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.[1]

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.[2] 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.[3] 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.[4]

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[1] 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.

[2] Tribes are "distinct, independent, political communities * * *" *Worcester* v. *Georgia*, 31 U.S. (6 Pet. 515 (1832).

[3] 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).

[4] 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,"[5] 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.[6] 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.[7]

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."[8] 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

[5] 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.

[6] 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).

[7] 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.*, 396 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).

[8] 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 veiw 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.[9]

[9] 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)[1] 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,[2] 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,[3] 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.[4]

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

[1] Codified as 18 U.S.C. § 1162 and 28 U.S.C. § 1360.
[2] 83d Cong., 1st sess. (1953).
[3] The following tribes were in fact terminated: 61 tribes, groups, communities, rancherias or allotments in California terminated 1954–60; Paiure (Bands), Public Law 762 (1954); Klamaths, Public Law 857 (1954); Menominee Public Law 399 (1954); mixed-blood Utes; Wyandotte; Ottawa; Alabama Indians; and Texas Coushatta.
[4] See Task Force No. 1's Report on Trust Responsibility.

assumption of federal jurisdiction by the individual states: (1) Assumption is mandatory in five named States—California, Minnesota, Nebraska, Oregon, and Wisconsin;[5] (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.[6] 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.[7]

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:[8]

> * * * 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

[5] With statehood, Alaska would be added to this mandatory group.
[6] 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.
[7] 25 U.S.C. § 11231–26 (1970). The act also provides for retrocession of jurisdiction to the Federal Government by States.
[8] 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.[9]

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.[10] 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.[11] 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.[12] Felix Cohen published a blistering attack on the BIA bureaucracy shortly before the passage of Public Law 280.[13] 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.[14]

The major argument, however, for the passage of Public Law 280 was "the hiatus of criminal law enforcement on Indian reservations." [15]

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

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

[9] This argument has no basis. See *U.S.* v. *Mazurie,* 419 U.S. 544, 557 (1976).
[10] Meriam & Associates, "The Problem of Indian Administration," 1928.
[11] See Cohen, supra, at 83, for a brief discussion of the Johnson-O'Malley Act of 1934, 25 U.S.C. § 452.
[12] 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).
[13] The Erosion of Indian Rights, 1950–53: "A Case Study in Bureaucracy," 62 Yale L. J. 348 (1948).
[14] Ibid., at 387.
[15] Rept. No. 848, 83d Cong., 1st sess. (1953).
[16] H. Rept. No. 1506, 80th Cong., 2d sess. (1948).
[17] 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).
[18] 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.[19]

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.[20]

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.[21] 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 [22] 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.[23]

The following chart [24] 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.[25]

[19] Ibid., at 541.
[20] See California Department of Housing and Commercial Development, "California Indians and Public Law 280," at 15 (1974), and Goldberg, supra, at 540.
[21] 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, factural 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 Kroebler, A. L., "Handbook of the Indians of California" (1925) and Forbes, J.D., "Native Americans of California and Nevada" (1969).
[22] 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.
[23] 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.
[24] 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).
[25] 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. 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 retroceded. Robinson v. Wolff, 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.[26] 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[27] 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.[28]

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*[29]

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.[30] Analytically, the major Public Law 280 problem area has been to define whether or not, in a specific case, a particular tribe of

[26] E.g., See *Kennery* 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 (1976).

[27] 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).

[28] See Goldberg, supra, at 567–575 for an excellent discussion of this point.

[29] 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.

[30] *Metlakatla* 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 haunting 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.[31]

(*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.[32] 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[33]—*Madrigal* 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*,[34] 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,[35] 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:

[31] Goldberg, supra, nt 17, at 584, footnote 218.

[32] 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.

[33] *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.

[34] 532 F. 2d 655 (9th cir. 1975).

[35] 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 [36] 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." [37]

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.[38]

(*c*) *Taxation*

Taxation is perhaps the most vexing problem within the Public Law 280 context. As one commentator accurately relates,[39] 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,[40] 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,[41] 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

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[36] Ibid., at 658.
[37] Ibid., at 667.
[38] See ch. III. sec. D for fuller discussion of land use controls.
[39] Goldberg, supra.
[40] *Bryon* v. *Itasca County*—U.S.—96 S.Ct. 2102. (1976).
[41] ***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.[42]

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.[43]

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.[44]

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,[45] 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

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[42] 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.

