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 decisionmaking. 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]

[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).

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).

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

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

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

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

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

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

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

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

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

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

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

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

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[32] 42 U.S.C. §§ 1857, *et seq.*
[33] 42 U.S.C. § 1857 c-5(a)(2)(B).
[34] 42 U.S.C. § 1857 C-5(a)(4).
[35] 42 U.S.C. § 1857 C-5(a)(2)(F)(i); see also 40 CFR § 51.11.
[36] 42 U.S.C. § 1857 C-5(a)(2).
[37] Brecher, at 42, n. 145.
[38] See e.g., *Snohomish County* v. *Seattle Disposal Co.*, 70 Wash. 2d 668, 425, P.2d 22 (1967), *cert. denied*, 389 U.S. 1016; *Rincon Band of Mission Indians* v. *County of San Diego*, 324 F. Supp. 371 (S.D. Cal. 1971); *Agua Caliente Band* v. *City of Palm Springs*, 347 F. Supp. 42 (C.D. Cal. 1972).
[39] 29 U.S.C. § 651, *et seq.*
[40] 29 U.S.C. § 667.
[41] 29 U.S.C. § 657.
[42] 29 U.S.C. § 658.
[43] 18 U.S.C. § 1114; 29 U.S.C. § 666.
[44] Northwest transcript at 257–59.
[45] Southwest transcript at 293.
[46] Southwest transcript at 7–8.
[47] 42 U.S.C. § 3711, et seq.
[48] 32 U.S.C. § 3733.
[49] Southwest transcript at 201–02.

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

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

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

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

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

Findings

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

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

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

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

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

6. Thus, Indian eligibility for assistance programs becomes conditioned on both Federal and State regulations which can be an intolerable burden on tribes and, consequently, a frustration of the special Federal trust responsibility to the tribes.

[50] Southwest transcript at 208.
[51] Ibid at 202–03.
[52] Ibid at 209.
[53] Ibid at 191–93.

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

Recommendations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. SPECIAL PROBLEM AREAS

A. Hunting and Fishing Rights [1]

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

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

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

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

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

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

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

[3] *Antoine* v. *Washington*, 420 U.S. 194 (1975).

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

[5] Northwest Transcript at 338–39 and 343–45.

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

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

1. ON-RESERVATION HUNTING AND FISHING RIGHTS

(a) *State regulation*

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

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

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

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

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

[6] *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1972); *Rice* v. *Olson*, 324 U.S. 786 (1945); *Bryan* v. *Itasca Co.*, — U.S. — 96 SC+2102 (June 14, 1976) (No. 74–5027).
[7] *Williams* v. *Lee*, 358 U.S. 217 (1959).
[8] 31 U.S. (6 Pet.) 515 (1832).
[9] For the purposes of this section, treaty rights are those established by treaty, Act of Congress, agreement, or Executive order. The validity and the force of method of creating reservations and preserving other rights is well established. See Wilkinson and Volkman.
[10] *Menominee Tribe* v. *United States*, 319 U.S. 404 (1968); See also *Cappaert* v. *U.S.*, — U.S. — 48 L Ed 2d 523 (June 7, 1976) (No. 74–1107) (Decided June 7, 1976) for a discussion of the effect of reservation by the Federal Government and its impact on water rights).
[11] *McClanahan* v. *Arizona State Tax Commission*, *supra*; *Moe* v. *Confederated Salish and Kootenai Tribes*, — U.S. — 48 L Ed 2d 96 (April 27, 1976), (1976).
[12] *United States* v. *Winans*, 198 U.S. 370, 381 (1908).
[13] E.g., *Menominee Tribe* v. *United States*, 318 F. 2d 998 (Ct. Cl. 1967), aff'd 391 U.S. 404 (1968); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 105 (1949); See, *Whitefoot* v. *United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).

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

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

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

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

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

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

[14] Cf. *Choate* v. *Trapp*, 224 U.S. 665 (1912).
[15] 391 U.S. at 413. *Accord*, *Kimball* v. *Callahan*, *supra*.
[16] *Confederated Tribes of the Colville Indian Reservation* v. *State of Washington*, 412 F. Supp 651 (E.D. Wash., April 14, 1976), C–75–146.
[17] E.g., *Moore* v. *United States*, 157 F.2d 760 (9th cir. 1946), *cert. denied*, 330 U.S. 827 (1946); *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. supp. 1001 (D. Minn. 1971); *Klamath and Modoc Tribes* v. *Maison*, 139 F. supp. 634 (D. Ore. 1956); *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 pp. 557 (1930); *State* v. *Edwards*, 188 Wash. 467, 62 pp. 2d 1904 (1936); *Arnett* v. *Five Gill Nets*, 48 Cal. App. 3d, 121 Cal. Rptr. 906 (1975), *cert. denied*, 44 USLW 3545 (Mar. 29, 1976); *Elser* v. *Gill Net No. 1*, 245 Cal. App. 2d 30, 54 Cal. Rptr. 568 (1966).
[18] 334 F. supp. at 1003.

"notwithstanding the issuance of any patent, and, including rights-of-way * * *" [19]

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

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

The courts have held that Public Law 280 States have no jurisdiction to regulate on-reservation hunting and fishing rights.[20]

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

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

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

During negotiations between the tribe and the State over implementation of hunting and fishing regulations pursuant to the *Antoine* decision [23] concerning ceded lands no longer within the external boundaries of the reservation, the assistant director of the State game department assured tribal officials that the State would take no actions against non-Indians fishing without State permits on the reservation as the State did not wish to jeopradize the atmosphere of mutual cooperation, although the State felt it had such jurisdiction.

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

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

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

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

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

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

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

[19] 18 U.S.C., sec. 1141.
[20] E.g., *Klamath and Modoc Tribes* v. *Maison, supra*; *Quechan Tribe of Indians* v. *Rowe*, 531 F. 2d 408 (9th Cir. Feb. 2, 1976), No. 72-3199 (9th cir. Feb. 2, 1976); *Confederated Tribes of the Colville Indian Reservation* v. *State of Washington, supra*.
[21] Northwest transcript at 342–43.
[22] *Ibid.*, at 591–92, 348, 372.
[23] *Antoine* v. *Washington*, 420 U.S. 194 (1975).
[24] Northwest transcript, at 591–592.
[25] *Ibid.*, at 359.
[26] *Id.*, at 548.
[27] *Id.*, at 347.
[28] *Id.*, at 340–43.
[29] *Id.*, at 592.
[30] *Id.*, at 592.

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

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

Mr. Ernstoff concludes that the State consistently engaged in this sort of "confrontation politics." [32]

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

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

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

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

[31] *Id.*, at 443–4. Mr. Ernstoff is with Ziontz, Pirtle, Morisset & Ernstoff, a Seattle law firm that represents a number of tribes.

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

[33] 521 F.2d 408 (Feb. 2, 1976).

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

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

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

(*b*) *Federal regulation*

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

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

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

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

[35] E.g., *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

[36] *Menominee Tribe* v. *United States*, *supra*.

provide the necessary authority for the executive to promulgate regulations governing Indian on-reservation fishing.[37]

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

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

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

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

> First, we have the White Earth Reservation where in 1971, I believe, one Angus Parker, an enrollee of White Earth, wrote President Nixon and asked what his rights were to hunt and fish on the White Earth Reservation. He received a letter from the Solicitor's Office of the Department of Interior (sic) advising that President Nixon had instructed them to answer the letter and in the letter, it stated that you have the rights to hunt on trust land within the reservation and depending on what happens in the Leech Lake case you may well have a right to hunt on public lands and waters and fish and rice between the reservation. During the *Leech Lake* case, the (State) Attorney General's staff told the judge whatever decision he rendered, it certainly would affect the other reservations. After the case was decided. Angue Parker's father, knowing he had written the President, was arrested for having deer on his assigned land, private trust land within the reservation. Because the Solicitor's Office had written him indicating he could hunt, they felt it an obligation to represent him, you know, since it was a county court criminal matter. They did represent him in county court and lost. The judge found that he had no rights. He appealed to the District Court, I believe in 1972, and Judge Swenson dismissed the charges on the ground that the State had no jurisdiction, he did have hunting and fishing rights, so subsequent to that we had a letter directed to a member of the band from the President or his functionary, saying that he could hunt and fish. You got a court case in other words, establishing rights and you have a district judge saying you got rights. Now in my estimation, a reasonable man would think he had some rights so a number of White Earth enrollees then proceeded to hunt and fish without State licenses and they were all arrested.[42]

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

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

(c) Tribal regulation

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

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

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

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[37] *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45 (1962).
[38] *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968) (Puyallup I); and *Department of Game* v. *Puyallup Tribe*, 441 U.S. 44 (1973) (Puyallup II) discussed *infra*.
[39] Midwest Transcript at 67–70.
[40] In order to be eligible for LEAA funding, the tribe must be certified as having LEAA responsibilities by the Secretary of the Interior.
[41] Site visit to Cheyenne-Arapahoe, May, 1976.
[42] *Ibid.* at 150–7.
[43] Great Lakes Transcript, at 109–10.
[44] See e.g., Hobbs, "Indian Hunting and Fishing Rights," 32 Geo. Wash. L. Rev. 504, 523 nn 100–101.
[45] See e.g., Sol. Op. M 36638 (May 16, 1962).
[46] See, *State* v. *McClure*, 127 Mont. 534, 268 P 2d 629 (1954).
[47] See *Onechan Tribe of Indians* v. *Rowe*, *supra*.
[48] *Colville Tribe* v. *State of Washington*, No. C–75–146 (E.D. Wash. 1976).
[49] E.g., *State* v. *Danielson*, 427 P. 2d 689 (Mont., 1967); see also, In re Crosby, 149 P. 989 (Nev. 1915).

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

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

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

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

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

[50] *Donahue* v. *Justice Court*, 15 Cal. App. 2d 557, 93 Cal. Rptr. 310 (1971).
[51] See e.g., *Quechan Tribe* v. *Rowe*, *supra*.
[52] In some cases, private counsel have donated their services. Great Lakes Transcript at 102–10 and *infra*. Those tribes left to depend on Federal agencies charged with defending their rights have little hope of receiving such protection soon. Legal services are either unsophisticated in such areas or must wait for the exact fact situation which will allow their involvement under their rather strict guidelines. These avenues, however, seldom lead to a definite conclusion since the case cannot be fashioned to ultimately resolve the matter of jurisdiction.

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

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

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

2. OFF-RESERVATION HUNTING AND FISHING

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

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

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

[53] Great Lakes hearing transcript, vol. II, at page 66.
[54] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973).
[55] *Missouri* v. *Holland*, 252 U.S. 416 (1920).

