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I. HISTORY AND STRUCTURE OF TRIBAL COURTS

PART II
HISTORICAL DEVELOPMENT AND CURRENT STRUCTURE OF
TRIBAL COURTS

The tribal court systems that function on Indian reservations today are diverse and evolving institutions. The vast majority of these varying systems are attempting to discharge significant jurisdictional powers in the face of staggering operational handicaps. As detailed in Part III of this report, the courts surveyed are confronted in differing degrees with a wide range of practical burdens: inadequate staffing and salary levels; unmet training needs; political interference in judicial decision-making; lack of proper court and detention facilities; unavailability of competent legal assistance; insufficient or non-existent administrative and planning capacities; and, underlying all of the above, absence of adequate funding for judicial operations. Assessment of these obstacles facing tribal courts, as well as the formulation of remedial policies by the federal government, should commence with analysis of several factors.

Initially, this part of the report examines the historical developments that have shaped the evolution of Indian judicial systems. With only limited exceptions, tribal courts have evolved during the last century as traditional modes of tribal justice were undermined by contact with non-Indians and by deliberate policies of the federal government. During this period Congress and the federal executive branch have exerted a pervasive influence upon the jurisdiction, structure, and procedures of tribal courts. Many, if not all, of the opera-

tional handicaps now confronting these courts stem from misconceived federal policies designed either to terminate Indian justice systems or to assimilate them into the dominant legal structure. Although the prevailing Congressional goal is to foster the integrity and effectiveness of tribal courts, federal efforts to increase the operational capacities of those courts will have to be substantial in order to compensate for past policy failures.

Section B affords an overview of the legal structure of the various tribal court systems. As a result of historical influences, considerable diversity exists among these systems regarding methods of organization and modes of operation. Although only certain Pueblos in New Mexico still retain wholly customary judicial mechanisms, other tribes vary widely in the extent to which Anglo concepts and procedures have replaced traditional law. An understanding of these differences, as well as the still evolutionary nature of virtually all courts, should aid the development of federal programs and policies affecting tribal judiciaries.

Section C describes the criminal and civil jurisdiction theoretically vested in Indian tribes, and the extent to which courts included in the survey are asserting such jurisdiction. Special focus is directed toward the increasing exercise of judicial power over non-Indians. Effective assertion of that authority was deemed critical by an overwhelming percentage of the courts studied. Few tribes, however, have the resources to deal adequately with current caseloads or to expand jurisdiction without federal assistance.

Section D explores the survey data concerning the impact of the 1968 Indian Bill of Rights^{1/} upon tribal courts. That legislation made certain federal constitutional protections applicable to tribal court proceedings. It has produced pressures to "professionalize" Indian judiciaries and to revamp tribal procedural codes to accord more fully with Anglo standards. Tribes have responded to these pressures in a variety of ways. However, none has moved to pattern its judicial system entirely upon federal and state court models. Federal support is needed to assist tribal implementation of the Indian Bill of Rights without destruction of the unique characteristics of tribal courts.

A. Historical Development of Tribal Courts

The history of Indian judicial systems is marked by the vacillating policies pursued by the federal government toward Indian tribes. This section traces chronologically the major developments of each of these policies and their impact upon the administration of tribal justice.

1. 1789 to 1871: Establishment of Reservations and Deference to Tribal Models of Justice

From the formation of the American Republic until the latter part of the Nineteenth Century, the United States Government followed a policy of removing Indian tribes from their aboriginal territory and confining them upon reservations. This process of removal and confinement frequently was achieved

^{1/} 25 U.S.C. §1302 (1970).

through conclusion of federal treaties with the Indian nations. Although tribal consent was rarely voluntary,^{2/} these treaties did recognize the signatory tribes as "distinct, independent, political communities."^{3/} Even in the absence of any treaty, the mere establishment of a reservation by federal statute or executive order operated to confirm inherent tribal sovereignty. Thus, tribes were recognized to possess jurisdiction over all persons and disputes within the territory reserved for their use unless treaty or statutory provisions specifically directed otherwise.^{4/}

Until the late 1800's Congress made relatively few intrusions upon the inherent power of Indian tribes to dispense justice by traditional methods. During this period virtually all tribal societies utilized governing modes premised upon communal property concepts and administered on the basis of oral customs. Only a small number of tribes, most notably those known as the Five Civilized Tribes, ^{5/} had developed Anglo-style governments that functioned under written constitutions

^{2/} As the United States Supreme Court observed in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627 (1970):

The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arms-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent.

^{3/} *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

^{4/} See discussion in Part I, Section C infra.

^{5/} Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations.

and legal codes. Although the Five Tribes and the Seneca Nation of New York maintained separate judicial branches of government similar to Anglo models,^{6/} the vast majority of tribes did not. The primary characteristics of traditional tribal systems are summarized as follows in a task force report of the American Indian Policy Review Commission:^{7/}

Rather than the representative style typical of western governments, tribal societies were often governed by communal systems of chiefs and elders. Leadership was often earned by performance or acknowledgment, and rested upon consensus and theological grounds for exercise. Many different systems existed for resolving disputes and maintaining order.

Some tribes had warrior societies which functioned as enforcement mechanisms, other tribes utilized community pressure to enforce norms; scorn is said to have been an extremely effective method of enforcement. Imprisonment was unknown, and restitution, banishment, and death were the major retributive sanctions utilized.

Consistent with the early deference accorded customary mechanisms of tribal justice, Congress refrained from major alterations of tribal jurisdictional authority. It did act in various treaties and in the so-called "General Crimes Act" of 1817^{8/} to assert concurrent jurisdiction over crimes involving United States citizens that occurred within tribal

^{6/} See COHEN, HANDBOOK OF FEDERAL INDIAN LAW 421, 427 (Univ. of New Mexico Press 1971) (hereinafter cited as FEDERAL INDIAN LAW.)

^{7/} Report of AIPRC Task Force No. 4 on Federal, State and Tribal Jurisdiction 254 (July 1976) (hereinafter cited as "AIPRC Task Force Report"). For a discussion of the enforcement mechanisms or "police" deployed by several tribes, see Indian Law Enforcement History 11 (BIA, July 1, 1975) (hereinafter cited as "Indian Law Enforcement History").

^{8/} Act of March 3, 1817, Stat. 383, as amended, 18 U.S.C. §1152 (1970).

domains, but all offenses involving only Indians remained within the exclusive power of the tribes.

2. 1871 to 1934: Allotment of Reservations and Assimilation of Tribal Justice Systems

In the last three decades of the Nineteenth Century, two factors combined to reverse this federal policy of deference toward tribal rights of self-government. One primary influence was the insatiable desire of non-Indians to acquire tribal lands. Of equal significance was the growing conviction that Indians should be assimilated politically and culturally into the dominant society. Traditional tribal governing institutions and the communal property concepts underlying them became inconsistent with these objectives. Confined on reservations under supervision of federal agents, threatened with military reprisals, and dependent on federal rations due to depletion of game, the tribes were powerless to resist these influences.

In 1871 Congress enacted legislation terminating the era of treaty-making.^{9/} Although prior treaties remained unimpaired and Congress continued to secure Indian land cessions by negotiated "agreements" comparable to treaties, this statute symbolized the birth of a new federal-Indian policy. Thereafter, pressures increased to open reservations to non-Indian settlement and to impose a system of laws upon the tribes.

^{9/} Act of March 3, 1871, 16 Stat. 556, 25 U.S.C. §71 (1970).

Amidst these demands, federal civilian agents assigned to the various reservations began to deploy tribal members to maintain order. Designated as "Indian police," these officers enabled the agents to oust military authorities from control over the tribes.^{10/} More importantly, however, use of Indian police facilitated "[t]he curtailment of prerogatives formerly claimed by tribal chiefs,"^{11/} thereby hastening the assimilation process. The major experiment in this regard commenced in 1873 on the San Carlos Apache Reservation in the Arizona Territory. In 1878 Congress provided the first appropriation to pay small salaries to the Indian officers, and by 1881 Indian police forces existed at 49 of the 68 agencies.^{12/}

Tribal members arrested by the Indian police were tried and sentenced initially by the agents. In 1884, however, the Secretary of the Interior issued regulations for the establishment of "courts of Indian offenses" on the various reservations. These rules instructed the agents to appoint Indian judges for such courts, and they also set forth a code of offenses. Numerous tribal customs and religious practices were outlawed by this administrative code.^{13/} Suppression of these traditions by Indian police and judges was considered the most effective method of "civilizing" the tribes.

10/ AIPRC Task Force Report, supra note 7 at 255.

11/ Indian Law Enforcement History, supra note 7 at 10, quoting from Annual Report of the Commissioner of Indian Affairs, IX (1880).

12/ Indian Law Enforcement History, supra note 7 at 4, 14.

13/ Id. at 23. The 1884 Departmental code prohibited, inter alia, ritual dancing, practicing as a medicine man, and the mourning custom of distributing or destroying the property of the dead.

Congress acquiesced in this bureaucratic initiative and commenced funding the courts of Indian offenses in 1888. A federal court decision in the same year characterized these courts as "mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."^{14/} Although tribal resistance to the imposition of these judicial systems was widespread, by 1890 courts of Indian offenses were operative at two-thirds of the reservation agencies.^{15/}

Contemporaneously, Congress acted to assert federal jurisdiction over offenses previously reserved to the exclusive province of the tribes. In 1885 it passed the so-called "Major Crimes Act"^{16/} in response to a Supreme Court decision two years earlier barring federal prosecution of offenses within Indian country involving only Indians.^{17/} This legislation empowered the federal courts to try and punish Indians for commission of seven enumerated felonies within any Indian reservation.^{18/} Assertion of this authority stemmed from the prevailing conviction that traditional tribal modes of justice were incompatible with the goal of civilizing Indians. In 1886 the

^{14/} U.S. v. Clapox, 35 Fed. 575, 577 (D. Ore. 1888).

^{15/} AIPRC Task Force Report, *supra*, note 7 at 257.

^{16/} Act of March 3, 1885, 23 Stat. 362, 385, as amended,
¹⁸ U.S.C. §1153 (Supp. 1976).

^{17/} Ex parte Crow Dog, 109 U.S. 556 (1883).

^{18/} By virtue of subsequent amendments, fourteen crimes are now included within the Major Crimes Act. See Part II, Section C *infra*.

Supreme Court upheld the constitutionality of the Major Crimes Act, declaring that this extension of federal authority was justified by the "duty of protection" owed to Indians.^{19/}

The pressures to divide communally-held reservations and to assimilate the tribes culminated in passage of the 1887 General Allotment Act.^{20/} This legislation authorized the President to allot small tracts of reservation land to individual tribal members, and to negotiate with tribes for cession of surplus lands not needed for allotment. Indian allottees, who became U.S. citizens by virtue of the Act, were to abandon traditional means of livelihood for the civilized pursuits of farming and grazing. The vast portion of each reservation remaining after completion of allotments could then be opened to non-Indian settlers whose presence would enhance the civilization process. Finally, the General Allotment Act called for eventual subjection of tribal allottees to the criminal and civil jurisdiction of the various state or territorial governments.

Over the next half century the assimilation policy produced a devastating erosion of the land holdings and governmental authority of most tribes. From 1887 to 1934 the cession

^{19/} United States v. Kagama, 118 U.S. 375, 383 (1886). The court held that the federal duty to protect Indians arose "[F]rom their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised...." It should be emphasized, however, that the tribes did not request the alleged "protection" of the Major Crimes Act which was imposed upon them unilaterally by Congress.

^{20/} Act of Feb. 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. §§331 et seq. (1970).

of reservation lands and the transfer of allotments to non-Indians resulted in the loss of 90,000,000 acres.^{21/} On many reservations during this period, employees of the federal Indian Service (now BIA) assumed czar-like authority over the conduct of tribal affairs.^{22/}

The agency superintendents also exercised considerable control over judges of the courts of Indian offenses. These courts, as well as the Indian police, continued to function in place of traditional mechanisms on most reservations despite the Congressional goal of subjecting Indian allottees to state laws. In 1921 Congress passed the Snyder Act^{23/} which provided in part that the BIA could expend general appropriations for the employment of Indian police and judges. By 1926 there were a total of 70 Indian judges hired with federal funds.^{24/}

However, Congress did not enact legislation defining either the jurisdictional authority or the applicable procedures of courts of Indian offenses.^{25/} Consequently, these courts continued to operate in accordance with Interior Department regulations.^{26/} These rules limited the court's jurisdiction to Indians and to specified offenses not included within the Major Crimes Act.