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See letter to Senator Abourezk, from Chief Leon Shenandoah, Six Nations Council of Chiefs, S. 2010 hearings.
[43] See ch. V.
[44] 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.
[45] 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.[46]

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.[47] Since that time, attempts to get the State to offer again to retrocede jurisdiction over the Winnebago Tribe have not been successful.[48]

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.[49] 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.

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[46] *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).

[47] Ibid.

[48] Statement of John C. Evans, Counsel, Committee on the Judiciary, Nebraska, State Senate—S. 2010 hearings.

[49] 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." [1]

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.[2] 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.[3]

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.[4] Curiously, the remedy adopted

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[1] 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.

[2] See ch. II, sec. A, supra.

[3] *United States* v. *Kagama*, 118 U.S. 375, 383 (1886).

[4] 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.[5] 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.[6]

(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.[7]

A somewhat similar view was expressed by representatives of the Pala Reservation in rural southern California,[8] and the Agua Caliente Band of Mission Indians concerning more rural parts of Palm Springs.[9] 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.[10] 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.[11]

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.[12] 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.[13]

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

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[5] 25 U.S.C. § 1303 (1970).

[6] 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 Right. *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."

[7] Testimony of Valancia Thacker, Southern California Trans., vol. II at 82.

[8] Testimony of King Freeman, Southern California Trans., vol. II at 92.

[9] Testimony of Raymond Patentio, Southern California Trans., vol. II at 74.

[10] Testimony of Jeff Sullivan, Northwest Trans., at 149.

[11] Testimony of Elizabeth Morris, Northwest Trans., at 124–125.

[12] Testimony of Hank Murphy, Southern California Trans., at 132.

[13] Marvin Sargent, White Earth Chippewa, Great Lakes Trans., vol. I at 153.

to crimes committed on the reservation.[14] 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." [15]

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.[16]

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." [17]

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.[18] 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.[19] In Nebraska, the issue was the same. Interestingly from the State perspective, retrocession was seen as a way of saving substantial sums of moneys.[20] 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.[21] 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." [22]

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[14] Testimony of John Johnson, Northwest Trans., at 588.

[15] Ibid.

[16] Testimony of Kent Tupper, Fond DuLac, Great Lakes Trans., vol. I, at 134.

[17] Testimony of Richard Balsinger, Montana Trans. at 118.

[18] Testimony of Harry Boness, Great Lakes Trans. at 141.

[19] Field interviews.

[20] Statement of Ralph H. Gillan, Asst. Atty. Gen. of Nebraska, S. 2010 hearings, at 471.

[21] Testimony of James Peterson, South Dakota Trans., at 9.

[22] 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.[23]

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.[24] The representatives from Cochella [25] related similar incidents of being shuttled back and borth 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.[26]

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 . . .[27]

Perhaps the most cogent exposition of the failure of law enforcement concerns the experience of the Colville Reservation.[28] 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 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.[29] 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.[30]

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,[31] 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

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[23] Testimony of Marvin Sargent, Great Lakes Trans., vol. I at 149.
[24] Testimony of Adeline Rhodes, South California Trans., vol. II at 156–159.
[25] Testimony of Wm. Callaway, South California Trans., vol. I at 174–177.
[26] Testimony of Hank Murphy, South California Trans., vol. I at 142.
[27] Testimony of Walter Lara, North California Trans., at 114.
[28] 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.

[29] The BIA Superintendent then assigned to Colville was the same one who had terminated the Klamaths.
[30] Chief Johnson, supra note 28, at 2.
[31] *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.[32] 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.[33]

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.[34]

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.[35]

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 interwined, with the notion that Public Law 280 somehow 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 philiosophy 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.[36]

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.[37]

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.[38]

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

[32] 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).
[33] South California Trans., vol. I, at 133.
[34] Testimony of Valancia Thacker, South California Trans., vol. II, at 84–86.
[35] Northwest Transcript at 468.

[36] Statement of Ann Flicker, editor, Walthill Citizen, Nebraska S. 2010, at 565.
[37] Statement of Alan Curtiss, city attorney, Pender, Nebr., S. 2010, at 575.
[38] 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.[39] 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.[40]

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.[41]

Coupled with these arguments is the belief that being subjected to tribal jurisdiction [42] 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 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.[43]

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.[44]

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 [45] when they or their ancestors 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.

