tribes, would allow a deduction against federal

income tax liability for taxes paid to an Indian tribe, would authorize estate and gift deductions for gifts to Indian tribes, and would provide tribal enterprises with certain exemptions from gasoline and fuel excise taxes already granted state and local governments.

Any attempted legislation designed to create an across-the-board exemption for Indians and/or Indian property from federal income taxation may well be unrealistic. The exemption would be fundamentally inconsistent with the often held position of the United States Supreme Court that federal taxes apply to Indians in the absence of some specific statutory exemption. However, even in the absence of such a broad exemption, the enactment of the Indian Tribal Government Tax Status Act would provide significant benefits to reservation Indians for it would strengthen the ability of tribes to undertake additional governmental programs and to participate in new proprietary activities without disturbing their exempt tax status.

Perhaps the greatest need for clarification of the tax status of Indians, which can be achieved through congressional legislation, is in the scope of state tax authority over reservation ventures which include both Indian and non-Indian interests. On one hand, Congress cannot be expected to enact legislation which would grant reservation Indians the power to sell at wholesale or retail free of state taxation products normally manufactured and sold off the reservation. This of course seems to be the ruling in *Moe v. Salish and Kootenai Tribes*. On the other hand, where the subject of the venture is peculiar to the Indian reservation, such as the development of minerals, timber, commercial fish, and other resources peculiarly associated with the reservation, Congress would be much more sympathetic to enacting legislation granting the Indian tribes primary jurisdiction to impose tribal taxes over such activities. Such legislation would provide that an authorized tribal tax imposed on a business venture would preempt state taxes otherwise applicable.

This legislation would be in line with the current state of the law which suggests that state laws, including tax laws, may not be authorized against non-Indians on a reservation where their application would significantly interfere with the right of reservation Indians to govern themselves. Since the proposed legislation would be limited to business ventures tied peculiarly to resources of the Indian reservation, the legislation could not be open to the criticism that it would create a "tax haven" for Indians. Moreover, to the extent that the states presently have no taxing authority over that portion of a venture which is Indian owned, the proposed congressional enactment would clarify the lack of state authority over only that portion of the venture not owned or controlled by Indian interests. Finally, nothing in the proposed legislation would prevent a tribe from inducing reservation development by offering business ventures a temporary exemption from the otherwise applicable tribal tax. A copy of the proposed tax enactment is attached to this report.

## III. CONCLUSIONS

The subject of the unique Indian tax status has been given considerable attention recently by the United States Supreme Court. In a number of far reaching decisions the Court has clarified considerably the scope of the exemptions enjoyed by Indian tribes, reservation Indians and Indian property against both federal and state taxes. The scope of the exemption is significantly greater for state taxes than it is for federal taxes. Federal legislation has been introduced clarifying the government tax status of Indian tribes and providing tribes with significant benefits. It is proposed that federal legislation be enacted to clarify the most important unresolved aspect of the Indian tax status. The proposed legislation would confirm the primary authority of tribal taxation over reservation businesses and would provide that where reservation business ventures are involved directly with reservation resources tribal taxing authority may preempt state taxation.

Of course, nothing in this proposed legislation would prevent tribes from asserting in federal court litigation that state taxation of *any* Indian or non-Indian reservation business unlawfully interfere with the right of reservation Indians to govern themselves where the tribe has enacted a lawful tax on that reservation business.

[In the House of Representatives]

Mr. Ullman introduced the following bill; which was referred to the Committee on Ways and Means

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Resource Tax Act of 1976".*

FINDINGS AND DECLARATION OF PURPOSE

SECTION 1. The Congress finds that—

(a) the governmental status and powers of Indian tribes has been repeatedly recognized and affirmed by the Congress, the executive branch, and the courts from the earliest days of the Republic, and

(b) notwithstanding such recognition, Indian tribes have been effectively prohibited from asserting tribal taxes on businesses owned and operated by non-Indians located on reservations which are involved directly with reservation resources, because states have undertaken broad taxation of reservation resource development, and

(c) establishing the primary tax jurisdiction of Indian tribes over reservation resource development would recognize the unique governmental status of Indian tribes, the depletion of treaty reserved Indian trust properties which often occurs as a result of the development of Indian resources, the contribution of Indian resources to American economic needs, the special governmental services provided to reservation Indians by Indian tribes, and at the same time recognize the limited responsibilities which the states have over reservation affairs.

SECTION 2. A new Section, 25 U.S.C. § 481, shall be added to Vol. 25 U.S.C. which shall provide, "When a tribal tax is imposed with respect to a business owned in part or in whole by a non-Indian and the business is directly involved with development and sale of a resource which is peculiar to the reservation or secured for the benefit of the Indians, the tribal tax shall preempt any inconsistent state taxes which might be otherwise applicable."

○