^{21/} H. Rept. No. 1804, 73d Cong., 2d Sess. 6 (May 28, 1934).

^{22/} Haas, Ten Years After IRA (BIA 1947):

^{23/} Act of Nov. 2, 1921, 42 Stat. 208, 25 U.S.C. §13 (1970).

^{24/} Indian Law Enforcement History, *supra* note 7 at 45.

^{25/} Legislation to clarify the jurisdiction of these courts, and to affirm their validity, was considered but rejected by the House of Representatives in 1926. *Id.* at 47-48.

^{26/} The regulations issued by the Secretary of Interior in 1884, upon formal creation of the courts, were amended thereafter in 1892.

Consistent with an 1896 Supreme Court decision that the Federal Bill of Rights was inapplicable to Indian tribes,^{27/} the Departmental code did not contain Anglo-style procedural protections for criminal defendants. Indian judges received no systematic training in Anglo law, and proceedings often were conducted on an informal basis in the tribal language. For these reasons, as well as the extensive influence exerted by superintendents over the Indian judges, a movement grew for reform of these courts.^{28/}

This criticism of courts of Indian offenses was accompanied after 1932 by the efforts of the new federal administration to reverse the disastrous effects of the allotment era. Assimilationist policies of the preceding fifty years had failed to integrate Indians as equal members of the dominant culture. To the contrary, in the 1930's the tribal land base was still declining and many Indians were destitute even by Depression standards. The authority of tribal governing bodies and the force of traditional laws were undermined severely. In their place stood only rule by federal agents and an imposed system of hybrid courts.

^{27/} Talton v. Mayes, 163 U.S. 376 (1896). This ruling was premised upon the theory that the residual sovereignty of tribes, including power to administer justice, did not derive from the federal constitution and thus was not limited by the restraints which that document imposed upon the federal and state governments.

^{28/} John Collier, later Commissioner of Indian Affairs, was a leading exponent of the views that the courts of Indian offenses did not provide due process of law to litigants and were manipulated by federal agents. See Indian Law Enforcement History, supra note 7 at 47.

3. 1934 to 1953: Reaffirmation of Tribal Sovereignty and Creation of Tribal Courts

Responding to the corrosive consequences of the allotment period, Congress, in 1934, passed the Indian Reorganization Act (IRA).^{29/} This legislation provided for numerous reforms to reestablish the Indian land base,^{30/} authorized creation of an Indian employment preference system to replace non-Indian domination of the federal Indian service,^{31/} and enabled tribes to form federally chartered corporations for purposes of economic development.^{32/}

Section 16 of the IRA^{33/} contained provisions designed to restore the status and authority of tribal governing bodies. Pursuant to this measure, tribes who voted to accept IRA^{34/} were given the option of adopting written constitutions to reorganize their governing structures. The Secretary of the Interior was empowered to call special tribal elections for the purpose of ratifying such documents. Each constitution adopted in this manner became effective when approved by the Secretary

^{29/} Act of June 18, 1934, 48 Stat. 984, as amended, 25 U.S.C. §§461 et seq. (1970).

^{30/} See, e.g., 25 U.S.C. §461 (prohibition upon further allotments); §§464, 465 (consolidation of remaining lands in Indian ownership and purchase of additional lands with federal funds); §467 (creation of new reservations).

^{31/} 25 U.S.C. §472 (1970).

^{32/} 25 U.S.C. §477 (1970).

^{33/} 25 U.S.C. §476 (1970).

^{34/} Under 25 U.S.C. §478, a referendum vote was conducted on each reservation to determine whether the Indians thereon wished to come within the provisions of the Act.

who was also given the discretion to approve any subsequent constitutional amendments.

Section 16 was silent, however, concerning the procedures for drafting constitutions and the governing structures to be established thereby. It specified only that each constitution must contain certain tribal prerogatives usurped during the allotment era,^{35/} as well as "all powers vested in any Indian tribe or tribal council by existing law." Some tribes had adopted written organic documents prior to 1934.^{36/} However, for most of these tribes, as well as for the majority of Indians functioning without such documents, constitutional government was a novel experience. This inexperience, combined with a lack of access to necessary legal assistance, left few tribes in a position to develop their own constitutions.

Consequently, the Interior Department prepared a model constitution following passage of IRA. The boilerplate provisions of this model were adopted with few alterations by virtually all tribes which voted to organize under that Act.

^{35/} These prerogatives of IRA constitutional tribes included employment of legal counsel subject to Secretarial approval; veto power over any federal disposition of tribal lands or assets; authority to negotiate with federal, state, and local governments; and the right to be advised by the Secretary concerning federal budgetary items or projects benefitting the tribe.

^{36/} As of December 1934, prior to adoption of any IRA constitutions, the Interior Department had on file a total of 67 tribal "constitutions or documents in the nature of constitutions." FEDERAL INDIAN LAW, supra, note 6, at 129, n. 59. There is no indication that the mere existence of these pre-IRA constitutions affected any substantial reduction in the influence exerted over tribal councils and courts of Indian offenses by Indian Service officials.

Thus, although IRA was designed to restore residual powers of tribal sovereignty, the extent and exercise of those powers were determined largely by the Interior Department, not the tribes.

With limited exceptions, these standardized constitutions vested primary governing authority in a council (or committee) elected by the tribal membership. The powers to be exercised by the council were set forth in accordance with a lengthy opinion issued by the Solicitor of the Interior Department in October, 1934.^{37/} This ruling expanded upon the IRA §16 directive that each constitution should vest in the affected tribe "all powers ...[recognized] under existing law". Among the powers enumerated by the Solicitor was the authority of each tribe to devise mechanisms for the administration of justice. Such authority was held to be an inherent attribute of tribal sovereignty and capable of limitation only by express treaty or statutory language. Neither the General Allotment Act and statutes patterned thereon, nor congressional appropriations for courts of Indian offenses, were deemed to constitute such limitations.^{38/}

Accordingly, most standardized constitutions provided that the tribal council could by ordinance establish a

^{37/} Op. Sol. M. 27781, 55 I.D. 14 (Oct. 25, 1934).

^{38/} Express federal limitations upon the inherent tribal power to administer justice were exceedingly rare prior to the termination era of the 1950's, discussed infra. See, e.g., the Curtis Act of June 28, 1898, 30 Stat. 495, §28 (abolishing the courts of the Five Civilized Tribes).

court system and adopt judicial codes, thus subordinating tribal judiciaries to council authority. The constitutions did not spell out either the structure or procedures of potential court systems, however, and due to the erosion of traditional law and judicial mechanisms, the only viable models available to most tribes were the courts of Indian offenses and the Secretary's limited regulations.^{39/}

In 1935 the Interior Department issued a revised set of rules governing operations of the courts of Indian offenses and Indian police.^{40/} These regulations applied to those courts functioning on the reservations of IRA-organized tribes "until a law and order code has been adopted by the tribe in accordance with its constitution and bylaws and has become effective".^{41/} Upon adoption of a tribal code, the provisions governing Indian judges^{42/} and Indian police^{43/} continued in effect as long as they were paid from federal funds "or until

^{39/}

See notes 25 to 27 supra and accompanying text.

^{40/}

These regulations, with minor alterations not relevant herein, have remained unchanged and are now contained in 25 CFR §§11.1 et seq. (1976). Since publication of these rules in the Code of Federal Regulations in 1935, courts of Indian offenses have also been labelled as "CFR" courts.

^{41/}

25 CFR §11.1(d).

^{42/}

The regulations covered judicial qualifications, appointment (by the Commissioner of Indian Affairs subject to two-thirds vote of the tribal council), tenure (four years), and removal by the Commissioner of Indian Affairs for cause upon council recommendation. See 25 CFR §§ 11.3, 11.4.

^{43/}

25 CFR §§11.301 to 11.306.

otherwise directed".^{44/}

Following issuance of these regulations, the councils of many IRA constitutional tribes established courts and adopted judicial ("law and order") codes. Virtually all of these "tribal" codes, however, were copied verbatim or patterned to a considerable extent upon the new Departmental rules. Since many tribes also continued to receive federal funding for their Indian judges, the judicial appointment and removal provisions of these rules were incorporated into tribal codes. Thus, although the tribal courts established by these codes were legally distinct from courts of Indian offenses,^{45/} in terms of structure and procedures the two systems were practically identical.^{46/}

^{44/}

25 CFR §11.1(d).

^{45/}

Tribal courts as a matter of law were created pursuant to the residual sovereignty of tribes, *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d (8th Cir. 1956). Courts of Indian Offenses, on the other hand, were "educational and disciplinary instrumentalities" of the federal government, *U.S. v. Clapox*, supra, note 14, whose legal bases were founded, in the view of the Interior Department, " . . . principally on the statutes placing supervision of the Indians in the Secretary of the Interior coupled with the long line of appropriation acts. . . for the pay of Indian judges and Indian police to maintain order on Indian reservations." Op. Sol., April 27, 1939.

^{46/}

As discussed in Section B of this Part, infra, the practical operations of these two systems remain similar today in several respects. For this reason, as well as the ambiguity in the Departmental regulations, see 25 CFR §11.1(d), it is difficult now to categorize some Indian judiciaries as either tribal courts or courts of Indian offenses.

Even those tribes opting not to adopt an IRA constitution often used the 1935 regulations as a basis for law and order codes. Still other tribes, whether organized under that Act ^{47/} or independent thereof, ^{48/} elected not to adopt tribal codes or to establish tribal courts. Thus, pre-existing courts of Indian offenses continued to function on those reservations. By 1935, very few tribes ^{49/} had customary judicial mechanisms which had not been replaced by courts of Indian offenses or tribal courts patterned thereon.

In implementing tribal organization after 1934 and developing a model code for the new tribal courts, the Interior Department exerted a pervasive influence upon the development of Indian judiciaries. Of critical impact were the administrative limitations imposed upon the scope of tribal jurisdictional powers. In accordance with the 1934 Solicitor's opinion ^{50/} enumerating those powers, tribes were recognized to possess only limited jurisdiction over the conduct of non-Indians within reservation boundaries.

^{47/}

The Hopi Tribe of Arizona adopted an IRA constitution in 1936, but the pre-IRA Hopi Court of Indian Offenses continued to function until 1972 when the tribe adopted its own code and court system.

^{48/}

The Navajo Nation elected not to organize under IRA, but a court of Indian offenses established prior to 1934 functioned on the Navajo Reservation until creation of a tribal judiciary in 1960.

^{49/}

As discussed in Section B of this Part, *infra*, several Pueblos still maintain traditional justice systems premised upon unwritten customs.

^{50/}

See note 37, supra.

Thus, IRA constitutions, as well as non-IRA documents approved by the Secretary,^{51/} frequently restricted the criminal jurisdiction of tribal courts to offenses by tribal members or other federally-recognized Indians. A similar limitation was set forth in the 1935 regulations governing courts of Indian offenses,^{52/} and in tribal codes approved by the Secretary. Under tribal constitutions, the only remedy against non-Indian lawbreakers was the authority of the council to enact ordinances excluding them from the reservation. However, exercise of this power usually was subjected to review by Interior Department officials.

The 1934 Solicitor's opinion did recognize the tribal powers to license and to tax non-Indian commercial activities on-reservation. However, Secretarial review authority over the exercise of such powers by tribal councils was inserted in both IRA and non-IRA constitutions. These documents also limited the civil jurisdiction of some tribal courts to Indians,^{53/} and tribal codes based thereon barred judicial authority over civil disputes involving non-Indian defendants unless the latter consented to jurisdiction.

^{51/}

Section 16 of the IRA authorized the Secretary to approve only constitutions adopted under that provision. The Secretary, however, relied upon 25 U.S.C. §2 (1970) as authority to exercise an approval power over non-IRA constitutions.