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

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

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

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

(a) The States

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

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

for conservation" standard. *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*).[64]

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

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

[64] Whatever apparent practical wisdom may have motivated the decisions in the *Puyallup* cases, allowing the exercise of State police power over a federally reserved right seems inconsistent with the principle that Indian rights stemming from Federal treaties are immune from State regulation because of the supremacy clause. Further, the holding is difficult to reconcile with axioms of treaty construction, as Indians hardly could understand that their treaty rights would be subjected to control by some non-Indian entity, indeed one that was not then even in existence at the time. It also seems inconsistent with the court's own requirement in *Puyallup I* that the treaty right cannot be "qualified or conditioned by the State". 391 U.S. at 399. Remarkably, the Supreme Court in *Puyallup I* cited no case or other authority specifically holding that Indian treaty rights can be regulated by the State. Instead, a few cases in which dicta to that effect appeared were cited. The court simply reached the conclusion based on its inability to find any reason that the rights could not be regulated, stating: "And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise fo the police power of the State", 391 U.S. 398. The lack of foundation for the Supreme Court's extension of State power over federally secured rights has been strongly criticized. See *U.S.* v. *Washington, supra*, 384 F Supp. at 334–39 ; and Johnson, *The State* v. *Indian, Off-Reservation Fishing: United States Supreme Court Error*, 47 Wash. L. Rev. 212 (1972). It would appear that the Court was heavily influenced by an improvident stipulation in the case that Indian fishing "would virtually exterminate the salmon and steelhead fish runs" if it were allowed to continue free of state regulation. 391 U.S. at 403 n.15. Whatever questions might be raised as to the correctness of the *Puyallup* decisions allowing State regulation, it is the law of the land.
[65] *United States* v. *Winans, supra*, 198 U.S. at 380.
[66] *Tulee* v. *Washington* 315 U.S. 681 (1942).
[67] Puyallup I, 391 U.S. 392, 401 n. 14.
[68] Puyallup II, *supra*.
[69] *Sohappy* v. *Smith, supra* ; *United States* v. *Washington, supra*.

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

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

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

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

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

Where the off-reservation right is not qualified by language indicating that Indians intend to share it with non-Indians, the allowance of State regulation loses its rationale. Thus, in *State* v. *Arthur*, 74 Ida. 251, 261 P. 2d 135 (1953), the Idaho Supreme Court held that a treaty with the Nez Perce Indians reserving the right to hunt upon "open and unclaimed land" entitled them to hunt on land owned by the Federal Government and other land not settled and occupied by whites under possessory rights or patent "without limitation, restriction or burden" imposed by State regulations.

[70] *State* v. *Gowdy*, 462 P.2d 461 (Or. App. 1969).
[71] *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975).
[72] *Maison* v. *Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963).

More recently, and after the *Puyallup* decisions, the same court construing a Shoshone-Bannock treaty "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the white and Indians on the borders of the hunting districts," found that, like the right in the Nez Perce treaty, it was "unequivocal" and "unqualified." [73] Based on the Indians' understanding at the time of the treaty, the court found that the hunting right expressed in the treaty included fishing activity. The court, however, seemed to soften the earlier decision in *Arthur* by suggesting that State regulation of the fishing right might be possible upon a showing of necessity for conservation. The court neither expressly overruled *Arthur*, nor stated that had the State shown necessity for conservation, it would have upheld the regulation. The court said:

> It would appear that if *qualified* treaty fishing rights received this kind of special protection . . . the exercise of an unqualified treaty right to fish . . . certainly cannot be regulated by the state unless it clearly proves regulation of the treaty Indians fishing in question to be necessary for preservation of the fishery. 497 P.2d at 1393.

The *Tinno* court did not really have to reach the question of whether the *Puyallup* rule must be applied but rather seems to be reasoning a fortiori. The concurring opinion of Justice McQuade criticizes this aspect of the decision, insisting that "[n]othing in Puyallup requires deviation from *Arthur* in deciding this case." [74]

The Supreme Court of Michigan also has recognized the distinction between the off-reservation rights considered in *Puyallup* and its progency and other rights, not subject to the same qualification. A Chippewa treaty provided that the Indians who "reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President." The court found that this off-reservation right rendered invalid the game regulations of the State as to Indians covered by the treaty.[75] A Michigan lower court has ruled that "the right of hunting on the land ceded" found in an 1835 Chippewa and Ottawa treaty subjected the Indians to State regulations which are "unnecessary to prevent a substantial depletion of the fish supply." [76] On appeal, the Indian defendant has argued that the site of his arrest was not in the ceded area but it is within the Bay Mills Indian Reservation, but that if the court finds it to be off the reservation, that the *Puyallup* rule ought not to be applied to this unqualified treaty right. The case awaits decision.

Because of the savings clause in Public Law 280, the conclusions as to the limits of State jurisdiction over off-reservation rights are the same in both Public Law 280 and non-Public Law 280 States.[77]

The difficulties experienced by Indian people in exercising their off-reservation rights and their conflicts with the States is well known. The history of this conflict is long and well recognized. Justice Miller in

[73] *State* v. *Tinno*, 94 Ida. 759, 597 P.2d 1386 (1972).
[74] 497 P.2d at 1396.
[75] *People* v. *Jondreau*, 384 Mich. 539, 185 N.W. 2d 375 (1971).
[76] *People* v. *LeBlanc*, 55 Mich. App. 684, 223 N.W. 2d 305 (1974).
[77] E.g., *State* v. *Gurnoe*, *supra*.

United States v. *Miller*, 18 U.S. 375, 383–84 (1886) delivered the most famous language, saying:

> They (the Indians) owe no allegiance to the States and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies.

Although some relationships have changed, the underlying conflict remains. Judge Burns delivered the following language nearly 100 years later concerning off-reservation fishing rights:

> * * * I deplore situations that make it necessary for us [District Court judges] to become enduring managers of the fisheries, forests and highways, to say nothing of school districts, police departments, and so on. The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their local non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the District Court. This responsibility should neither escape notice nor be forgotten.[78]

The State of Washington has not relented.

> They [the State] have done everything possible to throw obstacles in front of the tribes in their efforts towards implementing the decision . . . They [non-Indians] fished last year with complete disregard for their own regulations, the State's regulations that is. The State attempted in some instances to arrest these people but the courts refused to prosecute them.[79]

The Washington Post reported on June 28, 1976, that non-Indian commercial fishermen continued to defy a Federal court order banning fishing and only when faced with possible contempt citations did the State officials relent and agree to enforcement. This came 6 months after Gov. Dan Evans offered testimony in Yakima, Wash., that issues were settled and only cooperation over management need be worried over.[80] Further examples serve no purpose. It is summed up concisely by Peter R. Taft in recent congressional testimony.

> I think we have a situation which is developing similarly day by day now in the State of Washington where in effect, the State courts and the State administration both have totally abandoned the protection of Indian treaty rights in fishing and have thrown the total burden of enforcement of fishing rights not only for Indians, but in effect, for commercial and sports fishermen as well into federal court.
>
> They have thrown up their hands. They have abandoned any semblance of recognition of obligations to the tribes in that instance.[81]

Reid P. Chambers, Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior, concurred in testimony at those same hearings.

> * * * [T]he situation out in the State of Washington which is virtually one of lawlessness in terms of what the State courts are doing in that State. The State Supreme Court within the last two weeks, has come down with a decision that is grossly violative of the Supreme Court of the United States decisions.
>
> Local State courts have issued injunctions against the enforcement of federal court decrees in the State of Washington.[82]

What is needed most desperately is firm congressional commitment to protection of these rights so vital to the integrity of the Indians

[78] *United States* v. *Washington*, 520 F.2d 676, 693 (9th Cir. 1975) (concurring opinion).
[79] Charlie Peterson, Makah Indian Tribe, N.W. Hearings at 438–39.
[80] Northwest Transcript at 674, exhibit 23.
[81] Hearings before the Subcommittee on Administrative Practices and Procedures, Senate Committee on the Judiciary, June 22, 1976. Testimony of Peter R. Taft, Assistant Attorney General, Land and Natural Resources Division, Department of Justice.
[82] Ibid., testimony of Reid P. Chambers. See *Northwest Trollers Association et al.* v. *Moos, et al.*, Me. Op. 5321 (Superior Court of Washington, Thurston County, June 1, 1976).

of the Northwest and elsewhere. To succumb to the lawlessness of some segments of the society in order to quell the controversy is repugnant to the most fundamental notions upon which any society is based, particularly one that has taken so much in exchange for the few guarantees extended.

(*b*) *Federal regulation*

The Federal Government has acted in at least one instance to provide regulations for off-reservation treaty fishing. In 1967, the Secretary of the Interior promulgated regulations that appear at 25 CFR Part 256. Those regulations twice have been reformulated but never have been fully implemented. The regulations provide merely for identification cards for Indians, identification of fishing equipment and a framework for later issuance of substantive regulations to govern the exercise of treaty fishing rights.

It has been indicated above that the Secretary has been held to lack power to regulate treaty rights on the reservation. It would seem to follow that he could not regulate them outside the reservation without enabling legislation.[83] The authority of the Secretary to enact off-reservation treaty fishing regulations in absence of legislation has not been tested. It is unreasonable to predict that if there were such a test, the result would track decisions regarding a State's power to regulate the same rights. Thus, where a right is specifically to be shared between Indians and non-Indians, as is the case with the "in common with" rights, Federal regulations may be upheld, while rights not subject to such qualification will not be. Congress has given the President power to prescribe regulations to carry out provisions of acts and treaties relating to Indian affairs.[84] Under this authority, the Secretary could make any regulations which fulfill treaty purposes. Under the *Puyallup* reasoning as expanded by the *United States* v. *Washington* cotenancy analogy, it would appear that the Secretary can promulgate regulations necessary to preserve the resource which is to be shared as between Indians and non-Indians according to treaty terms.[85]

Some treaties by their terms may furnish a basis for the Executive to promulgate regulations. For instance, it has been suggested that the phrase "until otherwise ordered by the President" following definition of the hunting and fishing right in the Chippewa Treaty of 1854 would empower the President to "issue an order limiting or extinguishing the hunting and fishing rights of the Indian." *People* v. *Jondreau*, *supra*, 185 N.W. 2d at 381. It certainly would seem that any such order would have to be consistent with the purpose of the treaty as understood by the Indians at the time they entered into it. The conclusion of the Michigan court is probably correct but should be limited to situations in which regulations can be demonstrated to fulfill treaty purposes.[86]

As in other areas, indirect impact is felt from congressional and other Federal actions. A recent report of the Senate Committee on Appropriations for fiscal year 1977 is pertinent. While appropriating funds to implement *United States* v. *Washington*, the committee

[83] See Hobbs, "Indian Hunting and Fishing Rights II," George Washington Law Review 1251, 1266 note 87.
[84] 25 U.S.C. 9; *United States* v. *Clapox*, 35 F. 575 (D. Ore. 1888).
[85] Compare, "The James G. Swan," 50 F. 108 (D. Wash. 1892).
[86] Compare, *Rockbridge* v. *Lincoln*, 449 F.2d 567 (9th Cir. 1971).

directs the establishment of a high ranking advisory group to design a long-range management and enforcement mechanism. Such group would be under the Secretary of the Interior and would include fishery enhancement in its considerations, and shall have fair representation from all major parties involved in *United States* v. *Washington*. The report then goes on to require that the plan will be forwarded to appropriate State and Federal agencies for implementation, while the Secretary of the Interior is to analyze how that Department might assist the tribes and States in complying. The notion that tribes be excluded from implementation while being subject to compliance is inappropriate.

In a recent report to Congress from the Comptroller General on protection of fishery resources [87] Indian rights are not mentioned. The report suggested that Congress consider imposing management measures on U.S. fiisheries where States fail to do so. How any such plan could be designed or implemented without contemplating Indian treaty rights is incomprehensible.

(*c*) *Tribal regulation*

The discussion of the limits on State regulation carries the clear implication that the appropriate regulator of fish and game taken pursuant to treaty rights is the Indian tribe which holds the right. In *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974), it was decided that Indian off-reservation treaty fishing rights include a right to regulate. It was specifically held that a tribe with an off-reservation right "in common with the citizens of the territory" has authority to arrest and prosecute tribal members outside the reservation for violation of tribal fishing regulations. The holding was supported by evidence as to the Indians' understanding and customary practices concerning control of members at the time of the treaty. The fact that continued Indian self-regulation was comprehended by the treaty enables the tribe today to exercise its regulatory power at "usual and accustomed places" outside reservation boundaries. This does not infringe on the State's sovereignty because the tirbe's regulatory power is protected by the supremacy clause of the Constitution.