[39] *Ibid.*, at 31–32.
[40] *Id.*, at 35.
[41] Testimony of R. H. Lambeth, president of MOD, South Dakota transcript at 37, 39.
[42] Public Law 280 or retrocession neither removes nor grants tribal jurisdiction over non-Indians.
[43] Testimony of F. L. Ingraham, South Dakota transcript at 36.
[44] Northwest transcript at 109.
[45] Mrs. MORRIS. "I would be less than honest if I didn't tell you I truly feel betrayed." *Ibid*, at 113.

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.

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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.[46]

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.[47]

The Mayor of Palm Springs, Calif. which has been in continual land use jurisdictional disputes with the Agua Caliente Band,[48] 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.[49]

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

[46] Testimony of John Cochrane, past president of the Flathead Lakers, Inc., South Dakota transcript at 52–53.
[47] Northwest transcript at 187.
[48] Testimony of Bill Foster, southern California transcript, vol. I at 81–83.
[49] 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.[50]

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.[1] 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." [2] 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. Ordic 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 . . .[3]

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

Another reason given for seeking retrocession which has significant support is the lack of initial tribal consent to State jurisdiction.[7] 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.

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[50] Statement of Jack Olsen, District Attorney, Umatilla County, Oreg., S. 2010 hearings at 563–4.

[1] 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.

[2] Great Lakes Transcript, vol. 1 at 22–23.

[3] S. 2010 hearings at 50.

[4] 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).

[5] Field interviews.

[6] *Supra*.

[7] 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 [8] brought much confusion.[9] 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.[10]

As noted previously,[11] 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.[12]

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*,[13] 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.[14] 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*,[15] 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:

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[8] See Chapter II, Sec. B, *supra* prosecutor, Northwest Transcript 46–52.

[9] See *e.g.*, testimony of Paul Majkut, Kitsap County.

[10] See *e.g.*, testimony of Barry Ernstoff, counsel to Suquamish, Northwest Trans. at 101.

[11] Chapter II, section A, *supra*.

[12] Testimony of Louis LaRose, chairman, Winnebago Tribe, Midwest Transcript at 409.

[13] 532 F. 2d 655 (9th Circuit, 1975).

[14] 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.

[15] 520 F. 2d 676 (9th Cir. 1975) at 693.

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> * * * 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.[16]

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.[17] 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.[18]

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.[19]

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,[20] 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 process was that jurisdiction was assumed over some but not all Indian reservations.[21]

[16] S. 2010 hearings at 110. Mrs. Covington has since become the chairwoman of the Colville Tribe.

[17] 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 NAICJA, volume I. "The Impact of Public Law 280 Upon the Administration of Justice on Indian Reservations."

[18] S. 2010 hearings at 12.

[19] *Ibid*. at 140.

[20] Nevada Rev. Stats. 41.430.

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.[22] 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 profer.

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.[23] 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.[24] 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.[25] 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.

[21] 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 Reesrvation Washoe Pinenut allotment, Washoe Tribal Farms, Winnemucca Colony, and Yomba Reservation.

[22] Interviews with Harold Wyatt, director of the Nevada Inter-Tribal Council, Dec. 18, 1975.

[23] Interviews with Robert Frank, Chairman Wassau Nation, Mike Deasay, Counsel, Wassau Nation, and Donald Pope, director, Nevada Indian Legal Services, Dec. 19, 1975.

[24] *Ibid.*

[25] 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 were there are few, if any, Indian lawyers, all CFR court judges are non-Indians.[26]

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 restrocession:

(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.[27]

(b) Menominee

As part of the termination, or assimilation, fever of the 1950's, the Menominee Tribe of Wisconsin was terminated.[28] After a long and hard-fought battle by Menominees and their allies, in December 1973, Congress reversed itself via the Menominee Restoration Act [29] and set up a mechanism to reestablish tribal government and the Federal trust relationship. While restoration is not legally the same as retrocession, the appliability 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.

[26] There is no legal or practical basis for adopting this "tradition."
[27] Interview with Mike Deasay, counsel to Washoe Nation, Dec. 19, 1975.
[28] 25 U.S.C. secs. 891–902.
[29] 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.[30]

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 * * * [31]

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,[32] 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.