^{52/}

See 25 CFR §11.2(c) (1976).

^{53/}

See 25 CFR §11.22 (1976).

The 1935 Departmental regulations also imposed limitations upon the type of crimes that could be tried before courts of Indian offenses as well as the sentencing authority of those courts. In accord with analysis contained in the 1934 Solicitor's opinion, it was held that Congress had removed tribal power to punish Indians for offenses included in the Major Crimes Act.^{54/} Thus, the CFR regulations set forth a code of tribal offenses that excluded the felonies covered by that Act.^{55/} In addition, those regulations set forth maximum terms of imprisonment that could be imposed upon conviction for each offense, ranging from ten days to six months. These offense and sentencing limitations were inserted in tribally-adopted codes which became effective only upon approval by the Interior Department.^{56/}

The foregoing restrictions upon the criminal and civil jurisdiction of tribal courts generally reflected the practice in courts of Indian offenses prior to 1934. As a matter of

^{54/}

By 1935, the Major Crimes Act has been twice amended to extend to ten offenses committed by Indians within any Indian reservation: murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, robbery, incest, and assault with a dangerous weapon. See Federal Indian Handbook, supra note 6 at 147.

^{55/}

See 25 CFR §§11.38 et seq. (1976).

^{56/}

See 25 CFR §11.1(d) and (e).

law, however, such restraints were suspect.^{57/}

Although tribes acquiesced in these limitations in adopting constitutions and codes after passage of IRA, this was due primarily to the influence exercised by the Interior Department in drafting and approving such documents. In addition, the diminished status of tribal councils and the press of more critical priorities, such as land acquisition and economic development needs, necessarily reduced tribal capacities to focus on jurisdictional issues. It would take nearly four decades, and survival of a congressional effort to terminate their unique legal status, before Indian tribes could begin to erase jurisdictional limitations imposed during the early years of IRA.^{58/}

^{57/}

As discussed in Part II, Section C infra, federal courts recently have affirmed tribal court criminal jurisdiction over non-Indians, and the authority of tribes to punish Indians committing Major Crimes Act offenses remains an open question. The six months' maximum sentencing limitation imposed in 1935 upon Indian courts was not based upon any statutory authorization. Indeed, in 1926 Congress had rejected proposed legislation that would have mandated such a limitation, see note 25 supra, and it was not until passage of the 1968 Indian Civil Rights Act, discussed infra, that this restraint was given a statutory basis.

^{58/}

The vast majority of tribes are now exercising, or desire to exercise, jurisdiction over non-Indians, and some tribes are asserting authority over conduct included within the Major Crimes Act. See Part II, Section C infra. Expansion of jurisdiction by tribes has created critical needs for legal assistance in a variety of areas, including revision of outdated constitutions and codes adopted during the IRA period. See Part III, Section C infra.

4. 1953 to present: From Termination to Self-Determination

Despite the reaffirmation of tribal sovereignty signalled by the 1934 Indian Reorganization Act, soon thereafter the pendulum began to swing back toward integration and assimilation of Indians into the American mainstream. Congressional attempts to terminate Indian tribes occurred with increasing frequency. In addition, the theory that tribes should be placed under state jurisdiction to aid in their assimilation began to receive increasing institutional support.

In 1953, Congress passed Public Law 280^{59/} which attempted a comprehensive resolution of the question of state jurisdiction over Indians. That Act mandated the transfer of civil and criminal jurisdiction over reservation Indians to the state in five states. Other states were given the option of assuming such jurisdiction. Although Public Law 280 did not represent a wholesale abandonment of the tribes to the states,^{60/} it was clearly an instrument of federal policy of termination and assimilation.

Not all tribes were affected by passage of Public Law 280, but even those which ostensibly remained untouched were threatened by what the legislation portended. Thus, it is not surprising that most tribes, sensing the potential for imminent extinction, expended their energies in attempting

^{59/} Act of August 15, 1953, ch. 505, 67 Stat. 588-590 (now codified as 18 U.S.C. §1360 and other scattered sections in 18 and 28 U.S.C.).

^{60/} For a thorough discussion of this Act, see Goldberg, "Public Law 280: The Limits of State Jurisdiction over Reservation Indians," 22 U.C.L.A. L. Rev. 535 (1975).

to defeat federal policy rather than in planning for the eventual development of their governments or court systems.

Recognizing the degree to which Public Law 280 was incompatible with Indian self-determination, tribes and Indian organizations objected vociferously to its application. Criticism was also levied by the states, which were expected to assume varying degrees of jurisdiction over reservation Indians without federal financial help. As a result of these objections, the Act was later amended in 1968 to add a tribal consent requirement and to authorize states to retrocede jurisdiction to the federal government.^{61/}

Just as tribes had more pressing concerns than tribal court development, so did federal officials who no doubt thought it inconsistent to foster the development of tribal courts as independent institutions when eventual tribal termination was, if not a certainty, at least the express policy of the federal government. Thus, the 1950's were a time of little or no code reform, failure to train tribal court personnel, and substantial lack of concern for development of court systems and facilities. Only recently has training become available, and have significant federal funds been allocated for court improvement and code reform.^{62/}

^{61/}

25 U.S.C. §§1321-26 (1970). These amendments were not totally satisfactory to Indians because they did not permit tribal initiation of retrocession in states which had assumed jurisdiction prior to 1968.

^{62/}

The Hopi Tribe, for example, has recently received funds from LEAA expressly for the purpose of hiring legal assistance for code revision. See Appendix A.

Congressional interest in tribal courts was revived in 1961 when Senator Sam Ervin convened a Senate subcommittee to consider the constitutional rights of the American Indian. In his opening remarks to the subcommittee, Senator Ervin expressed the concern that Indian citizens were being treated arbitrarily by their courts and tribal governing bodies. The product of his subcommittee's deliberation was the passage, seven years later, of the Indian Civil Rights Act^{63/} which, with few exceptions, subjected Indian tribes to the same limitations as those which are imposed on the federal government by the United States Constitution.

Also in 1968, then-President Lyndon Baines Johnson proposed,

. . . [a] policy of maximum choice for the American Indian; a policy expressed in programs of self-help, self-development and self-determination. ^{64/}

The 1968 Indian Civil Rights Act which the President signed later that year might have allowed for the self-determination of which he spoke, had it, like the I.R.A., allowed Indian communities to vote to have the Act apply when they felt ready to accept its standards. Because it was imposed on the tribes without their consent, however, it represented an intrusion into the internal tribal settlement of disputes. Further, although the legislative history is voluminous and subject to varying interpretations, the language of the Act closely traces that found in the Bill of Rights and the Fourteenth Amendment,

^{63/} 25 U.S.C. §§1301 et seq. (1970).

^{64/} President's Address to Congress, March 6, 1968, 114 CONG. REC. 5394, 5395 (1968).

producing a fear on the part of Indian groups that the legislation will eventually be interpreted to impose non-Indian legal standards and governmental policy upon tribal governments.^{65/} As discussed later in this report, application of the 1968 Indian Civil Rights Act has placed substantial burdens on tribal courts and has significantly increased the magnitude of tribal court needs. Thus, although interest in tribal courts was revived in the 1960's, the outcome of this concern was primarily the application of stringent standards rather than development of a comprehensive program for tribal court improvement.

The theme of Indian self-determination was further expounded by President Nixon. Consistent with that policy Congress enacted the Indian Financing Act^{66/} in 1974. The next year the Indian Self-Determination and Education Assistance Act,^{67/} designed to involve tribes in the administration of federal services, became law. Indian self-determination and the strengthening of tribal self-government remains the current federal Indian policy.^{68/}

^{65/} This apprehension is not without basis in fact. See, e.g., *Martinez v. Santa Clara Pueblo*, No. 75-1615 (10th Cir., August 16, 1976).

^{66/} 25 U.S.C. § 1415 et seq.

^{67/} Public Law 93-638 (January 4, 1975), 25 U.S.C. §450 et seq.

^{68/} See *Bryan v. Itasca Co.*, No. 75-5027, slip op. at n. 14 (U.S. Sup. Ct., June 14, 1975); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975), cert. denied, 45 LW 3459, 3463 (Jan. 11, 1977) (No. 75-1674).

Despite these federal goals, Indian tribes remain subject to inconsistent federal requirements. On the one hand, they are encouraged to accept in good faith a course of government action with Indian self-determination as its foundation. On the other hand, the 1968 Indian Civil Rights Act implies to many Indians that self-determination is acceptable only to the extent that tribes develop sophisticated, anglicized tribal court systems. In addition, the view that tribal jurisdiction is limited has not disappeared from federal policy.^{69/}

Several attempts have been made to support tribal courts in improvement efforts. For example, in 1969, following passage of the Indian Civil Rights Act, both LEAA and the BIA increased their support of tribal courts. The Indian Financing Act of 1974 and the 1975 Indian Self-Determination Act also permitted some funding for tribal courts. However, it is the perception of a large majority of tribal court judges that such efforts, although well-meaning, have been woefully inadequate. Many judges are attempting to improve their court systems with minimal available resources. However, to expect immediate development, in the face of increasingly exacting federal standards, without massive support from the federal government pursuant to its trust obligations is to make a mockery of the hope for truly viable judicial bodies.

^{69/}

See, e.g., Part II, Section C, note 12, *infra*. for OMB policy. In addition, the Solicitor's Office in the Department of Interior, having withdrawn a previous opinion denying tribal jurisdiction over non-Indians, has failed for three years to issue a new opinion. See Manual of Indian Law D-4, D-5 (AILTP, 1976).

B. Legal Structure of Tribal Courts

Indian judicial systems are commonly classified today into three categories based upon their mode of organization and methods of operation. These categories are designated as tribal courts, traditional (or custom) courts, and courts of Indian offenses (also labelled as CFR courts). Although the distinguishing features of tribal and traditional courts are clearly delimited, several questions noted below arise in any attempt to define precisely the characteristics of courts of Indian offenses. This section first examines the generic distinctions among these three types of court systems. Thereafter, it summarizes the survey data collected on the legal structure of courts included in our sample.

The largest number of tribal systems are those known as "tribal courts". They are established pursuant to the inherent power of tribes to devise mechanisms for the administration of justice.^{1/} Authority to implement this sovereign prerogative is usually set forth in tribal constitutions adopted either under the 1934 Indian Reorganization Act (IRA)^{2/} or independently of that Act.^{3/} However, the power to create judicial systems does not require the existence of any written organic document, and

^{1/} See *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (9th Cir. 1956); COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 145-149 (Univ. of N.M. Press 1971).

^{2/} 25 U.S.C. §476 (1970).

^{3/} The majority of tribes that have "tribal courts" are organized under IRA constitutions. The authority of non-IRA constitutional tribes to erect such courts is confirmed in *Op. Sol. M-36783* (1969) (involving the Yankton Sioux Tribe of South Dakota).

some tribes that function without constitutions have organized "tribal courts". However, a central characteristic common to all tribal courts is the use of written legal codes.

Most tribal constitutions provide generally that the tribal council or other governing body shall be empowered to establish a court system and adopt judicial codes.^{4/} In a few instances, these organic documents specify the procedures for creation of courts, the jurisdiction they may exercise, and the methods for selection and removal of judges.^{5/} The organization and jurisdiction of most tribal courts, however, are detailed in the judicial codes or ordinances adopted by the various tribal governing bodies.

Whether established by constitution, code or ordinance, tribal courts are subordinate in authority to the tribal councils. Thus, as a general rule these courts are not empowered to review the validity of council actions or enactments although they may be called upon to render advisory opinions.^{6/} The judges of these courts may either be elected by the tribal membership or appointed by the tribal council. When operative appellate systems

^{4/} A tribal constitution need not contain express language authorizing creation of judicial forums. Such authority may be inferred from constitutional provisions that delegate to the tribal governing body the power to safeguard the "general welfare" of tribal members or to regulate specific activities such as hunting and fishing within the reservation. See Op. Sol., M-36821 (involving the Winnebago Tribe of Nebraska).

^{5/} See, e.g., the Constitution for the Pueblo of Isleta, Article IX, §§1-5 (1970).