As indicated previously, in the section concerning State regulation of off-reservation rights, the Federal circuit court in *United States* v. *Washington* also validated the power of the tribes to regulate their members' treaty fishing outside the reservation at usual and accustomed fishing sites. If tribes meet certain qualifiactions and conditions fashioned by the court, the State is enjoined from any regulation whatsoever. While as a matter of law under *Puyallup* the State possesses limited jurisdiction to prevent destruction to the resources, a remedy was developed which assured that with responsible tribal management, State control could be precluded.[88] The injunction also required that a qualified tribe must adopt and enforce as its own any State regulation shown to the court to be necessary for conservation. Failure to do so could be a ground for stripping the tribe of its self-regulating status.

The sphere of permissible State regulatory power over Indian treaty fishing probably is greatest in the case of the "in common with"

[87] See, Comptroller General's report to Congress, "Action is Needed Now To Protect Our Fishery Resources," GGD–76–34, February 18, 1976.
[88] See *United States v. Washington, supra*. 520 F.2d at 686.

treaty language. The exact limits of State vis-a-vis tribal rights must be determined by reference to the treaty language; evidence concerning treaty purposes; and the understanding of the parties. Accordingly, the question of whether there is any State regulatory power and the extent of it would depend on these factors.

Although the conclusion in *State* v. *Gowdy*, *supra*, that Indian fishing in violation of tribal regulations subjects that fishing to State regulation, appears to be basically correct, it should be pointed out that Indian regulation, like non-Indian regulation, takes account of many goals which are not strictly related to conservation (e.g., allocation of fishing opportunity and fishing sites).[89] Any violation of a tribal regulation which is not necessary for conservation should not subject an Indian guilty of such an infraction to the full range of State regulatory power.

3. ABORIGINAL FISHING RIGHTS

An area which has received almost no consideration by the courts is Indian hunting and fishing outside Indian reservation boundaries not embodied in any treaty. Most Indian rights which are found in treaties are aboriginal rights that have been preserved by mention of the rights in the treaty, with language preserving them all or in part, or by absence of any language giving up the rights. Because any analysis of Indian treaties is necessarily based upon the notion of reserved rights—that anything not given up is retained, the total absence of a treaty would argue for a continuation of aboriginal rights as they always were.

The relationship of the United States to Indians—one of having an exclusive right to deal with the Indians and to extinguish their rights—was first articulated in the case of *Johnson* v. *McIntosh*.[90] That case makes it clear that the United States succeeded to the sovereign rights of the "discovering" nations who first came to the New World, but that sovereignty was subject to a right of occupancy, or aboriginal title, of the Indians.[91] The Supreme Court has recently said of these principles of aboriginal title:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by the Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the Federal law. Indian title recognized to be only a right of occupancy was extinguished only by the United States.[92]

The exclusive right of extinguishing aboriginal property rights of Indians was reflected in the Indian Non-Intercourse Act, now codified in the current form at 25 U.S.C. § 177. It would appear, then, that the supremacy clause to the U.S. Constitution, operating via 25 U.S.C. § 177, which embodies the preemptive right of the United States to deal with Indians, would preclude the exercise of any State authority over presently existing aboriginal rights.

[89] See *Settler v. Lameer, supra*, 507 F.2d at 237.
[90] 2. U.S. (8 Wheat.) 543 (1823).
[91] 21 U.S. at 596.
[92] *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1947).

In *State* v. *Quigley*, 52 Wash. 2d 234, 324 P. 2d 827 (1959), the Washington Supreme Court held that an Indian did not possess aboriginal rights which prevented the exercise of State power to regulate his hunting. In that case, the Indian failed to show that his aboriginal right continued unextinguished. He had been arrested on lands he had purchased from a non-Indian. The *Quigley* panel was of the view that Indian title had been extinguished, although there was no express statutory or other clear manifestation of extinguishment. The case is questionable for this reason. Further, the court failed to distinguish between an extinguishment of title as to land and the right to hunt on such land. Court of Claims cases have made clear that the two rights are severable and distinct.

Even though aboriginal title to land may have been extinguished by a tribe's acceptance of compensation for the Government's unauthorized taking of lands, that would not necessarily extinguish aboriginal hunting and fishing rights unless they were specifically dealt with in resolving the Indians' claim against the Government.

The Interior Department Solicitor is of the opinion that this is the case with the Kootenai Tribe of Idaho which received compensation for lands taken mistakenly from the tribe which never participated in a treaty with the United States.[93] The same opinion deals with the question of to what extent a State might regulate the exercise of their aboriginal rights. It points out that there is no sound authority permitting State jurisdiction over the rights, as they would appear to be protected by the supremacy clause. But in the case of *Kake* v. *Egan*,[94] the Court held that the aboriginal fishing rights of Alaska Natives were not exclusive, and certain Federal regulations could not exempt them from Alaska's antifish trap law without appropriate legislation. The Court acknowledged that the aboriginal fishing rights of the Indians are property over which Alaska had disclaimed jurisdiction in its Statehood Enabling Act, but that the Enabling Act did not mandate exclusive Federal jurisdiction over such matters. It seems to allow State regulation based on the "migratory habits of salmon" which would make the presence of fishing traps "no merely local matter."

Kake was actually concerned with the extent of permissible Federal power to regulate and permit Indian fishing. It does not appear that the basis for the preemptive impact of aboriginal rights over the exercise of State regulatory power was fully considered. Furthermore, the anomolous situation of Alaska Natives was in a state of considerable uncertainty at the time of the *Kake* decision; it has now been resolved by the Alaska Native Claims Settlement Act, 43 U.S.C., sec. 1601, *et seq*. The Supreme Court of Idaho will soon be deciding the question of whether and to what extent a State may regulate the exercise of aboriginal hunting rights of the Kootenai Tribe. *State* v. *Coffee*.

Findings

(a) Indian tribes and individuals have been, and continue to be, subjected to continuous challenges by States and local non-Indians

[93] Memorandum from Associate Solicitor to Commissioner of Indian Affairs, dated Oct. 29, 1975.

[94] 369 U.S. 60 (1962).

over exercise of treaty and aboriginal hunting, fishing, trapping, and gathering rights.

(b) States have failed and/or refused to implement Federal court determinations as to the nature and scope of these important rights, thereby denying Indian tribes and people the effective exercise of these rights.

(c) Indian hunting, fishing, trapping, and gathering rights are an integral part of their culture, trade, and commerce, and are important to their continued survival and economic viability.

(d) State refusal to recognize and assist in the protection of these rights has promoted lawlessness and the effect of such State action is manifest of racial distinction which denies Indian people the equal protection of the laws in the exercise of their treaty rights.

(e) Failure to understand and appreciate the historical and legal foundation of Indian hunting, fishing, trapping, and gathering rights, coupled with growing competition for a diminishing resource, leads to non-Indian proposals for abrogations of these Indian rights; is inconsistent with the moral and legal foundations upon which they rest; and contributes to an atmosphere of disregard for Federal court determinations concerning such rights.

(f) Extensive and costly litigation has gone far to define the extent of these rights, and legislatively changing existing relationships will occasion renewed and extensive lawsuits to the economic detriment of all concerned.

(g) Federal actions which do not contemplate the integral role of Indian tribes in future management and planning for the protection of their resources is inconsistent with the viability of their rights and the importance to the resource.

Recommendations

(a) Congress should adopt a joint resolution which clearly supports Indian hunting, fishing, trapping, and gathering rights free from State regulation which unequivecally states that it shall not be the policy of Congress to abrogate these rights.

(b) Congress should make specific legislative provision for the recovery of attorney fees and expenses against any litigant adverse to the vindication of a treaty right brought by or against an Indian tribe or individual where the Indian litigant prevails in such a suit. Of particular importance are situations where the exercise of rights is frustrated by the acts or omissions of the various States in the exercise of their police power.

Provision should be made in the immediate future for funds to Indian tribes to obtain legal counsel to vindicate rights presently being challenged by the States. Where successful litigation generates attorney fees, that money may either be returned to the Treasury or be used in other areas where legal expertise is needed by tribes to clarify or implement jurisdictional provisions: for example amendments to tribal constitutions or bylaws; development of tribal law and order codes; or negotiation of mutual management compacts, et cetera.

(c) In recognition that Congress often passes laws which have impact on Indian rights by indirection, such as authorizations for

the building of a dam, there should be provision which will contemplate such impact. Ad hoc compensation is simply not appropriate or sufficient where such impact may totally wipe out an economic base or cultural structure when prior review could obviate such a result. Provisions for review such as are found in section 102(C) of the National Environmental Policy Act [43 U.S.C. 4332] would require investigation and research into possible infringements with notice and opportunity to the potentially affected tribe for input.

As a corollary to the above provisions, enactments by the various States which directly or indirectly impact on the exercise of Indian rights should be subjected to similar review provisions. Such enactments by States are forbidden when they interfere with Indian rights. Emergency provision should be made for those situations which present exigent circumstances with additional provision for speedy review.

(d) In recognition of the significant impact which international considerations have on Indian rights, specific provision should be made for Indian representation on such bodies: for example, International Pacific Salmon Fisheries Commission and the National Marine Fisheries Services of the United States.

Of significant importance is congressional cognizance and recognition of the importance of equal participation by Indian tribes in implementing plans for enforcement, management, and enhancement of fisheries. It is appropriate and consistent with Indian needs and their relative role in this area that they be an integral part of the management and enforcement implementation. Congressional action should so reflect.

B. Child Custody

* * * I can remember [the welfare worker] coming and taking some of my cousins and friends. I didn't know why and I didn't question it. It was just done and it had always been done * * *[1]

It is still being done, but now it is being aggressively questioned and fought, and hopefully in some places, the frequency of removing Indian children from their homes to non-Indian adoptive or foster care homes has lessened.

The issue is a crucial one in Indian country, and its ramifications are many. Removal of Indians from Indian society has serious long- and short-term effects, both for the tribe and for the individual child removed from his/her home environment who may suffer untold social and psychological consequences. Louis La Rose, chairman of the Winnebago Tribe, expressed the anger of many when commenting on the debacle of the Indian child placement situation:

I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A–1 in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think . . . they destroy him. And if you have ever talked to an individual like that when he comes to a reservation . . . I get depressed.[2]

One of the most pervasive components of the various assimilation or termination phases of American policy has been the notion that the

[1] Testimony of Valancia Thacker, southern California transcript at 88.
[2] Midwest transcript at 424–25.

way to destroy Indian tribal integrity and culture, usually justified as "civilizing Indians," is to remove Indian children from their homes and tribal settings. This effort began in earnest in the 1880's when Indian children were removed from their homes and sent to distant boarding schools. The Indian people fought this removal with whatever means were at their disposal. It is not necessary here to recount the horror stories, reams of which are well documented—suffice to say that the resultant mortalities were incredible and the brutality against Indian students belies any notion of civilization. Many current tribal leaders still bitterly remember their own experiences. Peter MacDonald, Chairman of the Navajo Nation, related tales of corporal punishment administered for speaking Navajo in school.[3] Although boarding schools still are in existence and still present major problems, many of the more perverse practices, fortunately, appear to have receded.