[30] 41 F.R. 8516.
[31] Great Lakes Transcript, vol. II at 119.
[32] 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 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 a 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.[33]

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.[34] 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 facors 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.[35]

(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 dissatisfaction 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.

[33] Statement of Elmer Savilla, Chairman of the Quechan Tribe, Transcript of site visit, Quechan Tribal chambers Yuma, Ariz., Jan. 12, 1976, at 43.
[34] See Report of Task Force No. 2.
[35] See *e.g.*, *Dodge* v. *Nakai*, 298 F. Supp. 17 (D. Ariz. 1968).

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.[36]

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.[37]

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.[38]

The other major resource potential,[39] 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

[36] Testimony of Elmer Nitzschke, Great Lakes Trans. vol. II at 178–79.
[37] Interview with Robert Frank, Chairman Wassau Nation; Mike Deasay, counsel, Wassau Nation, and Donald Pope, Director, Nevada Indian Legal Services, Dec. 19, 1975.
[38] Southern Calif. Trans., vol. I at 44–45.
[39] 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.[40] LEAA funding would, of course, defray some costs but it is clear that other financial resources will be required.[41]

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,

[40] Testimony of Richard Balsinger, Montana Transcript 143–4, of cost in the Portland area office.

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

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.

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.[1] 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.[2] 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.[3]

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.[4] 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.[5]

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

[1] 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.

[2] *Id.* at 61.

[3] See Cohen, "Handbook of Federal Indian Law," Chapter 5.

[4] Cohen, *supra*, at 89 and following.

[5] 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 . . .[6] (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.[7]

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,"[8] 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[9]

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.[10] 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.

[6] *Id.* at 383–84.

[7] 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.

[8] 22 Kan. L. Rev. 351 (1974).

[9] 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.

[10] 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.[11] 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 committeed 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.[12]

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.[13] Likewise, tribal courts have exercised jurisdiction over theft, although larceny is one of the proscribed crimes.

[11] Most recently amended by the passage of S. 2129 adding kidnapping and rectifying some constitutional infirmities.
[12] See Taylor, "Criminal Jurisdiction" Manual of Indian Law, AILTP, 1975.
[13] 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.[14] 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 be (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.[15]

This lack of consistency stems from many attributes of federal prosecution by U.S. attorneys.[16] Most offices[17] 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.[18] Whether it can be said that tribes may have concurrent jurisdiction or not, the practical effect is that most reservations rely on Federal

[14] 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.
[15] Southwest Hearings, Exhibit No. 8. (Question and Answer No. 6.)
[16] Many of the attributes of Federal prosecution described in this section are taken from an interview with Doris Meisner, Associate Director, Office of Planning and Policy, Office of the U.S. Attorney General, Dec. 12, 1975.
[17] One significant exception exists in the Office of Sidney I. Lezak. See NAICJA, *"Justice and the American Indian,"* vol. 5, at p. 5, *supra*.
[18] *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.[19] 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.[20]

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.[21]

[19] Judge William Roy Rhodes, Chief Judge, Gila River Tribal Court.
[20] Southwest Hearing at 12–13.
[21] 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.[22]

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.[23] The U.S. Department of Justice does not presently urge legislation to cure such a defect until the Supreme Court decides the *Antelope* case.[24] 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

[22] 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.
[23] 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).
[24] S. 2129 hearings, Mar. 10, 1976.

McBratney and *Draper*, thus obviating the disparity, as both defendants would then be subject to Federal law.[25]

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.[26] 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.[27] 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

[25] 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.
[26] 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, 3c.
[27] 686 U.S. 711 (1946).

State's laws.[28] This allows for significant intrusions on tribal self-government, even though such intrusions have been discredited and rejected in other situations.[29] 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.[30]

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.[31]

One commentator views *Sosseur* and *Quiver* as irreconcilable and sees *Sosseur* as no more than a "judicial aberration,"[32] 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").[33] 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."[34] 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

[28] See Justice and the American Indian, vol. 5, 1974.
[29] See *Williams* v. *Lee*, 358 U.S. 217 (1959); *Kennerly* v. *District Court*, 400 U.S. 423 (1971).
[30] 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).
[31] See Vollman supra, at 396.
[32] Taylor, "Criminal Jurisdiction" supra.
[33] Vollman, supra at 396.
[34] Paper delivered by Roger Adams, Jan. 27 to 29, 1975, Phoenix Ariz., U.S. Attorney's Conference on Indian Matters.