^{6/} See Id., Article IX, §5, which declares that the Isleta Pueblo Trial Court "shall determine the constitutionality of enactments of the [Isleta Pueblo] Council submitted to the court for review."

exist, power to review tribal court decisions may be vested either in the tribal council or in an appellate court composed of tribal judges.

The second category of tribal systems, known as "traditional courts", is composed of those Pueblo tribes in New Mexico that still maintain customary judicial procedures. These Pueblo courts, like tribal courts, derive their authority from the inherent tribal power to administer justice. However, this authority is not implemented by any written constitutions or legal codes. Rather, it is exercised entirely in accordance with longstanding oral customs.

Although characterized as "courts", the institutions developed by these traditional Pueblos bear little resemblance to the Anglo models adopted in part by the tribal courts and courts of Indian offenses. Judicial functions are entrusted primarily to the Governor, or chief executive officer of the Pueblo, and his staff. The Pueblo Council, composed of ex-Governors, usually acts in conjunction with tribal religious leaders to appoint a new Governor annually. The Council in some instances acts as the initial hearing forum, and it is available but rarely utilized as an appellate body to review judicial rulings made by the Governor.

The third group of tribal judicial systems is comprised of those courts which are established pursuant to provisions of the Code of Federal Regulations.^{7/} The regulations set out

^{7/} 25 CFR §11.1 ff.

the structure of these so-called courts of Indian offenses at some length; however, questionnaire responses indicate that the regulations contain ambiguities which have made it difficult for courts in transition to know at what point they cease to be defined as CFR courts.

As mentioned previously,^{8/} Section 11.1(d) indicates that the federal regulations apply until a tribe has adopted a law and order code in accordance with its own constitution. Certain sections of the regulations apply even after tribal adoption of a code, for as long as the Indian judges are paid from federal funds, "or until otherwise directed." Thus, it is not clear whether courts which have adopted codes but are still served by judges paid by the BIA are considered CFR courts.

Whether a court is defined as a CFR court or not, the regulations seem to indicate that for as long as a tribal judge's salary is being provided by federal agencies, the federal government and the tribal council will determine which persons shall serve as judges. Section 11.3 of the regulations requires that when judges are funded with federal appropriations, the Commissioner of Indian Affairs shall appoint the judge, subject to concurrence by two-thirds of the tribal council. Interestingly, however, while judges at 33 reservations are being paid in whole or in part by the BIA, only fifteen courts reported federal involvement in the selection of judges, and only 19 described themselves as operating under

^{8/} See text at Part II, Section A, note 41, supra.

the Code of Federal Regulations. Moreover, the courts which reported federal involvement and those which reported operation under CFR were substantially, although not totally, different. Thus, clarification of the requirements will be important in eliminating current confusion.^{9/}

Many courts which do not operate pursuant to the Code of Federal Regulations nevertheless function under rules similar to those set out in the Code. For example, the appellate structures provided for the Code are seen in many non-CFR courts.^{10/} Similarly, many non-CFR tribes have provisions relating to judges' selection and removal which resemble those promulgated in the Code.^{11/} For example, council's role in selection of judges is not limited to courts of Indian offenses. Such similarities should not be surprising, however. Federal regulations have not been changed significantly since 1935, and as was explained above^{12/} those post-1934 federal provisions were often incorporated by tribal governments as they began to establish their own constitutions and codes. The legal structure of many tribal courts today is much the same as it was soon after passage of the IRA in 1934.

^{9/} See 25 CFR §11, which has not been modified significantly since 1935.

^{10/} 25 CFR 11.6 provides for appellate review by judges. Similar appellate systems are provided for at §11.6C (applicable to the Crow Tribe) and 11.6CA (applicable to Coeur d'Alene Tribe).

^{11/} 25 CFR §§11.3, 11.4.

^{12/} See, text at Part II, note 39, supra.

From 1934 to the present, tribal councils have remained central to tribal legal structures, and have continued to affect the administration of justice on many reservations. With the exception of the nine traditional Pueblos where the councils are appointed by the caciques, all tribes now elect council representatives. The effect of council participation in the selection of judges and in tribal court improvement is detailed elsewhere;^{13/} however it is important to note that judges are appointed in 64 tribal systems, and are elected by the tribal membership at large on only 19 reservations. Tribal councils are also involved in the appellate processes of a significant number of tribes. Twenty-seven of 67 tribes which described their appellate systems reported that the tribal council heard appeals from tribal court judgements.^{14/} Significantly, 15 tribes reported having no appellate system, and even where such systems do exist, often they are not utilized.

Today, an overwhelming number of tribes--84 percent--have written constitutions. Of the 16 tribes which do not, nine are traditional Pueblos. All but 13 of the tribes for which information was available have law and order codes; nineteen use the Code of Federal Regulations, and 59 utilize written codes other than CFR. It is important to note, however, that

^{13/} See, Part III, Sections A and D, infra.

^{14/} In some instances, council participation in the appellate process may raise due process considerations under the 1968 Indian Bill of Rights. See, Part II, Section D, infra.

the fact that only a very few tribes have revised their constitutions since they were first drafted is not attributable to tribal satisfaction with the status quo. More than two-thirds of the courts which provided information about their constitutions indicated that revisions were now desired or were in process. Only nine tribes indicated that they had not perceived the need for code revision or drafting in recent years.^{15/}

Despite the fact that legal structures have remained relatively static during the past forty years, the responses of tribal judges indicated a strong desire for change. To the extent that technical assistance is made available to tribes in the near future, significant code and constitutional reform will occur. The relationships between tribal councils and tribal courts, already in transition, also seem likely to evolve as tribal courts develop in importance.

^{15/} The need for law revision is discussed in detail at Part III, Section C, infra. It is worth noting that while 52 courts stated they had no separate juvenile court systems, a number of tribes specifically mentioned the need for juvenile code drafting or revision.

II. RECENT CASE LAW ON TRIBAL JUSTICE

RECENT CASE LAW ON TRIBAL JUSTICE

The discussion below will present a summary and analysis of the more important case law affecting the administration of tribal justice systems. First, the three most significant Supreme Court decisions in this area -- namely, United States v. Wheeler, 435 U.S. 313 (1978), Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) -- will be described and analyzed. Second, several other recent court decisions having an impact on the administration of tribal justice systems will be summarized briefly.

A. The Wheeler, Martinez, and Oliphant Cases.

The Supreme Court held in the Wheeler case that an Indian defendant may be tried in tribal and federal court for crimes arising from the same incident without violating the Double Jeopardy Clause of the United States Constitution. In its opinion the Court specifically reaffirmed the principle that tribal powers derive from the inherent sovereignty of Indian tribes rather than from a delegation of authority by Congress. Thus, the Court was able to rely in reaching its holding on the established principle that a prosecution by one sovereign does not bar a subsequent prosecution by a separate sovereign for crimes arising from the same criminal act.

In the Martinez case, the Court held that the Indian Civil Rights Act is not an implied waiver of tribal sovereign immunity, nor does it create a private cause of action

for declaratory or injunctive relief against tribal officers. With respect to tribal sovereignty, the Court stated that, "[i]n the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit." 436 U.S. at 59. In addressing the question whether the Act creates a private cause of action against tribal officials, the Court noted that authorization of such actions would be a direct interference with tribal sovereignty as well as an interference with the Congressional policy of tribal self-determination.

The Court was sympathetic to the fact that ". . . a central purpose of ICRA and in particular of Title I was to 'secure for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal government.'" 436 U.S. at 61, citing S. Rep. No. 841, 90th Cong., 1st Sess. 5-6 (1969). The Court determined, however, that the legislative history, as well as other titles of the Act, more strongly supported a conclusion that Congress intended to resolve the foregoing conflict in favor of the goal of protecting tribal self-government. 436 U.S. at 64.

In the Oliphant case, the Supreme Court held that Indian tribes have no inherent authority to try and punish non-Indians for violations of tribal criminal law. The

Court observed that a review of various treaties, statutes, and federal policy demonstrated that the United States always had presumed an absence of tribal criminal jurisdiction over non-Indians. The Court determined further that, even assuming the foregoing presumption did not exist, as a result of their dependent status, Indian tribes necessarily are prohibited from trying and punishing non-Indians for violations of tribal law. The Court reasoned as follows:

By submitting to the overriding sovereignty of the United States Indian Tribes therefore necessarily give up their power to try non-Indian citizens of the United States, except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian Tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." HR Rep No. 474, 23d Cong, 1st Sess, 18 (1834). It should be no less obvious today, even though present-day Indian Tribal Courts embody dramatic advances over their historical antecedents. [435 U.S. at 210.]

B. An Analysis of the Wheeler, Martinez, and Oliphant Decisions.

The importance of the foregoing cases to the administration of tribal justice is readily apparent. With respect to criminal jurisdiction over Indians, under the Wheeler case, tribes clearly retain authority to try and punish violations of tribal law involving Indian defendants. Moreover, the Martinez case limits the civil remedies available to Indians for violations of the rights granted under

the Indian Civil Rights Act to those afforded to them by tribal courts -- with the exception of a petition for a writ of habeas corpus in federal court.

The Court, in Martinez, however, did offer an explicit warning with respect to the exercise of tribal civil authority. In declaring that the ICRA did not create an implied private cause of action against tribal officials the Court specifically noted that "[t]ribal forums are available to vindicate rights created by the ICRA, and §1302 has the substantial and intended effect of changing the law which these forums are obliged to apply." (Emphasis added.) 436 U.S. at 65.

The Court also noted that "Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of §1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions." 436 U.S. at 72. Thus, the Court offered a clear road map for Congress to follow if tribes refuse to meet the intent of the ICRA.

The Court's opinion in the Oliphant case also is clear in holding that tribes do not have criminal authority over the trial and punishment of non-Indians unless such power is specifically reserved to a tribe by its treaty or Congress chooses to confer such authority on tribes in the future.

A question unanswered by the Oliphant case is whether tribes possess civil jurisdiction over non-Indians. While

the Oliphant opinion, of course, is limited to the question of tribal criminal jurisdiction, the Court does comment that the Indian Civil Rights Act would apply to non-Indians only ". . . if and where they come under a tribe's criminal or civil jurisdiction by either treaty provision or Act of Congress." (Emphasis added.) 435 U.S. at 195, n.6. Thus, the Court raises at least the inference that the reasoning it used in Oliphant might be applied with respect to civil jurisdiction as well.

Furthermore, the Oliphant opinion promulgates a legal theory which readily could be applied to strike down the tribes' right to regulate non-Indian civil activity within the boundaries of their reservations. Specifically, the Court need only declare, as it did with respect to criminal jurisdiction, that, as a result of their dependent status, tribes necessarily lost authority to regulate non-Indian civil activity.

Despite the foregoing rather troublesome inferences which may be drawn from the Court's opinion in Oliphant, Indian tribes should assume, based on present authority, that they retain civil authority over non-Indians. See Buster v. Wright, 135 Fed. 947 (8th Cir. 1905). Indeed, in a number of civil contexts, courts have upheld tribal authority over non-Indians.

OTHER RECENT CASES

The following are brief summaries of several other re-

cent cases which are important to the administration of tribal justice.

A. Criminal Jurisdiction.

1. Quechan Tribe v. Rowe, 531 F.2d 408 (9th Cir. 1976). State officers may not interfere with tribal law enforcement officers enforcing federal or tribal regulations on the reservation. However, where a tribal constitution specifically provides for criminal jurisdiction over members of the tribe and fails to address enforcement against non-members, the tribe is precluded from exercising such jurisdiction over non-members on the reservation.

2. United States v. State of Montana, 457 F. Supp. 599 (D. Mont. 1978). The state has exclusive jurisdiction to prosecute for violations of state game laws occurring on fee lands within the boundaries of the Crow reservation. The state has jurisdiction concurrent with the United States to prosecute for violations of state game laws occurring on trust or restricted land. Absent specific authorization from Congress, a tribe has authority only to refuse permission to non-Indians to use trust or restricted land for hunting and fishing purposes.