Current issues focus more on the problems of the adoption of Indian children by non-Indian families and the temporary and permanent placement of Indian children in non-Indian foster care homes and institutions. It is a curious paradox that many early, non-Indian commentators, observing Indian culture, praised familial and tribal devotion to their children, yet now, after generations of contact and conflict with Western civilization, so many Indian families are perceived as or found to be incapable of child rearing. The practices of assimilation and removal have had their impact.

The jurisdictional questions are fairly simple: who decides whether an Indian child needs to be removed from his or her home, and who decides where and how that child is to be raised? In America today, these decisions are made by a combination of public and private social service agencies and court systems. The question further refined becomes: Do tribal authorities make these decisions for dependent Indian children, or do non-Indian authorities make these decisions? In this century, most decisions have been made by non-Indian authorities. The pattern, however, is beginning to shift, as tribes, through their court systems, and developing tribal social service agencies, reassert their historical role in the care and protection of Indian children.

One might ask, since both Indian and non-Indian systems should act in the best interests of the child, what difference it makes which court has jurisdiction. The difference is that these decisions are inherently biased by the cultural setting of the decisionmaker and the history as to what has happened to Indian children when decisions are made by non-Indian authorities. Several years ago, it was estimated on the best available data that 25 to 35 percent of all Indian children are being raised by non-Indians in homes and institutions.[4]

An Indian family's initial contact with these non-Indian institutions is usually the "welfare worker." Given the destitute and impoverished conditions extant on many reservations and in the urban areas to which Indians were relocated, public assistance is a painful but necessary reality. The social workers, who are usually untrained [5] and have little or no understanding of Indian lifestyle or culture, make judgments concerning the adequacy of the Indian child's upbringing.

[3] Transcript of hearings before the U.S. Commission on Civil Rights, Window Rock, Ariz., Oct. 22–24, 1973, at 18.
[4] Indian Family Defense, Winter, 1974.
[5] Untrained is defined as lacking an M.S.W. Unfortunately, most M.S.W. programs do not include any training with respect to Indians.

Even assuming that the judgment is correct and that the welfare worker has not imposed inapplicable social-cultural values, if the judgment is negative, then the social worker should attempt to provide counsel to the family. The effort should be made to maintain an intact family unit while problems are being resolved. Unfortunately, given cultural barriers, this effort is often not possible.

The next step is frequently termination of parental rights. Economically dependent parents are often urged to consent to the removal of their child. The termination of parental rights is done through a court proceeding. Once parental rights are terminated, the court, again relying on the poorly trained, often biased or judgmental social worker, then decides the question of the custody [placement] of the child. If custody is given to public or private social service agencies, they then decide the actual placement of the child. In adoption proceedings, the court will rule on the actual adoptive family.

Within these systems, two levels of abuse can and do occur. In the initial determination of parental neglect [6] the conceptual basis for removing a child from the custody of his/her parents is widely discretionary and the evaluation process involves the imposition of cultural and familial values which are often opposed to values held by the Indian family. Second, assuming that there is a real need to remove the child from its natural parents, children are all too frequently placed in non-Indian homes, thereby depriving the child of his or her tribal and cultural heritage. Non-Indian institutions apparently have a very difficult time finding Indian foster homes and adoptive parents. In recent years, some States are making concentrated efforts to improve; [7] however, many of the home approval criteria are rigid and inappropriate for the economy and lifestyle of many Indian families. Because of this, many fine potential Indian adoptive and foster care families are rejected or, fearing rejection, do not apply. This process can eliminate blood relatives of the child.

Unless a tribe is actively involved with child welfare issues through its court system and its social service agencies, it has almost no way of knowing what is occurring with respect to its minor tribal members.[8] Even where a tribe is actively involved with these issues, there are substantial difficulties, particularly when events occur outside of its territorial jurisdiction. There is no existing requirement that public or private social service agencies, whether they are close by or in distant cities, have to notify a tribe when they take action with respect to any tribal member.[9] Even when a tribe seeks to aggressively assert its interests in child custody proceedings in non-Indian forums, it cannot do so as a matter of right.[10]

A particular problem also exists where the child is entitled to moneys based on tribal membership—either on a yearly per capita basis or

[6] Few Indian children are brought to court based on "abuse".

[7] Testimony of Gerald Thomas, Director of Social Services, Washington State, Northwest transcript at 499.

[8] Because of the lack of any systematic and comprehensive recordkeeping, even the non-Indian agencies which are removing Indian children on a daily basis do not know the full dimensions of the problem. Several State social service agency officials who were contacted as part of the data collection process (presented in the following section) expressed surprise at the statistics they gathered.

[9] Although the Washington State social service agency stated that it was their practice to notify tribal officials whenever it took any action involving tribal members this policy is, however, not codified. Northwest transcript at 501. Tribal frustration with the general pattern of nonnotice is reflected by a Gila River ordinance which makes it a criminal offense to remove an Indian child from the reservation without the consent of the tribal court.

[10] Matter of Greybull, 543 P. 2d 1079 (1975).

otherwise—and the tribe is required to turn these moneys over to agencies and placement families.

1. THE DEMOGRAPHY OF THE PROBLEM [11]

Because of the various recordkeeping systems of States and counties, it is difficult to obtain a picture of the full dimensions of this problem. Data is often grossly incomplete, omitting crucial information such as whether placements are made to Indian or non-Indian homes. Information is often not available on all the factors which affect the placement issue, such as private agencies.

The data in this section has been calculated on the most conservative basis possible; the figures presented therefore reflect the most minimal statement of the problem. Adoption statistics are calculated by using the child's age at adoption and projecting pattern based on available yearly placement patterns. Foster care figures are derived from the most recent yearly statistics available. All statistics are from 1973–1976 unless otherwise indicated.

Statistics are presented for those States where a significant Indian population resides.

Alaska

There are 28,334 Alaskan Natives under 21. Of these, 957 (or 1 out of every 29.6) Alaskan Native children has been adopted; 93 percent of these were adopted by non-Native families. The adoption rate for non-Native children is 1 out of 134.7. By proportion, there are 4.6 times (460 percent) as many Native children in adoptive homes as there are non-Native children.

There are 393 (or 1 out of every 72) Alaskan Native children in foster care. The foster care rate for non-Natives is 1 out of every 219. There are, therefore, by proportion, 3 times (300 percent) as many Native children in foster care as non-Native children. No data was available on how many children are placed in non-Native homes or institutions.

Arizona

There are 54,709 Indian children under 21 in Arizona. Of these, 1,039 (or 1 out of every 52.7) Indian children has been adopted. The adoption rate for non-Indian children is 1 out of every 220.4. There are therefore, by proportion, 4.2 times (420 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 558 (or 1 out of every 98) Indian children in foster care.[11a] The foster care rate for non-Indians is 1 out of every 263.6. There are therefore, by proportion, 2.7 times (270 percent) as many Indian children in foster care as there are non-Indian children.

California

There are 39,579 Indian children under 21 in California. Of these, 1,507 (or 1 out of every 26.3) Indian children has been adopted; 92.5 percent of these were adopted by non-Indian families. The adoption

[11] Much of this section is based on Indian Child Welfare Statistical Survey, July 1976, prepared for the Task Force by the Association on American Indian Affairs, Inc.; all data unless otherwise indicated is from this survey.

[11a] Absolute minimal estimate.

rate for non-Indian children is 1 out of every 219.8. There are therefore, by proportion, 8.4 times (840 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 319 (or 1 out of every 124) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 366.6. There are therefore by proportion 2.7 times (270 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.

Idaho

There are 3,808 Indian children under 21 in Idaho. The figures on adoptions are too small to be statistically significant.

There are 296 (or 1 out of every 12.9) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 82.7. There are therefore by proportion, 6.4 times (640 percent) as many Indian children in foster care as there are non-Indian children.

Maine

There are 1,084 Indian children under 21 in Maine. Of these, 0.4% were placed for adoption during 1974–75.

There are 82 (or 1 out of every 13.2) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 251.9. There are therefore by proportion, 19.1 times (1,910 percent) as many Indian children in foster care as there are non-Indian children; 64 percent of the Indian children are in non-Indian foster care homes.

Michigan

There are 7,404 Indian children under 21 in Michigan. Of these, 912 (or 1 out of every 8.1) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 30.3. There are therefore by proportion, 3.7 times (370 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 82 (or 1 out of every 90) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 641. There are therefore by proportion, 7.1 times (710 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

Minnesota

There are 12,672 Indian children under 21 in Minnesota. Of these, 1,594 (or 1 out of every 7.9) Indian children has been adopted; 97.5 percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 31.1. There are therefore by proportion, 3.9 times (390 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 737 (or 1 out of every 17.2) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 283.8. There are therefore by proportion, 16.5 times (1,650 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.

Montana

There are 15,124 Indian children under 21 in Montana. Of these, 541 (or 1 out of every 30) Indian children has been adopted; 87 percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 144.6. There are therefore by proportion, 4.8 times (480 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 534 (or 1 out of every 28.3) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 363.5. There are therefore by proportion, 12.8 times (1,280 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes or institutions.

Nevada

There are 3,739 Indian children under 21 in Nevada. The figures on adoptions are too small to be statistically significant.

There are 79 (or 1 out of every 47.3) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 333.8. There are therefore by proportion, 7.0 times (710 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

New Mexico

There are 41,315 Indian children under 21 in New Mexico. The figures on adoptions are too small to be statistically significant.

There are 287 (or 1 out of every 147) Indian children in foster care. The rate for non-Indians is 1 out of every 343. There are therefore by proportion, 2.4 (240 percent) as many Indian children in foster care as there are non-Indian children. No data is available on how many Indian children are placed in non-Indian homes and institutions.

New York

There are 10,627 Indian children under 21 in New York. The figures on adoptions are too small to be statistically significant.

There are 142 (or 1 out of every 74.8) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 222.6. There are therefore by proportion, 3 times (300 percent) as many Indian children in foster care as there are non-Indian children. An estimated 96.5 percent are placed in non-Indian foster homes.

North Dakota

There are 8,126 Indian children under 21 in North Dakota. Of these, 269 (or 1 out of every 30.4) Indian children has been adopted. Seventy-five percent of these were adopted by non-Indian families. The adoption rate for non-Indian children is 1 out of every 86.2. There are therefore by proportion, 2.8 times (280 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 296 (or 1 out of every 27.7) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 553.8. There are therefore by proportion, 20.1 times (2,010 percent) as many Indian children in foster care as there are non-Indian children. No data was

available on how many Indian children are placed in non-Indian homes and institutions.

Oregon

There are 6,839 Indian children under 21 in Oregon. Of these 402 (or 1 out of every 17) Indian children has been adopted. No data was available on adoptions by non-Indian families. The adoption rate for non-Indian children is 1 out of every 19.2. There are therefore by proportion, 1.1 times (110 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 247 (or 1 out of every 27.7) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 228.5. There are therefore by proportion, 8.2 times (820 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

Oklahoma

There are 45,511 Indian children under 21 in Oklahoma. Of these, 1,116 (or 1 out of every 40.8) Indian children has been adopted. No data was available on adoption by non-Indians. The adoption rate for non-Indian children is 1 out of every 188.1 There are therefore by proportion 4.4 times (460 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 337 (or 1 out of every 135) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 551. There are therefore by proportion 3.9 times (410 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

South Dakota

There are 18,322 Indian children under 21 in South Dakota. Of these, 1,019 (or 1 out of every 18) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 32.4. There are therefore by proportion, 1.6 times (180 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 832 (or 1 out of every 22) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 492.1. There are therefore by proportion 22.4 times (2,040 percent) as many Indian children in foster care as there are non-Indians. No data was available on how many Indian children are placed in non-Indian homes.