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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 [35] reaches the rather questionable conclusion that 15 U.S.C. 1175 does not apply to military reservations.[36] 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 judiction.

(*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' morals 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

[35] *United States* v. *Blackfeet Tribe of Blackfeet Indian Reservation,* 364 F. Supp. 192 (D.C. Mont. 1973).

[36] 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 "straighting 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 Picton 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, leads 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 [1]

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," [2] 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.[3] To mitigate the effects of this rule, courts have established a test for the abrogation of treaty rights which requires a "clear and plain" [4] 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*.[5] 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." [6] 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.[7]

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.[8] 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

[1] 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].
[2] 112 U.S. 94, 100 (1884).
[3] See *Reed* v. *Covert*, 354 U.S. 1, 18 (1956).
[4] *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 353 (1941).
[5] 508 F.2d 453 (8th Cir. 1974).
[6] 16 U.S.C. § 668(a).
[7] 508 F.2d at 457 (emphasis added).
[8] 162 F. Supp. 580, 582 (D.D.C. 1955), *aff'd* 262 F.2d 27 (D.C. Cir. 1958), *certificate denied*, 360 U.S. 909.

be ignored without any showing of congressional intent on the theory that the Corps exercised "delegated administrative discretion." [9]

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.[10] 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.[11] 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.[12]

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.[13]

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).[14] 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.[15] 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.[16] Thereafter, the applicant may seek a *de novo* determination in

[9] *Seneca Nation of Indians* v *Brucker* ("Seneca II"), 338 F.2d 55, 56 (2d Cir. 1964), *certificate denied*, 380 U.S. 952 (1965).
[10] 319 F. Supp. 128 (D.Neb. 1970) appeals dismissed, 451 F.2d 667 (8th Cir. 1971) *certificate denied*, 405 U.S. 1026 (1972).
[11] 160 F. Supp. 193 (D.S.D.) vacated as moot *sub.nom.*
[12] *Id.* at 196–97.
[13] *United States* v. *White*, *supra*, No. 5.
[14] 5 U.S.C. § 551, *et seq.*
[15] 5 U.S.C. § 552(a)(3).
[16] 5 U.S.C. § 552(a)(6)(A).

a district court.[17] 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; [18] the BIA released its files on a Navajo Reservation gravel mining operation: [19] an attorney representation contract of the Agua Caliente band was ordered disclosed to a news service; [20] however, the New Mexico State engineer was refused technical information on water resources on three New Mexico reservations.[21] 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.[22] 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.[23] 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,[24] and the courts have narrowly construed these exemptions.[25]

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-

[17] 5 U.S.C. § 552(a)(4)(B).
[18] Washington Post, May 20, 1976, p. A7.
[19] Letter from Stanley E. Doremus, deputy assistant secretary for Program Development and Budget, Department of the Interior to Tim Vollman, Oct. 17, 1975.
[20] Letter from Royston C. Hughes, assistant secretary for Program Development and Budget, Department of the Interior, to Will Thorne, Mar. 18, 1975.
[21] Letter from Mitchell Melich, Solicitor, Department of the Interior to Hogan and Hartson, Sept. 24, 1971.
[22] 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).
[23] 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.
[24] *Washington Research Project, Inc.* v. *Department of HEW*, 504 F.2d 238, 244 (D.C. Cir. 1974) *certiorari denied*, 421 U.S. 963 (1975).
[25] See *Montrose Chemical Corp.* v. *Train*, 492 F.2d 63. 66 (D.C. Cir. 1974).

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.[26]

The National Environmental Policy Act (NEPA)[27] 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." [28]

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.[29] 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 [30] 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*,[31] 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

[26] *Estrada* v. *Ahrens*, 296 F.2d 690, 698 (5th Cir. 1961), quoted w/approval in *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859, 873 (D.C. Cir. 1970).
[27] 42 U.S.C. § 4321, *et seq.*
[28] *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, 449 F.2d 1109, 1115 n. 12 (D.C. Cir. 1971).
[29] 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).
[30] 42 U.S.C. § 4332.
[31] 514 F.2d 856 (D.C. Cir. 1975).