3. State of Montana ex rel. Old Elk v. District Court, 552 P.2d 1394 (Mont. 1976), appeal dismissed, 429 U.S. 1030 (1977). Where an Indian is suspected of committing a crime off the reservation, a state official may, in the absence of established tribal extradition procedures, enter

the reservation and arrest the Indian suspect without interfering with the tribal right of self-government.

4. United States v. Burns, No. 74-3022 (9th Cir., Dec. 22, 1975). Federal courts have jurisdiction over violations of general federal law by Indians in Indian country unless a treaty right exempts the Indian from the law in question or confers exclusive jurisdiction on the tribe.

B. Civil Jurisdiction.

1. Fisher v. District Court of the Sixteenth Judicial District of Montana, 424 U.S. 382 (1976) (per curiam). Adoption proceedings in which all parties are members of the Northern Cheyenne Tribe and residents of the reservation are subject to exclusive tribal jurisdiction. A state court's assumption of jurisdiction over the matter is invalid, as it interferes with tribal self-government.

2. Enriquez v. Superior Court of the State of Arizona, No. CA-CIV 2330 (Ariz. Ct. App., Jan. 14, 1977). The state courts of Arizona do not have jurisdiction to entertain a tort action brought by non-tribal members against reservation Indians for damages resulting from a motor vehicle accident which occurred on a state highway within reservation boundaries. Jurisdiction over this matter is properly with the tribal court.

3. Stops v. Little Horn State Bank, 555 P.2d 211 (Mont. 1976), cert. denied, 431 U.S. 924 (1977). A state court which has jurisdiction to render a judgment requiring

members of an Indian tribe to repay a loan from an off-reservation bank may enforce that judgment through writs of execution on wages and property of the tribal members located within the reservation.

C. Indian Civil Rights Act.

1. Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976).

A Lummi Indian who had been convicted of driving without a license on the Lummi reservation brought suit for habeas corpus relief alleging that he had been denied the right to have appointed counsel. The Ninth Circuit denied the petition, holding that, although individuals are guaranteed the right to appointed counsel in criminal actions brought by the United States and individual states, tribal members in tribal courts do not have a commensurate right under either the federal Constitution, the Due Process Clause of the Indian Bill of Rights, or the Lummi Constitution.

2. Wounded Knee v. Andera, 416 F. Supp. 1236 (D. S.D. 1976). In this case, an Indian of the Crow Creek Sioux Tribe filed a petition for a writ of habeas corpus under the Indian Civil Rights Act after the tribe had failed to act on her request for permission to appeal a conviction for disorderly conduct. The court held that the defendant had sufficiently fulfilled the "exhaustion" requirement before filing the action in federal court, and found that an Indian tribal court in which the judge was forced to serve simultaneously as tribal prosecutor was inherently unfair and

violated the Due Process Clause of the Indian Civil Rights Act.

3. Big Eagle v. Andera, 418 F. Supp. 126 (D. S.D. 1976). Two Indians who had been convicted in tribal court of disorderly conduct sought a writ of habeas corpus. A South Dakota District Court granted relief, holding that the tribal disorderly conduct ordinance, which was unconstitutionally vague and overly broad on its face, had not been construed by the tribal courts in a sufficiently narrow and clarifying manner and, therefore, violated the Indian Bill of Rights.

4. Schantz v. White Lightning, 468 F. Supp. 1070 (D. N.D. 1973), aff'd, 502 F.2d 67 (8th Cir. 1974). Federal courts lack subject matter jurisdiction over a tort action arising on an Indian reservation involving non-Indian plaintiffs and an Indian defendant, despite the fact that plaintiffs were left without a forum. The tribe had not consented to state court jurisdiction under Public Law 280, and tribal courts were open to non-Indian plaintiffs only if they had been residents of or doing business on the reservation for at least one year. Although not addressing the question, the court intimated that the tribal court's limitations on jurisdiction over non-Indians might constitute a violation of due process and equal protection under the Indian Civil Rights Act.

III. FEDERAL STATUTES AND LEGISLATIVE PROPOSALS
AFFECTING TRIBAL JUSTICE

PART III

FEDERAL STATUTES AND LEGISLATIVE PROPOSALS AFFECTING TRIBAL JUSTICE

FEDERAL LAWS RELEVANT TO JURISDICTION IN INDIAN COUNTRY

There are four major groups of federal laws relevant to jurisdiction in Indian Country. These are: the general laws governing crimes in Indian Country; P.L. 83-280 which place many Indian tribes under state jurisdiction; the Indian Civil Rights Act of 1968 which imposed statutory restraints on actions of tribal governments; and, the Indian Child Welfare Act of 1978 which confirms and expands existing tribal jurisdiction in child welfare matters. A short description of each of these groups follows.

A. General Federal Laws Governing Crimes in Indian Country

The general statutes governing jurisdiction over crimes committed in Indian Country appear in title 18 U.S.C., chapter 53, sections 1151 through 1165. The first three sections are the most important. Section 1151 defines Indian Country as including all lands within the boundaries of a reservation, including fee patents and rights of way; all dependent Indian communities; and all Indian allotments outside a reservation which continue to be held in trust status. Federal jurisdiction extends over this territory.

Section 1152 extends to Indian Country the general criminal laws of the United States which are applicable within places subject to the sole and exclusive jurisdiction of

the United States. The best example of such a place is a military reservation. The provisions of Section 1152 do not apply to offenses by one Indian against the person or property of another Indian or to an Indian who has been punished by the local laws of a tribe. In addition, the Supreme Court has held that the provisions of this section do not apply to offenses by non-Indians against non-Indians. With the exception of those crimes listed in Section 1153, jurisdiction over offenses by Indians which do not harm the person or property of a non-Indian are subject to the exclusive jurisdiction of the tribe.

Section 1153 lists fourteen major crimes such as murder, rape, and arson which, when committed by an Indian within Indian Country, are subject to federal jurisdiction. These provisions apply to Indians whether the victim is Indian or non-Indian. It had not yet been demonstrated whether a tribe may exercise jurisdiction over these offenses concurrent with that of the United States. It is clear that a tribal prosecution for a lesser offense will not bar a later federal prosecution for the major offense.

There are two additional sections in title 18 of the United States Code which have an important bearing on federal criminal law in Indian Country. Federal laws applicable in a federal enclave or reservation are not as complete as state law. For this reason, sections 7 and 13 of title 18 provide for the adoption of state law as federal law in those

cases where no specific federal law covers the offense. Thus, the state law is "assimilated" and becomes federal law. These provisions, cumulatively known as the Assimilative Crimes Act, apply in Indian Country through Section 1152. They do not apply to offenses by Indians against Indians or offenses by non-Indians against non-Indians.

B. Public Law 83-280

On August 15, 1953, Congress enacted Public Law 83-280 which unilaterally place tribes in six states (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) under the jurisdiction of the states in which their reservations were situated and authorized all other states to assume such jurisdiction with respect to civil and criminal matters. Provisions of this act are codified in title 18 U.S.C. 1162 for criminal matters and title 28 U.S.C. 1360 for civil matters. In 1968 this Act was amended to provide that no state could assume either civil or criminal jurisdiction over an Indian tribe unless the tribe manifested its consent through a tribal referendum. This provision is codified in title 25 U.S.C. 1321-1326.

For many years it was believed that P.L. 83-280 precluded the exercise of any policy authority or jurisdiction by the tribes. However, last year a district court in the state of Washington held that tribes enjoyed jurisdiction concurrent with that of the state. In addition, it has been held that P.L. 83-280 is not a general authorization to states to impose

all of their civil laws; rather, its purpose was to provide a forum in which to resolve issues affecting Indians.

C. Indian Civil Rights Act of 1968

The Indian Civil Rights Act of 1968 (ICRA) is codified in title 25 U.S.C. 1301-1341. It is divided into four titles. One of those titles discussed above amended P.L. 83-280. The only other title relevant to jurisdiction in Indian Country is title 1, found at 25 U.S.C. 1301-1303. Section 1302 contains ten provisions which parallel the restrictions imposed on the federal government in the first ten amendments to the United States Constitution. These restrictions on the government serve to protect the individual rights of persons affected by government action. Two of the most important provisions of the ICRA require that a tribe accord all people affected by their actions due process of law and equal protection of the laws. Section 1303 provides that the writ of habeas corpus shall be available to any person to test in federal court the legality of his detention by order of an Indian tribe. Habeas corpus is normally thought of in the context of criminal cases, but it can also have application to civil matters such as mental health commitments and child custody matters.

Despite the limit under section 1303 to federal judicial reviews by habeas corpus, federal courts assumed a broad range of jurisdiction over cases in Indian Country under the theory that the rights established in Section 1302 necessarily implied federal jurisdiction to enforce those rights. Many cases in-

volved election disputes and internal operations of tribal governments. In 1978, the Supreme Court, however, over-turned these federal court decisions and held that the rights established by section 1302 were a matter for enforcement by tribal forums only.

D. Indian Child Welfare Act of 1978

In 1978, Congress enacted the Indian Child Welfare Act. This Act is codified at 25 U.S.C. 1901. Title 1 of this Act has numerous jurisdictional features of importance to Indian tribes. The jurisdictional provisions apply only to children who are members of or entitled to membership in a federally recognized Indian tribe. The exclusive jurisdiction of the tribe over such children when they are located within the boundaries of a reservation is reaffirmed. In addition, title 1 provides that when a state initiates action off the reservation which could lead to temporary removal of a child from its Indian parent or custodian or, worse, termination of parental rights, the Indian tribe of which the child is a member or is eligible for membership (1) must be given notice of such proceeding; (2) has a right to intervene in such state court proceedings; and, (3) may request that the proceeding be transferred to the court of the Indian child's tribe. The Act requires that full faith and credit be given to the public acts of the tribe, including its laws and the acts of its courts. In addition, the Act provides that tribes presently under state jurisdiction may

petition the Secretary of the Interior for retrocession of jurisdiction, thus restoring to the tribes exclusive jurisdiction over child custody matters.

There has not been adequate time for judicial construction of this Act. All evidence indicates that it is working well. However, constitutional challenges have been filed in courts of the states of Oklahoma and South Dakota and possibly elsewhere.

BILLS IN CONGRESS

During this session of Congress there have been a number of bills introduced which will have an impact on tribal justice if they are enacted. In addition, the Senate Select Committee on Indian Affairs is working on the development of legislation to expand the role of federal magistrates serving Indian Country. A short description of certain bills introduced in Congress follows.

A. Bills Introduced in the Senate

1. S.1722

One major bill affecting jurisdiction in Indian Country which is before the present Congress is S.1722, a bill to reform the Criminal Code of the United States. The majority of the federal criminal laws are now found in title 18 of the United States Code. However, there are many other crimes defined in other titles of the code which are often inconsistent with each other. S.1722 is an effort to bring all federal

criminal laws into title 18 and to reform the laws to achieve consistency and to conform to current concepts in criminal jurisprudence.

Legislation to implement reform of the criminal laws has been introduced in the last three congresses: S.1 in the 94th Congress; S.1437 in the 95th; and S.1722 in the present Congress. S.1437 was listed as "backlash" legislation by the Longest Walk delegation in 1978. This opposition was premised on the mistaken notion that some provisions in S.1 which would have adversely affected tribal jurisdiction were still in the bill. In fact, the deficiencies of S.1 were corrected in S.1437. The provisions in S.1722 regarding tribal jurisdiction are identical to those in S.1437 in the last Congress. With one major modification, these bills would simply carry forward existing federal criminal laws as they appear in title 18.

The modification in question appears in Section 161(i) of S.1722. This provision would allow Indian tribes which are now under state jurisdiction to petition the Secretary of the Interior to retrocede jurisdiction to the United States, thus restoring the tribes to the full range of jurisdiction and immunities enjoyed by non-PL 280 tribes. This provision for retrocession was first developed in S.1 and has been carried forward in each of the two succeeding bills. This provision has been opposed by the attorney general of the state of Washington, but is supported by the governor of that state. S.1722 will probably be voted on in the Senate early in the next term of Congress.