Washington

There are 15,980 Indian children under 21 in Washington. Of these, 740 (or 1 out of every 21.6) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 407. There are therefore by proportion, 18.8 times (1,900 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 559, or 1 out of every 28.9 Indian children in foster care. The foster care rate for non-Indians is 1 out of every 275. There are therefore by proportion, 9.6 times (960 percent) as many Indian children in foster care as there are non-Indian children. Eighty percent of these were placed in non-Indian homes.[12]

Wisconsin

There are 10,456 Indian children under 21 in Wisconsin. Of these, 733 (or 1 out of every 14.3) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 251.5. There are therefore by proportion, 17.9 times (1,760 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 545 (or 1 out of every 19) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 252. There are therefore by proportion, 13.4 times (1,330 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

Wyoming

There are 2,832 Indian children under 21 in Wyoming. The figures on adoptions are too small to be statistically significant.

There are 98 (or 1 out of every 28.9) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 301.6 There are therefore by proportion, 10.4 times (1,040 percent) as many Indian children in foster care as there are non-Indian children. Fifty-seven percent of the Indian children in State foster care are in non-Indian homes; and 51 percent of the children in BIA foster care are in non-Indian homes.

Utah

There are 6,690 Indian children under 21 in Utah. Of these, 328, (or 1 out of every 20.4) Indian children has been adopted. No data was available on adoptions by non-Indians. The adoption rate for non-Indian children is 1 out of every 68.5. There are therefore by proportion 3.4 times (340 percent) as many Indian children in adoptive homes as there are non-Indian children.

There are 249 (or 1 out of every 26.4) Indian children in foster care. The foster care rate for non-Indians is 1 out of every 402.9. There are therefore by proportion, 15 times (1,500 percent) as many Indian children in foster care as there are non-Indian children. No data was available on how many Indian children are placed in non-Indian homes and institutions.

2. LEGAL STATUS—WHO DECIDES?

The Federal courts, as well as some State courts, have generally recognized the crucial place which the issue of child custody holds in the framework of tribal self-determination.

> If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right within its own boundaries and membership to provide for its young, a *sine qua non* to the preservation of its identity.[13]

The most recent Supreme Court case on the subject, *Fisher* v. *District Court*,[14] affirmed the jurisdiction of the Northern Cheyenne

[12] Northwest transcript, exhibit 14.
[13] *Wisconsin Potowatomies of Hannahville Indiana Community* v. *Houston*, 396 F. Supp. 719, 730 (W.D. Mich., 1973).
[14] 47 L Ed. 2d 106 (1976).

Tribal Court to make custody determinations in the face of a challenge to have such jurisdiction taken by Montana State courts. Since Montana had not acquired any jurisdiction over Indian country pursuant to Public Law 280, and the action arose on the reservation, the Supreme Court characterized the tribal court's jurisdiction as exclusive.

Many Indian child placement issues do not necessarily arise in such clean-cut fashion. Frequently, the physical location of the child affects whether the tribal court has jurisdiction. *Decoteau* v. *The District Court*,[15] is a case involving a conflict between State and tribal jurisdiction, where the pertinent acts occurred on both trust land and non-trust land. The Supreme Court upheld State jurisdiction based on a finding that the non-trust portion of the "former" reservation had been terminated. In that case, the tribal interest in the welfare of its minor member, however, cannot be as a practical matter any less than where geography assures jurisdiction.

Although *Decoteau* did not deal with the issue of "domicile," it is pertinent to child welfare jurisdiction. "Domicile" is a legal concept that does not depend exclusively on one's physical location at any one given moment in time, rather it is based on the apparent intention of permanent residency. Many Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on employment and educational opportunities. The domicile of a child is often viewed as a basis for a court's jurisdiction to determine his/her custody. In these situations where family ties to the reservation are strong, but the child is temporarily off the reservation, a fairly strong legal argument can be made for tribal court jurisdiction. In a recent New Mexico case involving a Navaho child situated off reservation in Gallup, N. Mex., it was argued that the Navajo tribal court is the appropriate forum to determine custody.[16]

> Child rearing and the maintenance of tribal identity are "essential tribal relations" [citation omitted]. By paralyzing the ability of the tribe to perpetuate itself, the intrusion of a State in family relationships within the Navaho Nation and interference with a child's ethnic identity with the tribe of his birth are ultimately the most severe methods of undermining retained tribal sovereignty and autonomy.[17]

This concept of court jurisdiction is based on the tribal status of the individual rather than the mere geography of the child and recognizes that the tribal relationship is one of *parens patriae* to all its minor tribal members. It is an attractive formulation, considering that in reality, Indian children are usually culturally and tribally terminated by placements to non-Indian homes when they are subject to State court systems.[18] This has not been given substantial recognition by the courts.[19] As a practical matter, this construction seems limited to situations where the Indian child is in reasonable proximity to the tribal court, such as in a border town. Applying this construction to an Indian child living in Chicago who is an enrolled

[15] 420 U.S. 425 (1975).
[16] See *e.g.*, *Wisconsin Potowatomies of the Hannahville Indian Community* v. *Houston*, *supra*; and *Shaving Bear* v. *Pearson*, et al., S.D. Cir. Ct., 6th Jurisdiction Cir. June 21, 1974 (unreported)
[17] In the matter of the Adoption of Randall Nathan Swanson, Amicus Curae Brief, No. 2407.
[18] *Ibid* at 8.
[19] See, Matter of Greybull, 543 P 2d 1079 (1975).

member of the Yakima Nation would create major practical difficulties without a well-defined operating system for effectuating tribal jurisdiction.

Just as mobility will frequently remove Indian children from reservation systems and bring them into initial contact with non-Indian systems, so mobility will also remove a child subject to a tribal court's jurisdiction into another geographic jurisdiction. This can create the following problem: After a tribal court determines child custody, the child leaves the reservation, and the issue of custody is relitigated in a non-Indian court. Generally, between the States, the constitutional standard of "full faith and credit" governs the way one court will treat the decisions of another. This standard is not constitutionally required of State courts with respect to the judgments of tribal courts. State courts can (and some do)—under the principle of comity—respect between sovereigns—recognize the determinations of tribal courts. Recently the Maryland Court of Appeals refused to allow Maryland courts to determine the custody of a Crow child where that determination had been made by the Crow Tribal Court.[20]

Findings

1. The removal of Indian children from their natural homes and tribal setting has been and continues to be a national crisis.
2. Removal of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.
3. Non-Indian public and private agencies, with some exceptions, show almost no sensitivity to Indian culture and society.
4. Recent litigation in attempting to cure the problem of the removal of Indian children, although valuable, cannot affect a total solution.
5. The current systems of data collection concerning the removal and placement of Indian children are woefully inadequate and "hide" the full dimension of the problems.
6. The U.S. Government, pursuant to its trust responsibility to Indian tribes, has failed to protect the most valuable resource of any tribe—its children.
7. The policy of the United States should be to do all within its power to insure that Indian children remain in Indian homes.

Recommendations

1. Congress should, by comprehensive legislation, directly address the problems of Indian child placement. The legislation should adhere to the following principles:

a. The issue of custody of an Indian child domiciled on a reservation shall be subject to the exclusive jurisdiction of the tribal court where such exists.

b. Where an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child shall be given reasonable notice before any action affecting his/her custody is taken.

[20] *Wakefield* v. *Little Light*, 276 Md. 333, 347 A 2d 228 (1975)

c. The tribe of origin shall have the right to intervene as a party in interest in child placement proceedings.

d. Non-Indian social service agencies, as a condition to the Federal funding they receive, shall have an affirmative obligation—by specific programs—to:

(i) provide training concerning Indian culture and traditions to all its staff;

(ii) establish a preference for placement of Indian children in Indian homes;

(iii) evaluate and change all economically and culturally inappropriate placement criteria;

(iv) consult with Indian tribes in establishing (i), (ii), and (iii).

e. Significant Federal financial resources should be appropriated for development and maintenance of Indian operated foster care homes and institutions:

(i) in reservation areas such resources should be made directly available to the tribe;

(ii) in off-reservation areas, such resources should be available to appropriate local Indian organizations.

f. The Secretary of the Interior should be authorized to:

(i) undertake a detailed study of the manner and form of child placement records;

(ii) to definitely determine the full statistical picture of child placement as it currently exists;

(iii) to require standardized child placement recordkeeping systems from all agencies receiving Federal moneys;

(iv) to require annual reports from such agencies pursuant to the mandatory recordkeeping system;

(v) to review all rules and regulations of the Federal Government with respect to child placement, and revise such, in consultation with Indian tribes and child placement agencies to reflect Federal policy of retaining Indian children in Indian homes.

C. Jurisdiction Over Non-Indians

This area must be approached on several levels. There is widespread apprehension in the non-Indian community residing on or near Indian reservations concerning the exercise or potential exercise of tribal jurisdiction over non-Indians. This feeling appears to be, at least in part, based on a major nonunderstanding in the non-Indian community about the legal status of Indian tribes and their historical-constitutional relationship with the Federal Government. Complicating this vacuum of knowledge is an implicit, and sometimes explicit, viewpoint that while it might be permissible for Indian tribes to have power over Indians, it is somehow morally inappropriate to have such power over non-Indians within their territories. In this furor over the exercise of power, Indian governments are, in the political arena, being held to higher standards of performance than Americans generally expect from their public institutions—it is as if competence of non-Indian governments is assumed and that of Indian governments must be demonstrated.

On the technical-legal side of the issue, there is no question that the case for Indian jurisdiction—be it exclusive in some components and concurrent in other components—over non-Indians is rooted in fundamental, long established principles of international law and domestic constitutional law. The case is persuasive, although it is not as yet subject in every instance to definitive Supreme Court decisions.

As persuasive as the legal case for tribal jurisdiction over non-Indians is, the actual exercise of this jurisdiction has been relatively limited. Many tribes, while affirming that they retain jurisdiction, have not yet sought to exercise jurisdiction over non-Indians. This tribal decision has been based, and probably will continue to be based, on several practical realities: (1) the size and economic ability of a particular tribe; (2) the tribal relationship with neighboring counties and the State within which it is located; (3) demonstrated willingness or lack thereof of non-Indian governments to provide fair and impartial treatment of the Indian community; and (4) the physical proximity or isolation of the tribe to other government services. In a sense, the performance by non-Indian governments of the responsibilities they have assumed in exercising jurisdiction over any matter on an Indian reservation will play a strong role in any tribal decision as to whether to exericse jurisdiction over non-Indians.

1. THE LEGAL CASE FOR JURISDICTION OVER NON-INDIANS

To trace what jurisdiction is retained by Indian tribes today, it is necessary to start with the concept that sovereign tribes have full jurisdictional powers, except to the extent that specific components may have been limited by the United States. The loss of jurisdiction is not to be inferred. It must be specifically found in acts of Congress or treaties. Chief Justice John Marshall in 1832 stated the classic formulation of domestic constitutional law, upon which Federal Indian law has been based:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors to the soil, from time immemorial, with the single exception of that imposed by the irresistible power. * * *[1]

At that time the only powers that had been removed from tribes generally were related to international jurisdiction—the rights to go to war and enter into compacts and treaties with nations other than the United States. Chief Justice Marshall characterized this condition as "domestic, dependent nations. * * *"[2]

Treaties are, of course, one mechanism whereby jurisdiction could have been ceded from the tribe to the Federal Government. While there may be an individual tribe that by treaty divested itself of jurisdiction, the general construction of early treaty language does not lead to that conclusion. There is much language in the early treaties pertaining to the trial and prosecution of offenses committed within the Indian territories. The phrase most frequently found is for tribes to "deliver up" persons who committed offenses in the territory of the

[1] *Worcester* v. *Georgia* 31 U.S. 515, 559 (1832); although the concept has undergone modification, it is still viable, as a basis for the current Federal preemption test of identifying jurisdiction. *McClanahan* v. *Arizona State Tax Comm.*, 411 U.S. 164 (1973).