On the House side, no bill has yet been introduced. The House Subcommittee on Criminal Justice did consider S.1437 in the last Congress. However, few, if any, of the subcommittee members agreed with S.1437 and they began drafting their own bill. There is now a working draft available for public comment. The provisions affecting jurisdiction in Indian Country differ from the provisions of S.1722 in significant respects. There is a clear need for monitoring the House bill as it develops. Inquiries concerning this bill should be addressed to the House Subcommittee on Criminal Justice, Room 2137 Rayburn House Office Building, Washington, D.C. 20515. The Subcommittee proposes to introduce this bill early in the next session of Congress.

2. S.1181 - The Tribal-State Compact Act

This bill is intended to serve as a federal enabling statute authorizing Indian tribes and states and their political subdivisions to enter into compacts and agreements between themselves on matters relating to: (1) the enforcement or application of civil, criminal, and regulatory laws of each within their respective jurisdictions; (2) allocation or determination of governmental responsibility over specified subject matters or specified geographical areas, or both; and, (3) agreements or compacts which provide for the transfer of jurisdiction of individual cases from tribal courts to state courts or state courts to tribal courts in accordance with procedures established by the laws of the tribes and the states.

States and tribes already have authority to enter into agreements on many issues. However, provisions in federal law appear to limit this authority in other areas touching upon jurisdiction. The purpose of this bill is to eliminate these restrictions. This bill is presently before the Senate Select Committee on Indian Affairs.

B. Bills Introduced in the House

1. H.R. 3434 - Amendments to Social Security Act

H.R. 3434 was passed by the House and referred to the Senate Finance Committee for consideration. On the Senate side, amendments were adopted in committee which will authorize the Secretary of Health, Education and Welfare to enter into agreements with Indian tribes for direct funding of Title IV-B money. These funds are used to provide support for children who are in foster care settings. This amendment was requested by the Department of Health, Education and Welfare. This bill is expected to go to conference early in the next session of Congress. In the event the Senate version of H.R.3434 is adopted and enacted, this bill provides a much needed source of money for support of children placed in foster care settings under tribal court orders.

2. Bills Affecting Indian Fishing Rights

There have been a number of bills introduced in the House in this session of Congress which could affect the rights of Indian tribes to govern fishing within their reservations or at usual and accustomed fishing sites outside reservation

boundaries. Two such bills are H.J.RES. 246 which could affect Indian fishing rights throughout the nation, and H.R. 6144 introduced on December 14, 1979 which would amend the Black Bass Act as it applies to steelhead trout. These bills are before the House Committee on Interior and Insular Affairs and the Merchant Marines and Fisheries Committee.

C. Legislative Proposals

1. Federal Magistrates Bill

The Senate Select Committee on Indian Affairs is working on the development of legislation to expand the role of federal magistrates serving Indian country. Concept papers have been developed and contact made with staff of the Judicial Conference for the U.S. courts. Legislation has not yet been drafted. Among the concepts which have been considered by committee staff is a more aggressive role for the federal government in enforcement of authority which it already has under federal criminal laws; expanded federal jurisdiction over non-Indians for victimless offenses which threaten or jeopardize Indian interests within an Indian reservation; concepts for assimilation of tribal law and order to provide a limited response to the Oliphant decision; and, provision of support funds to enhance the capacity of tribal courts in the administration of justice in Indian Country. The Federal Magistrates Act of 1979 authorizes magistrates to conduct jury trials in civil matters and over misdemeanor criminal offenses. This new authority

could correct a problem which exists in some parts of Indian Country, namely the lack of representation on jury panels in federal courts. The Committee will be seeking tribal input of ideas in the near future.

IV. CIVIL RIGHTS PROTECTION IN INDIAN COUNTRY

CIVIL RIGHTS PROTECTION IN INDIAN COUNTRY

prepared by Gil Hall*

On May 15, 1978 the United States Supreme Court issued a judicial decision of extreme significance to Indians. Entitled *Santa Clara Pueblo v. Martinez*, its central focus was the power of federal courts to intervene in disputes between Indian tribal governments and individuals on reservations.

Until that decision, federal courts had relied upon the Indian Civil Rights Act of 1968 as authority to review and, in some instances, overrule the actions of tribal governing bodies and courts in some 80 cases. The threshold finding by the courts in those cases was two fold: (1) The Indian Civil Rights Act (ICRA) created certain rights which individuals could enforce against Indian tribal governments and courts; and (2) the ICRA authorized individuals to use federal courts to sue Indian tribes for violations of their civil rights.

The subject matter of the earlier ICRA cases varied considerably. It included disputes over the type of and manner of conducting tribal elections; reapportionment of voting districts on Indian reservations; tribal government employee rights; land use regulations and condemnation procedures; criminal and civil proceedings in tribal courts; tribal membership and voting; tribal police activities; conduct of tribal council members and council meetings; and standards for enforcing due process of law and equal protection of the laws in the tribal setting. The extent and breadth of charges brought against tribal governments by individuals relying upon the ICRA caused one tribal leader to complain that the ICRA was imposed on tribes "without any measures taken to prepare them to assume the additional burdens required." The same leader pointed out that in 1973 his tribe had 11 law suits pending against it on the basis that the tribal government was not complying with the procedural requirements of the ICRA. These suits cost the tribe an average of \$10,000 each, money which could have been used to "hire more knowledgeable attorneys to work with us, and prosecutors to be trained within our own tribal group." That Indian leader, like most, had no quarrel with the principles and ideals embodied in the ICRA. Rather, he was complaining about the burden to the tribe of having to argue frequently over those principles in federal courts. He felt that tribal institutions were better suited to interpreting and enforcing the ICRA than federal courts.

In the *Martinez* case the Supreme Court agreed basically with what many Indians had been saying. The Court said that Congress never intended that the ICRA give federal courts blanket authority to get involved in internal tribal disputes. It only gave them the power to review tribal actions in criminal cases.

The *Martinez* decision did not mean, however, that the ICRA may be ignored by tribes. It is a federal law which creates certain civil rights for

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individuals in their relationships with tribal governments and it is still binding on tribes. The difference now is that tribal institutions have the main responsibility for enforcing the civil rights guaranteed in the ICRA. Thus, when faced with allegations that violations of these civil rights have occurred such as an individual Indian complaining that his property was taken by the tribe illegally or a non-Indian claiming that he was harassed by a tribal official, the tribal court must consider whether the protections of the ICRA have been violated.

The ICRA was passed in 1968 by Congress because most of the civil rights protections contained in the U.S. Constitution do not apply in Indian country. An Indian denied his right to vote in state elections could file a suit in federal or state court to challenge the denial. If he was denied his right to vote in a tribal election, he had no legal recourse, unless the tribal constitution gave it to him. Likewise if he were locked in a tribal jail without a hearing he often had no court in which he could object. So Congress adopted the ICRA to ensure that certain basic individual rights were available on reservations as they were off reservations. The guarantee of rights was intended to guard against unreasonable or unfair actions by tribal governments. Under the ICRA tribes were forbidden to:

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

While a brief comparison of the rights contained in the ICRA and those in the U.S. Bill of Rights will show many similarities, there are considerable differences. Most of these differences were intentionally made by Congress to accommodate the unique status of Indian tribes. For example, the Bill of Rights prohibits the federal government from legislating the "establishment of religion" while the ICRA merely prohibits tribes from interfering with the "free exercise of religion." The difference in language allows for the mixture of religion and government prevalent in the Pueblos in New Mexico and Arizona. Even

language in the ICRA which is identical to that of the Constitution does not necessarily have to be interpreted in the same way. The Constitution requires that federal and state governments extend "equal protection of the laws" and "due process of the law" to all persons. The ICRA applies the same language to tribal governments, but it seems clear that the standards are not as strict for tribes as they are for Anglo governments. Tribes have much more flexibility in defining those terms in ways which are consistent with their own cultural characteristics.

In other ways the ICRA places higher standards on tribes than does the Bill of Rights on Anglo governments. The Bill of Rights guarantees the right to a trial by jury. The Supreme Court has interpreted this to apply only to cases involving a "serious crime." Petty or minor offenses may still be tried by a federal or state judge with no right of jury trial. Under the ICRA, however, there is an almost absolute guarantee of a jury trial on request. So, in tribal courts, even a minor traffic offense must be tried by a jury if there is a possibility that the defendant could get a jail sentence and if he requests a jury trial.

Regardless of the specific interpretations of the ICRA, the important point to remember is that the guarantees of the Act apply to all aspects of tribal government. The Supreme Court decision in the *Martinez* case does not change that. Tribal institutions have not only the obligation to interpret and apply tribal law but they also have a major responsibility in enforcing the substantive guarantees contained in the ICRA. If they do not accept this responsibility, the Supreme Court warned in *Martinez* that Congress can always amend the ICRA to authorize law suits in federal court for violations of the Act, or worse, amend the Act to further expand federal influence in internal tribal matters. There is already some support in Congress for taking such actions. It is up to tribal governments to prevent Congressional action by demonstrating that it is unwarranted because basic civil rights can be guaranteed in Indian country without the intervention of the federal government.

V. INDIAN CHILD WELFARE ACT OF 1978

THE INDIAN CHILD WELFARE ACT OF 1978: "A RE-AFFIRMATION OF THE ROLE OF TRIBES"

by Alan R. Parker*

Introduction

Three significant legislative proposals which provide enhanced protection and support for unique tribal rights were successfully advanced by Indian advocates in the 95th Congress: the *Indian Child Welfare Act of 1978* (Public Law 95-608, 25 U.S.C. § 1901 et seq.); the *American Indian Religious Freedom Act* (Public Law 95-341, 42 U.S.C. § 1996); and the *Indian Education Amendments (Title XI) to the Elementary and Secondary Education Act* (Public Law 95-541, 20 U.S.C. § 2701).

The American Indian Religious Freedom Act is intended to protect the rights of Indian, Native Alaskan and Native Hawaiian people to exercise traditional religious practices and customs. In the process of implementing the law, a federal Inter-Agency Task Force report was released in August 1979, which identifies a comprehensive series of policy and procedural changes adopted or under consideration by participating federal agencies. These initiatives are designed to correct abuses or infringements on the exercise of such practices or customs on the part of a variety of federal agencies identified in the legislative record of the Act.

The objective of the Indian Education Amendments to the Elementary and Secondary Education Act is to strengthen Indian community control over elementary and secondary education programs serving Indian students. The Act also establishes mechanisms for the development and implementation of tribal educational policies based on distinctive cultural values and practices.

The Indian Child Welfare Act was passed in response to congressional concern that, "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions"; and that, "the states, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (Congressional findings, Indian Child Welfare Act, section 2, 25 U.S.C. § 1901).

The major objectives of the Act are to: (1) keep Indian families intact whenever possible; (2) defer to tribal judgments on matters concerning custody of tribal children; and (3) place Indian children who must be removed

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from their biological parents or Indian homes with a member of their own extended family, families who are members of the same tribe, or an Indian foster home or institution. The Act is intended to accomplish these objectives by clarifying and expanding each tribal government's jurisdiction over child custody proceedings involving tribal members and establishing minimum federal evidentiary standards applicable to state court proceedings on petitions for involuntary removal of Indian children from their natural families or petitions to terminate parental rights. The Act also requires state courts to follow, in the absence of good cause, a specific order of preferences in the foster care or adoptive placement of Indian children.

This legal trilogy produced by the 95th Congress is representative of a new direction in the federal government's policy toward Indian people. At the heart of this policy is long overdue recognition of the role of the tribe and related cultural concerns which, in reality, constitute the foundation of tribal societies. By placing the Indian Child Welfare Act in this broader context, one can more readily appreciate its significance as one part of a government policy whose overall purpose is to provide Indian people with the legal tools necessary to secure their unique rights. This approach contrasts sharply with governmental programs of the not too distant past which were designed to bring about the dissolution of all Indian tribes as distinct, self-governing communities, along with the eventual assimilation of Indian people into the general population. This termination-assimilation approach was supported by the public as a means of bringing "civilization and education" to the tribes, but the result of this policy was the transfer of lands and resource rights from Indian to non-Indian ownership and, literally, generations of hardship. Fortunately, the public's opinion and perception of what is reasonable and fair has changed dramatically during the past several generations. An increased public understanding, tolerance and support for minority rights and the assertion of ethnic pride and identity has slowly brought about a reversal of past government policies toward Indian tribes. The presently prevailing approach symbolized by the expression "Indian self-determination," is founded on a recognition of the role of the tribe as the key to the distinct status of Indian people under federal law.