[2] *The Cherokee Nation* v. *State of Georgia* 30 U.S. 1, 16 "they may, more correctly, perhaps, be denominated domestic dependent nations."

tribes.[3] This phrase must be construed in its historical context as well as in its plain treaty language. Many of these same treaties required the "delivery up" of both non-Indians and Indians who committed serious offenses. No one has seriously maintained that Indians divested themselves of jurisdiction over tribal members by treaty. At best, these provisions should be read to extend concurrent jurisdiction over tribal members. The same construction is logically applicable to non-Indians. It is instructive to indicate how Congress perceived the jurisdictional relationship in the treaties it approved and the legslation it adopted pursuant to those treaties:

> It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens.[4]

The courtesy referred to by the House committee in its report on what would become the General Crimes Act underscores a fundamental Federal policy in the early years of the Republic—to be a buffer between the Indian tribes and the non-Indian citizens who were frequently perceived as being a threat to the tribes. This buffer function was designed to try to keep conflicts from developing. It clearly was not based on any congressional notion that tribes lacked power to punish violators of their domestic peace.

The views of the Commissoners of Indian Affairs in 1834, which in large measure resulted in the Trade and Intercourse Act, section 25 of which became known as the General Crimes Act (codified as 18 U.S.C. sec. 1152), give credence to the view that Congress recognized Indian jurisdiction and was not acting to abrogate such power, but rather to insure harmony:

> If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men.
>
> * * * * * * *
>
> . . . while Government has reserved a constitutional supervision over all her red children. She has solemnly guaranteed protection of life and property to every tribe who removes here, and given assurance that no state or territory shall exercise jurisdiction over them. Hence intercourse laws are necessary; they may be made so energetic, too, as to defer offender, be they citizens of the United States or individuals of another tribe. All this may be done without impairing in the least the independence of the tribe within its own limits.
>
> Within the limits of the municipal laws of the tribes as may be in force; and should the laws of the tribes and the laws of the United States given concurrent jurisdiction, this would create no difficulty. It is, indeed, desirable to encourage the several tribes to adopt salutary laws, as far as possible, and render less frequent the intervention of Government.[5]

It is a curious twist of revisionist history that two lower Federal courts, *Ex parte Morgan*, 20 F. 298, 308 (W.D. Ark 1883), and *Ex parte Kenyon*, 14 F. CAs. 353 (No. 7720) (W.D. Ark. 1878), would cite section 25 of the Trade and Intercourse Act as prohibiting tribal jurisdiction with respect to non-Indians. These cases, which did

[3] See e.g. treaty dated Jan. 21, 1785 with the Wyandat, Delaware, Chippewa, and Ottawa Tribes, art. 5, p. 1; treaty concluded Jan. 9, 1789 with the Wyandot, Delaware, Ottawa, Chippewa, Pottowatomie, and Sac Tribes, art 9, p. 2; treaty with the Chippewa of the Mississippi tribe concluded Mar. 19, 1867; agreement with the Red Lake Band of Chippewas, concluded Aug. 23, 1886; treaty with the Sioux Brule, Oglala, Miniconjou, Yanktonai, Hunkpada, Blackfeet, Cuthead, Two Kettle, San Arcs and Santee, and the Arapahoe tribes, concluded Feb. 24, 1869 art 1.

[4] H.R. Rep. No. 474, 23d Congress, 1st session 13 (1834).

[5] *Ibid*., Report to the Secretary of War, Document S, appendix.

not provide any reasoning in support of their conclusions, are, as will be shown, erroneous.[6]

The General Crimes Act, then known as section 25 of the Trade and Intercourse Act, was one section of a three-part comprehensive effort to deal with the subject of Federal-Indian relations. The three bills reported from the House Committee on Indian Affairs were for: the regulation of trade and intercourse with the various Indian tribes, the organization of the Department of Indian Affairs and a bill to establish a western Indian territory. Only the first two were enacted into law. The committee report, however, was a combined one:

> These relations, though subjects of different bills, are intimately connected. They are parts of a system; and of a system which is, itself, also intimately acquainted with the general legislation of the Country. They have, therefore, deemed it proper to present, in the same report, their views on the subject embraced in the several bills.[7]

This view of the committee is extremely pertinent to provisions of the western Indian territory bill. Although not passed, it sheds significant light on the congressional intention with respect to Indian jurisdiction.

The pertinent provision of the General Crimes Act reads:

> Sec. 25. *And be it further enacted*, that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian Country: "*Provided*, the same shall not extend to crimes committed by one Indian against the person or property of another Indian.

When this provision is read in concert with the bill establishing the western territories, it is clear that Congress understood and intended that the Federal Government would exercise concurrent jurisdiction with the tribes:

> Sec. 9. *And be it further enacted*, that and in all cases when a person not a member of any tribe shall be convicted to an offense, the punishment whereof by the laws of the tribe shall be death, the judgment shall be forthwith reported to the Governor, who may, for good reasons, suspend the execution thereof until the pleasure of the President shall be known.[8]

The clear language, "a person not a member of any tribe," leaves no room to deduce any other congressional intention than that tribes retain concurrent jurisdiction over non-Indians within their territories. Assuming arguendo that the language could be construed as ambiguous, the dominant rules of statutory construction pertaining to Federal-Indian relations, that ambiguities be resolved in favor of the tribes and that jurisdiction will not be lost by inference,[9] buttress the conclusion that the General Crimes Act did not terminate such tribal jurisdiction.

One other major Federal statute has caused some conflict about the extent of tribal jurisdiction with respect to non-Indians. It is known as the Major Crimes Act.[10] In a major decision on the Federal jurisdiction in Indian country, the U.S. Supreme Court held in *ex parte*

[6] One noted commentator has observed that at no time has Congress ever explicitly acted to deprive Indian tribes of jurisdiction concerning non-Indians. Monroe E. Price, "Law and the American Indian." (1973), at 173. The opinion of the Solicitor of the Department of the Interior, 77 I.D. 113 (1970) taking a position opposing jurisdiction over non-Indians, has been officially withdrawn.

[7] H. Rept. 474, 23d Cong., 1st sess., at 1.

[8] Ibid., at 36–37.

[9] See, *Crow* v. *Oglala Sioux*, 231 F.2d 89, 94 (8th Cir. 1956), and Cohen, Handbook of Federal Indian Law (1942) at 123.

[10] Modified and codified in 18 U.S.C. 1153.

Crow Dog that the Federal district court did not have jurisdiction to try a Sioux tribal member for the murder of another tribal member occurring in Indian country. Crow Dog had been tried and convicted by tribal authorities. The traditional penalty of support of the decedent's family caused an uproar in the non-Indian community, prompting the extention of Federal jurisdiction with respect to enumerated felonies over Indians within Indian territories.

As originally proposed the bill read in part:

> Indians * * * shall therefore in the same courts and the same manner *and not otherwise* and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively.[11]

The italicized language could have been read to strip tribal courts of their existing jurisdiction; however, this language was deliberately and specifically struck by Congress for just that reason:

> Congressman BUDD. I desire to suggest another modification of the amendment—to strike out the words "and not otherwise." The effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country. I think it sufficient that the courts of the United States should have concurrent jurisdiction in these cases * * *.

The amendment as proposed by Congressman Budd was adopted without debate.

There are two other pieces of congressional legislation that need to be noted. The first is Public Law 280, which provides for both permissive and mandatory transfer of jurisdiction to the States. Public Law 280 must be interpreted to transfer jurisdiction to the States that is at least in part concurrent with that of the tribes. This conclusion is necessitated by the view that the Federal Government has for the most part only assumed jurisdiction concurrent to that of the tribes and, therefore, that is what it transfers.

An important piece of legislation, both as a limitation on jurisdiction and an affirmation of its existence, is the Indian Civil Rights Act of 1968. This legislation, among other things, makes applicable to the operation of tribal governments and courts many of the bill of rights type protections that are not constitutionally applicable to tribes. In the early Department of the Interior draft of the bill, the phrase "American Indian" was used throughout to define the class of persons to whom the rights were being extended. This phrase was deliberately changed to read "any persons"—a phrase clearly including non-Indians—in the legislation as finally passed.[12] This evidences a clear expression on the part of Congress that tribes continue to possess jurisdiction over non-Indians within their boundaries.

The further importance of the 1968 Indian Civil Rights Act is that it mitigates against any colorable argument that non-Indians be in any respect denied basic rights by being subject to the jurisdiction of tribal governments.

It should be clear, therefore, that Congress, at least in the area of criminal jurisdiction, has not affirmatively acted to terminate jurisdiction over non-Indians. In the civil area, there are numerous court

[11] Congressional Record, vol. 16, pt. II, at 934 (1885).
[12] Summary report of the constitutional rights of American Indians of the Senate Subcommittee on Constitutional Rights, of the Senate Judiciary Committee, 89th Cong., 2d sess., at 9–10.

decisions upholding tribal power; there are, however, several specific instances where Congress has granted certain States power in delineated areas. The general proposition is, however, the same. Tribal authorities have jurisdiction over non-Indians in civil areas generally and, even where Congress has legislated in the field, and/or allowed the State to exercise jurisdiction, absent a specific termination of tribal powers, such jurisdiction is deemed to run concurrently with tribal jurisdiction.[13]

In *Morris* v. *Hitchcock*, 194 U.S. 384 (1904), the U.S. Supreme Court upheld the authority of the Chickasaw Nation to levy a tax on the cattle of non-Indian lessees of tribal land. The court in that case relied upon the power of the tribe to control the presence within the territory assigned to persons who might otherwise be regarded as intruders * * * as sanctioned and recognized by the United States in treaties. The notion that the allotment acts and the resultant sanction for non-Indians to enter and reside in Indian country, including the establishment of towns and cities, somehow divested tribes of their sovereign powers, was laid to rest by the Eighth Circuit Court of Appeals 1 year later in *Buster* v. *Wright*.[14] This case involved the authority of the Creeks to tax non-Indians conducting business within their borders. The court stated:

> This power to govern the people within its territories was repeatly guaranteed to the Creek tribe by the United States.
>
> * * * * * * *
>
> But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, not by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners. The establishment of town sites and the organization of towns and cities within the limits of this Indian nation present no persuasive reason why any other rule should prevail in the measurement of its power to fix the terms upon which non-citizens may conduct business within its borders. The theory that the consent of a government to the incorporation and existence of cities upon its territory or to the conveyance of the title to lots or lands within it to private individuals exempts the inhabitants of such cities and the owners or occupants of such lots from the exercise of all its governmental powers, while it leaves the inhabitants of other portions of its country subject to them, is too unique and anomalous to invoke assent.[15]

The most recent litigation, and the one case clearly addressing the issue of jurisdiction over non-Indians in a clear and concise manner, is *Oliphant* v. *Schlie*,[16] a case arising on the Port Madison Indian Reservation in the State of Washington. In this case, a non-Indian was arrested by the tribal police for assaulting a tribal police officer. The incident occurred on the reservation on trust land. The Federal district court upheld the challenge to the tribe's jurisdiction on the following basis: Congress had neither terminated nor diminished the

[13] See *Williams* v. *Lee*, 350 U.S. 127 (159); *United States* v. *Mazurie*, 419 U.S. 544 (1975); and *In the Matter of the Last Will of Jimeson* 328 N.Y. Supp. 2d 466, 68 Misc. 2d 945 (1972), holding that the congressional grant of civil jurisdiction (25 U.S.C. 233) to New York State is concurrent with that of tribal authorities.
[14] 135 F. 947 (8th Cir. 1905).
[15] Ibid. at 951–952. This taxing authority was also upheld against due process challenges in *Barta* v. *Oglala Sioux Tribe*, 259 F. 2d 553 (8th Cir. 1958).
[16] Cir. No. 74–2154 (9th Cir. Aug. 24 1976). (W.D. Wash. 1974) appeal docketed No. 74–2154 9th Cir. April 30, 1974. *Contra. Dodge* v. *Nakai* 298 F. Supp. 17 (D. Ariz. 1968) and *United States* v. *Pollman*, 364 F. Supp. 995 (D. Mont. 1973).

reservation and Congress had not limited the tribe's sovereign powers to exercise such jurisdiction.[17] Although the court limited its holding to the particular fact pattern of this case, there is nothing in the reasoning of the court that would preclude the same holding regardless of the technical status—either trust or fee simple—of the land so long as it was within reservation boundaries. Specifically, the court found that the reservation had not been diminished,[18] and hence the principles of *United States* v. *Celestine*, 25 U.S. 278(1909), that all tracts in a reservation once established remain part thereof until specifically separated therefrom by Congress were applicable.