The tribe stands as the touchstone of Indian identity and, for the individual Indian, the link to the tribe is the family. While federal law recognizes the tribe as a political entity, a quasi-sovereign government with which the federal government has official relations, the tribe is also simply a composite of families and clans. In this dual sense, membership in a tribe is a source of political or citizenship rights which the federal government has specifically recognized in numerous contests. The federal courts have determined that government treatment of Indian people on this basis does not constitute a suspect racial classification under the United States Constitution, although, in actuality, membership is determined almost exclusively on the basis of family and bloodlines. In a sense, this paradox underlying the dual role of the tribe reflects the unique status of Indian people who co-exist in both tribal societies and the larger American society.

Perhaps because there is no counterpart to the Indians' tribal status in

either federal law or the American experience, a good deal of confusion and misunderstanding continues to surround the Indian Child Welfare Act. The Act interjects into a sensitive area of domestic relations law such relatively foreign concepts as the trust relationship, tribal sovereignty and tribal membership. Juvenile courts and social service practitioners are being required under federal law to take into account tribal and extended family interests in proceedings which traditionally have involved only the state's interests in relation to children and their immediate families. Even in those areas of the country where the Indian population is concentrated and state courts have some familiarity with Indian law, the Act authorizes an unprecedented role for tribes in proceedings involving Indian children. The rights of tribal intervention in such proceedings, the authority to transfer cases to tribal courts, the extension of full faith and credit to tribal law and the accession to tribal preferences in placements are unprecedented extensions of the tribal interest beyond the territorial boundaries of the reservation which have not been readily understood in all quarters. Nevertheless, the emphasis which Congress placed on the dual role of the Indian tribe and family, as well as the reasons for this policy, are clearly stated in the language of the Act.

For example, in the statement of congressional findings which precedes the operative provisions of the statute it is acknowledged that: "Congress, through statutes, treaties and the general course of dealings with Indian tribes, has assumed the responsibility for the protection and *preservation of Indian tribes* and their resources." (Emphasis added.) The statement of findings continues by briefly identifying the problems in Indian child welfare (*i.e.*, the alarmingly high percentage of Indian families broken up and Indian children placed in non-Indian foster homes and institutions) and a primary source of such problems (*i.e.*, the failure of state courts and social service personnel to "recognize the essential tribal relations of Indian people"). Although stated in very general terms, these findings serve as the justification for Congress' intent not only to "recognize the essential tribal relations of Indian people," particularly as related to child custody matters, but also to translate that recognition into specific legal tools or rights through which the Indian tribes could themselves protect these relations.

Finally, by way of introduction, it should be pointed out that the Indian Child Welfare Act has been consistently and strongly supported, both prior to and subsequent to its enactment, by tribal representatives and national Indian organizations. There continues to be a mixed reaction to some of the Act's provisions on the part of state judges and social service practitioners primarily because application of the sometimes complex jurisdictional rules has been regarded as vexatious; moreover, those provisions which add procedural and evidentiary burdens to involuntary child removal or termination of parental right petitions have generated hostility. Such hostility is most often expressed by those who see the Act as counteracting positive changes in child welfare practices designed to protect children and to make the child's best interest the dominating concern in a nuclear family context. While these considerations are discussed in more detail, *infra*, it is significant to note that critics and supporters of the Act have recognized that there is often an inherent tension

between competing interests in child custody proceedings.

The Indian Child Welfare Act is intended to correct what Congress perceived as a lack of balance between the interests of the state, the child, the tribe and the Indian family. Whether the objectives of the Act will be realized as a practical matter will depend largely on the skill, sensitivity and understanding of those who take part in individual Indian child custody proceedings. Through analyzing the Act, its legislative history, and federal, state and tribal developments since enactment, as well as preliminary litigation based on the Act, it is hoped that this article will be useful to all parties in Indian child custody proceedings.

Summary of Major Provisions of the Act

In summary form, the major provisions of the Act include:

1. Providing for exclusive Indian tribal jurisdiction over child welfare proceedings involving Indian children who reside or are domiciled on Indian reservations (which are not otherwise subject to state jurisdiction by existing federal law) and authorizing the transfer of proceedings involving Indian children not domiciled or residing on reservations from state to tribal courts. (§ 101(a)) and (b).)
2. Establishing a right of intervention in state court foster care and termination of parental rights proceedings on the part of an Indian child's tribe or Indian custodian. (§ 101(c).)
3. Requiring that full faith and credit be accorded by federal and state courts to tribal laws, records and judicial proceedings applicable to Indian child custody proceedings. (§ 101(d).)
4. Requiring that notice be provided to the parent or Indian custodian and tribe or, in lieu thereof, to the Secretary of Interior in any involuntary proceeding in a state court when there is actual or constructive notice that an Indian child is involved. (§ 102(a).)
5. Providing for a right to court appointed counsel for indigent parents in any proceedings involving child removal, placement or termination of parental rights. (§ 102(b).)
6. Establishing minimum federal evidentiary standards and procedures for state court proceedings involving the involuntary removal of Indian children from their homes or terminating parental rights. (§ 102(c) (d) (e) and (f).)
7. Establishing standards governing voluntary foster care or adoptive placements, and relinquishments or terminations of parental rights (§ 103.)
8. Establishing placement preferences and standards governing foster care, preadoptive and adoptive placements of Indian children. (§§ 105 and 106.)
9. Providing for a system of record keeping on the part of states placing Indian children, and authorizing, in the case of adoptive placements, access to such records by Indian children when they reach the age of 18 years, for the

purpose of determining tribal affiliation and related rights. (§§ 105 (e), 107 and 301.)

10. Authorizing the Secretary of the Interior to award grants to Indian tribes and organizations for the purposes of establishing and operating Indian child and family service programs and preparing and implementing child welfare codes. (§ 201(a).)

11. Authorizing the use of Interior Department funds as non-federal matching shares in connection with HEW administered Social Security Act funds and providing that licensing or approval of foster homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a state for purposes of qualifying for assistance under federally assisted programs. (§ 201(b).)

12. Authorizing the Secretary of Interior to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs. (§ 202.)

Analysis of Title I

Title I of the Act contains those substantive provisions of the law which most directly affect the rights of parties involved in Indian Child Welfare Act proceedings. Section 101 is intended to clarify and define which forum has jurisdiction over proceedings involving Indian children. Subsection (101(a) provides that an Indian tribe shall have exclusive jurisdiction over child custody proceedings where the Indian child is residing or domiciled on that tribe's reservation, unless federal law has otherwise vested such jurisdiction in the state. To define the scope of Section 101(a), it is necessary to refer to the Act's definitions of Indian tribe, Indian child and reservation. The term "Indian tribe" is defined in subsection 4(8) as "any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of Interior] because of the status as Indians, including any Alaska Native Village. . . ." Subsection 4(10) provides that "'reservation' means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the U.S. against alienation." Subsection 4(4) defines Indian child as "any unmarried person who is under the age of 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. . . ."

Those readers familiar with federal Indian law will recognize that section 101(a), when read with relevant definitional sections of the Act, only codifies prevailing law regarding tribal jurisdiction over Indian child custody matters. For the benefit of readers not already acquainted with this jurisdictional picture, the following discussions is intended to briefly summarize background information relevant to the Act's jurisdictional provisions. The Act applies to 289 Indian tribal governments currently recognized by the federal government as exercising varying degrees of

governmental power over 268 reservations comprising over 51 million acres of land. In addition, approximately 400 Native villages in Alaska are authorized to assert certain tribal rights under the Act.

As a general matter, federal law provides that Indian tribes constitute general purpose governments with inherent exclusive jurisdiction over all criminal and civil matters arising on the reservation. Such exclusive tribal jurisdiction is only limited by federal laws in which there is evidence of an express congressional intent to limit, restrict or affect the governmental powers of Indian tribes. A consequence of this legal theory of inherent tribal jurisdiction is that state governments have only that jurisdiction over Indian tribes and their members which has been expressly conferred, authorized or recognized by federal law. However, state jurisdiction over non-Indians within reservation lands is recognized to the extent that it does not interfere with the rights of tribal self-government or essential tribal relations. State jurisdiction over Indians when they are outside reservation boundaries is only limited or affected when preempted by federal law. Federal law protects individual Indians and tribal interests outside the reservation in many different contexts and, specifically, in the area of domestic relations. For example, tribal interests and jurisdiction over child custody matters involving reservation residents must be recognized by the state even when the state's jurisdiction is otherwise invoked by one of the parties. *Fisher v. District Court*, 424 U.S. 382 (1976). Of course, as we shall see, these jurisdictional principles have been affected significantly by the Indian Child Welfare Act.

These general principles of federal, state and tribal jurisdiction over Indian reservations were altered by a series of federal statutes expressly conferring and authorizing state jurisdiction over a number of Indian tribes. The furthest reaching of those statutes was enacted in 1953 and is commonly known as Public Law 280. Public Law 83-280, 18 U.S.C. § 1162, 28 U.S.C. § 1362. Public Law 280 expressly conferred civil and criminal jurisdiction over Indians and Indian territory upon six states (Alaska, California, Nebraska, Wisconsin, Minnesota, except for the Red Lake Reservation, and Oregon, except for the Warm Springs Reservation), and authorized any other state to assume such jurisdiction at such time and in such manner as it desired. Pursuant to this authority, the states of Washington, Idaho and Nevada assumed partial subject matter jurisdiction, and Montana assumed only criminal jurisdiction over one reservation, the Flathead Reservation.

In 1968, the law was amended to authorize state retrocession of jurisdiction and to condition future extensions of state jurisdiction on tribal consent. Some states have acted to retrocede, and the resulting mixture of subject matter and territorial jurisdiction as between tribes and states can only be determined accurately on a state by state basis.

With respect to those Indian tribes presently subject to state jurisdiction and outside the scope of section 101(a), the Act provides, in section 108, authority for them to reassume jurisdiction over Indian child custody proceedings by submitting a petition to the Secretary of Interior. The petition process is intended to allow for some flexibility whereby such tribes can opt and negotiate with the Interior Department for a reassumption of exclusive

jurisdiction over the entire reservation area or over limited community or geographic areas only, or of referral jurisdiction only over cases originating in the state courts and subject to the transfer provisions of section 101(b). Recent case law also suggests that Indian tribes have retained the right to exercise concurrent jurisdiction notwithstanding such federal statutes as Public Law 83-280. It is still too early to determine whether section 103 will be rendered moot by developments in case law, but, in the interim, the petition and reassumption process should serve the purpose of providing regularity in state-tribal relationships in the area of child welfare. Even if the legal theory of concurrent jurisdiction prevails, the authority to reassume exclusive jurisdiction as provided for in section 108 offers the advantage to tribes of achieving some certainty with respect to the jurisdiction picture.

In summary, it is important to keep in mind the fact that the exclusive tribal jurisdiction provision of section 101(a) is limited, not only by prior federal authorizations of state jurisdiction, but also by the "federally recognized tribe and reservation" definition. Indian children who are members of tribes that are not so recognized are not subject to section 101 tribal jurisdiction nor do the other provisions of title I apply to such individuals. According to the 1977 report of the American Indian Policy Review Commission, there may be as many as 120,000 Indian people in the United States who are members of either non-federally recognized Indian tribes or tribes subject to federal statutes terminating their federal relationships. The justification for the Act, *i.e.*, the need for sensitivity to culturally related considerations, for enhancing the role of the tribe and the extended family, etc., would no doubt apply with equal force to this population in most instances.