2. INDIAN COUNTRY

Resolving the legal issue of whether tribes have the authority to exercise jurisdiction over non-Indians within their territory leaves a major question unanswered: For jurisdictional purposes, what is a tribe's territory? "Indian Country" is the phrase that has been developed historically to define the geographic area in which Federal and tribal jurisdiction resides. The statutory definition of Indian Country technically is for criminal jurisdiction purposes; however, it has been utilized by the courts in both the civil and criminal areas.[19] 18 U.S.C. Section 1151 defines "Indian Country" thusly:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country" as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The crucial part of the definition here is "all land within the limits of any Indian reservation. * * *" When most of the foundations and principles of Federal Indian law were being developed, Indian reservations were almost exclusively occupied by Indians. Few land parcels had been legally conveyed within reservations to non-Indians. Today, the picture is demographically different. Those reservations which have had the misfortune to have been subject to the allotment acts, frequently have "a crazy patchwork quilt or checkerboard" pattern of land ownership: non-Indian lands held in fee patent, individual Indian allotments held in trust, and tribal lands held in trust. Often in these situations the majority of the land ownership and population within the reservation boundaries is non-Indian. The land owned by non-Indians is also frequently the most fertile or commercially valuable land.

These patterns of land ownership are most prevalent in the Midwest area and occasionally in the West.[19a] For example, the Omaha Reservation (Nebraska) is 90 percent non-Indian owned; Devils Lake (North Dakota) is 79–80 percent non-Indian owned; Turtle Mountain (North Dakota) is 93 percent non-Indian owned; Standing Rock (North and South Dakota) is 64 percent non-Indian owned; Crow Creek (South Dakota) is 57 percent non-Indian owned; Rosebud (South Dakota) is 71 percent non-Indian owned; Sisseton (South Dakota) is 89 percent non-Indian owned; Yankton (South Dakota) is 92 percent non-Indian owned; Flathead (Montana) is 51 percent non-Indian owned; Fort Peck (Montana) is 56 percent non-Indian owned; Coeur d'Alene (Idaho) is 77 percent non-Indian owned; Nez Perce (Idaho) is 88 percent non-Indian owned; and Umatilla (Oregon) is 56 percent non-Indian owned.

The pattern is not, however, even consistent within individual States. Fort Berthold (North Dakota) is 42 percent Indian owned; Cheyenne River in South Dakota is 47 percent Indian owned; and Flandreau (South Dakota) is 70.6 percent Indian owned.

Indian reservations in the Southwest, however, contain very little non-Indian land ownership: Southern Ute (Colorado) is 99 percent Indian owned; and in Arizona and New Mexico, most of the land within the various reservations and pueblos is Indian owned, usually at a rate of 90 percent or more.

This pattern is a pattern of divergency. Indian-owned land is interspersed with non-Indian land where such ownership exists. The mere fact that land is owned by non-Indians[20] through allotment of a reservation[21] or the establishment of non-Indian communities[22] does not oust Federal-tribal jurisdiction over criminal and civil events occurring on that land.[23]

The courts have devised another test for delineating the perimeters of Indian Country, and this test requires a reservation-by-reservation analysis. Known as the Celestine doctrine, the test is that when:

> Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.

Courts, then, inquire whether a treaty, a particular allotment act, or another congressional enactment has terminated or "diminished" any portion of the established reservation. Although specifically affirmed by *Celestine* and the line of cases following it,[24] the Supreme Court recently, in a case involving an assertion of jurisdiction by South Dakota over an Indian on non-trust land, "diminished" the Lake Traverse Reservation[25] (Sisseton-Wahpeton Sioux Tribe), on the basis of its reading of an 1889 agreement between the tribe and the United States, and the subsequent congressional enactment of the agreement.[26] The Supreme Court distinguished *Decoteau* from other factual situations because it determined that the tribe intended to cede all unallotted lands to the United States for a sum certain, re-

[17] See Appellees' brief for an excellent exposition of the theory and law of tribal jurisdiction over non-Indians.

[18] Decoteau, discussed *infra*, is no tapplicable to this section, as it concerns what lands are Indian Country and not the jurisdiction of the tribe within Indian Country.

[19] See e.g., *U.S.* v. *Mazurie*, 419 U.S. 544 (1975).

[19a] The statistics in this section are from an undated internal memorandum from P. Sayad, attorney to the Associate Solicitor, Indian Affairs, Department of the Interior, entitled "Indian and Non-Indian Owned Land on Specific Reservations," and a telephone survey of the pertinent BIA agency offices. The statistics were also cross-checked against data collected by Task Force No. 7. There is often conflict between the data sources as to specific acreage; where significant conflict exists, telephone survey results were utilized. These results tend to reflect somewhat higher levels of Indian ownership than do the Department of the Interior figures.

[20] *Kennerly* v. *District Court of Montana* 400 U.S. 423 (1971).

[21] *Buster* v. *Wright*, 135 F.947 (8th Cir. Ct. 1905).

[22] *City of New Town, N. Dak.* v. *U.S.*, 454 F.2d 121 (9th Cir. 1972).

[23] The State, however, may also have concurrent jurisdiction pertaining to non-Indians in these areas.

[24] See e.g. *Matt* v. *Arnett*, 412 U.S. 481 (1973); and *Seymour* v. *Supt.*

[25] *DeCoteau* v. *The District Court* 420 U.S. 425 (1975).

[26] Act of March 3, 1891, 26 Stat. 1039.

linquishing "all" of the tribe's "claim, right, title, and interest" in the unallotted lands. This was interpreted as a clear intention of the tribe and Congress to terminate the unallotted portion of the Lake Traverse Reservation. The Court came to its conclusion, even though the litigation concerned the crucial issue of child custody where it has repeatedly recognized tribal jurisdiction and where a tribal court and justice system had been recently reinstituted. Although not explicit in the reasoning of the decision was the fact that 89 percent of the land located within the original boundaries of the reservation were now owned by non-Indians. The dissent criticized the reasoning and the result of the majority opinion:

> If this were a case where a Mason-Dixon type of line had been drawn separating the land opened for homesteading, from that retained by the Indians, it might well be argued that the reservation had been diminished; but that is not the pattern. . . .
>
> * * * * * * *
>
> The "crazy quilt" or "checkerboard" jurisdiction defeats the right of self-government guaranteed by Article 10 of the 1867 Treaty (cite omitted) and never abrogated.
>
> * * * * * * *
>
> If South Dakota has her way, and the Federal Government and the tribal government have no jurisdiction when an act takes place in homesteaded spot in the checkerboard, and South Dakota has no say over acts committed on "trust" lands. But where in fact did the jurisdictional act occur? Jurisdiction dependent on the "tract book" promised to be uncertain and hectic.[27]

"Indian Country" is therefore an ambiguous concept under Court interpretation and not dependent on the ownership of any particular tract of land. Rather, it depends on "language" in treaties, agreements and statutes of ancient vintage which opened up reservations to non-Indian settlement. These documents were generally part of the land hunger prevalent in the latter half of the 19th Century and which rarely, if ever, considered jurisdiction repercussions. They were economic real estate transactions, usually imposed upon weak and dependent Indian tribes by their trustee, who curiously was the purchaser of their property.

The question, then, of over what territory the tribe retains jurisdiction—regardless of over whom—is left in these checkerboarded areas to a case-by-case determination, and since the "facts" will differ the courts probably will reach divergent results.

3. VIEWPOINTS

(a) *Non-Indians*

Perhaps no other issue in Indian law raises the emotional response from the non-Indian community as does the actuality of or the prospect of Indian tribes exercising jurisdiction over non-Indians. The issue, however, regardless of the terminology utilized, is not a strict legal issue but often a political one. As noted previously, most of the vocal opponents of tribal jurisdiction are persons residing on or near an Indian reservation who are or may become the recipients of tribal jurisdiction.

A major argument against tribal jurisdiction couched in legal-constitutional rhetoric is that non-Indians would be deprived of their

[27] *De Coteau* v *District Court*, 420 U.S. 425, Justice Douglas.

constitutional rights as American citizens to be subject to "foreign and alien" tribal jurisdiction.

Legal arguments focusing on what actual constitutional rights are, and to whom they apply, although pertinent, would not necessarily reduce any opposition of these individuals. For the "constitutional" argument, although capable of legal presentation, is a minor part of the concept. For it is not the reality of legal rights,[27a] but the perception of what rights "should be" that permeates the discussions:

> We are specifically opposed to jurisliction over nonmembers because this country was founded on the principle of participating in a government. . . .[28]

Similar expressions, focusing on the fact that non-Indians cannot vote in tribal elections, and violations thereof are expressed by most vocal opponents of tribal jurisdiction.[29] Other points, not necessarily legalistic in nature, are also made in opposition to tribal jurisdiction over non-Indians. There is a strong feeling among some that if in fact they are *subject to tribal jurisdiction*, they have been had by a mistaken Federal Government. Ki Dewar of the Suquamish community club argues that treaties between Federal Government and the tribal governments were mistakes of an inexperienced Federal Government, and are mistakes that should not be perpetuated.[30] John Cochran, past president of Flathead Lakers, Inc., felt that Federal Government sold land to non-Indians on Flathead "under false pretenses," leading them to believe it was no longer an Indian Reservation.[31]

Going further, some indicate that Federal policy, or at least the perception of Federal policy at the local level, has caused polarization between the non-Indian community and the Indian community—that discrimination against Indians in these communities has increased to the point that the attorney for MOD—a group opposing retrocession generally and jurisdiction over non-Indians particularly—seeks a change of venue when he has an Indian client who is to be in a predominantly non-Indian community on or near the Flathead reservation.[32]

Other arguments against tribal jurisdiction focus on a perception that tribal governments either are not or cannot fairly administer justice.

> I am sure you are not aware of the farce which is "tribal court" . . . Now the non-Indians are expected to sit back and accept jurisdiction of such an inadequate set of laws.[33]

Clarence Nash, an official of the city of Omak, Wash., opposed tribal jurisdiction, because, among other things, the tribe was not ready with the machinery of government.[34]

Thomas Tobin, attorney for civil liberties for South Dakota citizens—an organization generally opposed to tribal jurisdiction—main-

[27a] Court decisions have upheld a variety of limitations on participation in Government.
[28] Marion Schultz, President of Civil Liberties for South Dakota Citizens, South Dakota Transcript at 280.
[29] See e.g., Testimony of Henry Holwevner, Corson County Real Estate Owners Assn., S. Dakota Transcript, at 209; testimony of Robt. Halferty, Todd County, S.D. rancher, South Dakota Transcript at 112; Ki Dewar, Suquamish Community Club, Northwest Transcript at 12; Les Condrad, Yakima County Commissioner, Northwest Transcript at 146–7.
[30] Northwest Transcript at 11.
[31] South Dakota Transcript at 52.
[32] Testimony of F. L. Ingraham, S. Dak. Transcript at 23–24.
[33] South Dakota Transcript at 77.
[34] Northwest Transcript, at 214.

tained it was not a question of tribal ability, but that tribal courts were inherently defective; that it was impossible to have an independent tribal judiciary "that is not hypercritical of whichever political faction in power." [35] The argument is that tribal courts are under the political control of the tribe, and can be, therefore, swayed and biased in the performance of their duties.

Robert Halferty, also a member of C.L.S.D.C., criticized the "tyranny" and "brevity" of tribal administration.[36]

Another factor of importance is the economic impact that non-Indians perceive tribal jurisdiction to have. Jack Freeman, Ziebach County Real Estate Association, opposed assertion of sovereignty over nonmembers because it would reduce the number of prospective buyers for reservation property.[37] Elizabeth Morris, Quinault Property Owners, felt that tribal jurisdiction, among other things, reduced the value of her group's holdings.

Not all non-Indians, however, felt that tribal jurisdiction was necessarily inappropriate. Larry Long, State attorney for Bennett County, South Dakota, stated:

. . . . my experience is that law enforcement personnel tend to get along very well. And they tend to have nothing short of contempt for attorneys like us who set around and argue about jurisdiction.

Question. What are your feelings about the tribe exercising jurisdiction over non-Indians within the exterior boundaries of the reservation?

Answer. Well, my reaction would be basically this. If the tribal court was constituted and operated in such a manner that there was no question in anybody's mind but what an Indian or a non-Indian would receive justice, you know, in the tribal court, it wouldn't make any difference what court a person was in.[38]

(*b*) *Indian viewpoints*

The reassertion of jurisdiction over non-Indians is a fairly recent development. Chief Judge William Roy Rhodes,[39] Gila River Reservation, who presided over several thousand Indian and non-Indian cases since his tribe reasserted such jurisdiction in 1972, explains that the tribe was faced with multiple problems concerning nonenforcement of laws against non-Indians on the reservation by other governments to the social and economic detriment of the community. Before asserting jurisdiction, for example, some non-Indian hunters would enter the reservation during quail and white-wing season, and create utter havoc, even chasing birds and firing away in residential areas. Trucks and cars would come in and cut mesquite wood—a valuable commodity—with impunity.

Although the problems differ reservation to reservation, on a practical basis, the failure or unwillingness of other governments—county, State and Federal—to perform with respect to non-Indians, is perceived by some tribes as creating a dangerous vacuum. Although the experiences are not uniform, the exercise of tribal jurisdiction has created certain unanticipated results. Where counties and other non-Indian governments have had to deal with tribal governments exercising power over their citizens, these governments are required to be more cognizant of the rights of tribal members when in their jurisdiction—reciprocity between sovereigns.

[35] South Dakota Transcript, at 77–78.
[36] *Ibid.*, at 112.
[37] Id., at 128.
[38] *Id.*, 245–246.
[39] Judge Rhodes is a member of this task force

Many tribes, whether asserting such jurisdiction or not, preface its existence as an attribute of sovereignty:

The question frequently arises as to whether our tribal police can arrest non-Indians who commit offenses on the reservation which would be punishable under tribal law if committed by tribal members. This question arises with reference to violations of the fish, game and recreation code, traffic and boating offenses, criminal actions, repossessions of personal property, removing property from the reservation, whether it be plants, minerals, gems, rocks or personal property. Desecrating or interfering with tribal graveyards, both historic and prehistoric in the non-Indian sense, and the desecration or interference with areas of the reservation having substantial religious significance to the tribe.

It is our position that every person entering the exterior boundaries of the reservation has consented to the jurisdiction of the tribe, and its courts, and the tribe has the jurisdiction because of its sovereignty to take such action as is necessary to enforce its laws.[40]

The necessity of exercising the jurisdiction was focused on by some tribes as the only way the tribes could protect their economic future:

I think it's (jurisdictional authority re maintaining resources) a bedrock. It's absolutely the basis upon which a tribe exists.[41]

There also was a strong response from tribes to the arguments used by some non-Indians to oppose tribal jurisdiction.

Norbert Hill, vice chairman of the Oneida Nation (Wisconsin) related a viewpoint frequently heard:

Well, when you go to Rome, you do as the Romans do, when you go to Milwaukee, you do as the Milwaukeens do * * * [42]

Robert Burnett, president of Rosebud Sioux Tribe, espoused this position in even stronger terms:

* * * when I go to Ohio, I am under the laws of Ohio * * * But when they non-Indians) come to South Dakota, they think they ought to have their law. Now this land was set aside for the Rosebud Sioux tribe * * * But they don't want to submit themselves to our laws because they think that they are too damn good for our law.[43]

Leonard Tomaskin, chairman of Yakima Nation Council, expressed the strong views echoed by others in Indian country, concerning presence of non-Indians:

If they don't like [on] Yakima, they can always move to Seattle * * * I didn't ask them to set up homes on my reservation.[44]

The view that non-Indians innocently came to Indian country and were victims of Federal misrepresentation was also challenged:

Generally speaking, we don't have too many jurisdictional problems, really, in reality. We have problems with people, people who have come into Indian country understanding that they are coming into Indian country, because it is cheap to live there. It's cheap to lease land. It's cheap land to be purchased.[45]

Counsel for the Suquamish Tribe questioned as a matter of law, the innocent victim thesis; indicating that any abstract of the chain of title to land held by non-Indians, would indicate Indian ownership and would, therefore, create an obligation in the buyer to determine what that meant—reservation status.

[40] Testimony of Buck Kitcheyan, chairman, San Carlos Apache Tribe, Southwest Transcript at 287–288.
[41] Testimony of Thurman Trosper, Flathead Tribal Council, Montana, at 25. Similar views concerning protection of resources were expressed by Quinault, Northwest Transcript at 411–414.
[42] Great Lakes Transcript at 38.
[43] South Dakota Transcript at 277.
[44] Northwest Transcript at 671.
[45] Robert Burnett, president, Rosebud Sioux Tribe, South Dakota Transcript at 263.

The assertion that tribal governments and courts are either functionally or inherently incapable of providing justice was also challenged.

The Gila River Community Court, as noted previously, has handled thousands of cases—Indian and non-Indians, without ever being challenged under the Indian Civil Rights Act.[46]

Mario Gonzales, the former chief judge of Rosebud Sioux, testified that he had many non-Indian cases and always leaned over backward to assure that justice prevailed.[47]

Gary Kimble, former counsel for his reservation at Fort Belknap, and currently a member of State legislature, indicated that some tribal governments and courts were unsophisticated, and needed support, but the same was true for their counterpart State courts.[48]

The view that whatever disabilities the tribal exercise of jurisdiction may suffer is not inherently different from other government, was echoed by Robert Burnett:

> [The] Court system of the tribe is as good as their * * * in fact, better * * * The rest of the system (excluding the State supreme court) is handled by people who certainly are easily influenced by political situations * * *[49]

The existence of jurisdictional power, however, does not necessarily mean its exercise. Chief Judge Owens of the Yakima Nation's court indicated that in his view jurisdiction over non-Indians concerning fishing was crucial and that he appreciated the cooperation he had received to date from the State Fisheries Department in their appearances in tribal court to testify against violators (non-Indians). He, however, did not think it was necessary to exercise jurisdiction over Toppenish, a predominantly non-Indian city within reservation boundaries.[50]

The Warm Springs Reservation indicates that while they have jurisdiction over non-Indians, they have not exercised such. This restraint is due to the excellent jurisdictional cooperation existing between the tribe and neighboring jurisdictions—State and local—the fact of jurisdiction, however, is basic to the maintenance of this relationship.[51]

Findings

One: Congress has not terminated tribal jurisdiction over non-Indians.

Two: The exercise of jurisdiction assumed by Federal Government or granted to the States is in most instances concurrent with that retained by the tribes.

Three: The issue of jurisdiction over non-Indians has generated much hostility and emotionalism in both the non-Indian community and Indian communities.

Four: The issue of jurisdiction over non-Indians is not appropriately addressed by jurisdictional legislation.

Five: The long-term solution to this political-emotional problem lies in returning to a situation where Indian reservations—containing sufficient land for development and tribal survival and growth—

[46] See Chapter V.
[47] South Dakota Transcript, at 344 et seq.
[48] Montana Transcript at 100–105.
[49] South Dakota Transcript at 265.
[50] Northwest Transcript at 664–665.
[51] For an expanded discussion of the Warm Springs situation, see chapter V, section A.

are owned and occupied almost exclusively by the individual Indian tribe.

Six: A number of tribes currently have programs to consolidate their land bases.

(*a*) These programs are meagerly funded.

(*b*) Many non-Indians have indicated a willingness to sell out and leave the reservation.

Recommendations

Congress should establish a long-term program for the re-purchase of non-Indian owned lands within reservation boundaries.

(*a*) There should be separate negotiations, under congressional charter, with each tribe and the non-Indian interests in that area to develop the components of each reacquisition plan.

(*b*) The role of the Federal Government in negotiations should be that of trustee with the duty to assure tribes the right to assess their needs and not a party of interest.

(*c*) Plans will by necessity vary, but could include:

(1) Expansion of reservation land bases.

(2) The provision of life-estate or similar devices for non-Indian interests, rather than immediate sale.

(3) Redefinition of reservation boundaries only with tribal consent.

(4) Exchange of lands where appropriate.

(5) Allocation of financial responsibility, and the provision of a variety of funding mechanisms.

(*d*) This process should not be used for any other purposes than land consolidation. It would be an unconscionable abrogation of the Nation's moral obligation to utilize this process to terminate any existing Indian rights.

e. An appropriate mechanism for such planning would be the establishment of a congressional commission authorized to institute negotiations, and report to Congress on a reservation-by-reservation basis, the negotiated plan:

(1) The Commission responsibility would be limited to facilitation and reporting to Congress on a case-by-case basis the plan achieved for each reservation.

(2) Congress should appropriate directly to tribes the necessary funds for planning and technical services.

D. Taxation

As with all analysis of the sovereign nature of tribal governments, the discussion takes its genesis from *Worcester* v. *Georgia*,[1] in which Justice Marshall referred to Indian tribes as distinct, independent, political communities which were, at once and the same time, domestic dependent nations. More recently, the U.S. Supreme Court referred to them as "unique aggregations possessing attributes of sovereignty over their members and their territory."[2] The nature and extent of those attributes, especially when in relation to local, State and Federal governments, has been a matter of increasing concern and litigation

[1] 31 U.S. (6 Pet.) 515 (1832).
[2] *United States* v. *Mazurie* 419 U.S. 544 577 (1975).