Although this distinction may be characterized as an artificial legalism in the sense that federal recognition has nothing to do with whether an individual is biologically, culturally, ethnically or socially "Indian," its effect as a limit on federal action is undeniably real. Briefly stated, the theory of federal recognition is premised on the existence of an official government-to-government relationship between an Indian tribe and the United States. That the existence of such a relationship, or its official status, may be largely a matter of historical happenstance does not lessen the real effect of recognition in terms of federally cognizable tribal rights and individual member rights derived therefrom. As the legislative record for the Act demonstrates, Congress was convinced that it could not extend the federal rights provided for in the Act to either members of non-federally recognized tribes nor to descendants of members of federally recognized tribes who are themselves not actually eligible for official tribal membership status. Subsection 4(4) (definition of "Indian child" for purposes of the Act's coverage) is the operative provision limiting the scope of the Act to members of federally recognized tribes or to those children eligible for membership. During committee hearings on the bill, it was argued that legislation going beyond this class of actual or eligible members would be subject to constitutional challenge on essentially a reverse-discrimination theory.

Legislative Background

The Indian Child Welfare Act is based on extensive testimony during the 95th Congress presented before the United States Senate Select Committee on Indian Affairs, and the Committee on Interior and Insular Affairs of the United States House of Representatives. In all, more than 70 witnesses appeared before both committees and testimony was received from three executive branch departments, 20 states, 22 non-Indian private organizations, 35 Indian organizations, and 38 tribes. The bill, S. 1214, was completely rewritten twice in the Senate and twice again in the House after the Senate had passed it.

In addition to investigative studies and research conducted by the respective Senate and House Committees during the 95th Congress, oversight hearings on the subject of foster care and adoptive placements of Indian children were conducted in 1974 by the Indian Affairs Subcommittee, Senate Interior Committee, and in 1975 and 1976 by the American Indian Policy Review Commission. Much of this preliminary research was in turn, stimulated by studies and surveys sponsored by the Association of American Indian Affairs (AAIA), a New York based private organization. The AAIA conducted several nationwide surveys documenting the extent and dimensions of state and private social service agency practices which resulted, nationwide, in an inordinately high percentage of Indian child placements with concomitant family breakups as compared to the non-Indian population.

Each study, hearing, and investigation documented the conclusions of Indian community representatives and child care professionals who identified a combination of insensitive and rigidly applied standards and practices on the part of state and private social service personnel, as well as court officials, as the primary cause of a socially destructive pattern in the field of Indian child welfare. The remarks of Congressman Mo Udall, as he presented the bill for consideration by the House of Representatives, effectively summarizes the record upon which Congress acted:

Mr. Chairman, this bill is the result of over four years of congressional hearings, oversight and investigation. During that period, the House, the Senate, and the American Indian Policy Review Commission held days of hearings and heard from hundreds of witnesses on the subject of foster care and adoptive placement of Indian children.

The bill, in concept, is supported unanimously by the Indian community, by several states, and by numerous private agencies involved in child welfare matters.

The record developed by this congressional oversight has disclosed a serious problem in Indian child welfare which approaches crisis proportions.

Studies have revealed that about 25 percent of all Indian children are removed from their homes and placed in some foster

care or adoptive home or institution. This figure, standing by itself, is shocking.

In 1976, there were 54,700 Indian children under 21 in Arizona. Of these, 1,029 or 1 out of every 52 were placed for adoption. For non-Indians, the ratio was 1 out of every 220. In other words, 4.2 times more Indian children were placed for adoption in Arizona than non-Indian children. The foster care ratio was 1 out of every 98 Indians placed for foster care as opposed to 1 out of every 263 for non-Indians.

The statistics for other States surveyed were no less shocking. These figures not only show that Indian children are being removed from their families at alarming rates, but they also show that in the overwhelming majority of the cases, the children are placed in non-Indian homes.

Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy.

There are several reasons for this crisis in the Indian community. One, obviously, is the general poverty existing in Indian communities. Because of their economic or social condition they sometimes find it difficult to adequately raise their children or, more often, this poverty is used by state welfare agencies and officials as *prima facie* evidence to take the children from their families.

Title II of the bill is aimed at this factor. It authorizes the Secretary of the Interior to make grants to Indian tribes and organizations to operate Indian child and family service programs. These programs would assist in stabilizing Indian families and provides support to alleviate conditions of poverty. In addition, it provides tools to protect and defend the Indian family from outside assault.

The most distressing and critical factor giving rise to this emerging crisis of Indian families has been the inability or unwillingness of state agencies or officials to understand the different cultural and social norms prevailing in the Indian world. The record shows that in all too many cases, Indian parents have their children forcibly taken from them not because they are unfit parents or because they cannot adequately provide for those children as measured by the norms prevailing in the Indian community, but because they are Indians.

This is a shocking statement to make and, in this age of victory for racial civil rights, some members may not give it credence. Therefore, I will cite verbatim the findings of fact made by a State court which terminated the parental rights of an Indian woman to her child without finding that she was an unfit mother. I quote:

The child has physical features, as observed by the Tribal Court, of a non-Indian nature and her return to an environment consisting of primarily Indian people would subject her to being reared under unnatural conditions that would be detrimental and endanger her emotional well-being.

Solely on the grounds that she is an Indian living on an Indian reservation, this woman has been denied her child. After months of heartbreak and misery, this woman has had to petition the Supreme Court to review this holding and the case is now pending. We can only hope that they grant review and overturn the lower court decision.

One case of this kind would merit passage of this bill. But, all too often, Indian parents have had to chase their children from state to state—court to court—only to find the door slammed in their face by a denial of practical due process.

Title I of this bill addresses this factor. It clarifies the allocation of jurisdiction over Indian child custody proceedings between Indian tribes and the states. More importantly, it establishes minimum Federal standards and procedural safeguards to protect Indian families when faced with child custody proceedings against them in state agencies or courts.

Mr. Chairman, because of the trust responsibility owed to the Indian tribes by the United States to protect their resources and future, we have an obligation to act to remedy this serious problem. What resource is more critical to an Indian tribe than its children? What is more vital to the tribes' future than its children?

We have the constitutional power to act and we must do so.

Cong. Rec., House of Representatives, Oct. 14, 1978, H-12848-49.

As this legislative record demonstrates, the Indian Child Welfare Act is intended to remedy what was perceived as a widespread, endemic and tragic situation. The remedy involves the strong expression of a protective federal policy and acknowledgement of a federal responsibility as justification for the expansion of tribal jurisdictional authority and the imposition of federal standards upon state courts.

Hopefully, implementation of the Act will alleviate what Congressman Udall referred to as, "a serious problem in Indian child welfare which approaches crisis proportions." More specifically, a test of the Act's success will be whether it significantly reduces the number of foster care and adoptive placements of Indian children with non-Indian homes and institutions and results in Indian tribes assuming an increased responsibility for such cases. Ultimately, the Act will have succeeded if the number of Indian child placements declines as a whole and this decline accurately represents an increased stability in Indian family and tribal structures.

VI. A GLIMPSE OF THE INDIAN CHILD WELFARE ACT
IN OPERATION

A GLIMPSE OF THE INDIAN CHILD WELFARE ACT IN OPERATION:

In Re The Matter Of Madeline Jane Standing Elk

By Steve V. Quesenberry*

On August 19, 1978, a non-Indian couple filed a petition in the California Superior Court, County of Riverside, requesting that they be appointed legal guardians of a three-year-old Indian child, a member of the Northern Arapahoe Tribe of the Wind River Reservation. A second petition was subsequently filed, on February 9, 1979, alleging that the child's parents had abandoned her by voluntarily giving her over to the care and custody of the couple.

The facts of this case are not untypical of many other cases in which the custody of an Indian child is at issue in a proceeding where the petitioning parties are non-Indians. A brief review of the facts will provide a backdrop for the legal issues presented, will provide a better understanding of the way in which this case developed, and will give some insights into the factors which induced the California Superior Court to relinquish jurisdiction of the case and order its transfer to the Wind River Court of Indian Offenses, a tribal court of the Shoshone and Arapahoe Tribes of the Wind River Reservation.

The child's natural parents, both enrolled members of the Northern Arapahoe Tribe, were granted a divorce by the tribal court on July 23, 1976. The child's mother was awarded custody of the child and her two older sisters. The mother and three children moved into the mother's parents' home subsequent to the divorce. It was during this time that the mother made the acquaintance of the non-Indian couple.

The non-Indian couple were friends of the mother's parents and had adopted the son of one of her sisters. The boy had subsequently died and the couple, who were elderly, had taken an interest in the child while visiting the mother's family. They asked the mother if they might take the child on a month's vacation with them after which time they would return her to the Wind River Reservation. After much discussion with the mother and other members of her family it was agreed that the couple could take the child with them with the express understanding that the child would be returned after a month. The mother and other members of her family signed a brief statement to the effect that the child was lawfully in the custody of the couple and authorized emergency medical attention for the child if necessary. The couple left with the child on August 20, 1976.

The non-Indian couple failed to return the child as agreed and attempts by the mother and her family to contact the couple were unsuccessful until January 1977. In January, the mother spoke with the couple by telephone and demanded that they return her child. The couple refused.

After this conversation, the mother lost contact with the couple and experienced some severe personal problems of her own which eventually

resulted in a determination by the tribal court on February 4, 1977, that her three minor children, including the child in the couple's custody, be made wards of the court. For reasons which are somewhat unclear, the tribal court awarded temporary custody of the child to the non-Indian couple, describing the wife as the child's aunt.

However, the mother and members of her family, as well as the natural father continued to attempt to locate the non-Indian couple and convince them to return the child. Since the couple moved continuously in their mobile home, it was virtually impossible to utilize legal measures to apprehend them, even though they intermittently contacted the mother to let her know that the child was okay.

In April 1978, the mother contacted the BIA Social Services Office at the Wind River Agency and sought the assistance of the Social Services Officer, Elizabeth Freedman. Ms. Freedman attempted to trace the non-Indian couple through the California Department of Benefit Payments, but was unsuccessful. She then contacted the BIA Southern California Agency in Riverside, California, the last mailing address the couple had given, and requested assistance. In anticipation of locating the couple, she then filed a petition in the tribal court requesting an order directing the child's return to the Wind River Reservation. On April 19, 1978, the tribal court issued an order directing that the child be taken into custody by the BIA Southern California Agency Social Services Office, but the couple was never served with the order. Attempts to effect service by mail were returned with a notation "addressee unknown."

The non-Indian couple again eluded attempts to contact them and it was not until August 1978, when they filed their petition for guardianship in the Riverside Superior Court, that their whereabouts became known. The guardianship petition was not served on the mother until January 1979, at which time she again requested the assistance of the BIA Social Services Office on the Wind River Reservation. The Social Services Officer, Elizabeth Freedman, contacted Pauline D. Bevill, an attorney with Inland County Legal Services in Riverside, and requested legal assistance on behalf of the mother. On February 9, 1979, Ms. Bevill filed objections to the state court guardianship petition contending (1) that the child's domicile was that of her natural mother, on the Wind River Reservation, and that the tribal court, therefore, had exclusive jurisdiction under Section 101(a) of the Indian Child Welfare Act; and (2) that under the standards set forth in California Civil Code §5150 *et seq* [Uniform Child Custody Jurisdiction Act], the California courts were an inconvenient forum in that: (a) Wyoming was the home state of the child; and (b) the tribal court has already assumed jurisdiction of the matter pursuant to its order of April 19, 1978, directing that the child be returned to the Wind River Court for further proceedings (at this time it was not known by Ms. Bevill that the child had been made a ward of the tribal court as early as February 4, 1977).

While the state court proceedings remained pending, Ms. Freedman filed a second petition in the Wind River Court on February 28, 1979, alleging that

the child was subject to the Indian Child Welfare Act of 1978; that she was being unlawfully detained by the non-Indian couple in Riverside, California; and requesting action by the Court pursuant to §101 of the Indian Child Welfare Act [25 U.S.C. §1911]. Attempts to serve the petition on the couple were again unsuccessful.

After a couple of continuances, the state court proceedings were finally set for hearing in the Riverside Superior Court for April 27, 1979. Ms. Bevill, after a discussion with the couple's attorney, felt that they would leave the County despite an order restraining them from removing the child from the jurisdiction of the Superior Court. She contacted California Indian Legal Services (CILS), and also the attorneys for the Northern Arapahoe Tribe, Wilkinson, Cragun & Barker, and discussed the possibility of the Tribe or the natural father intervening in the California proceedings to seek a protective order placing the child in the temporary custody of the BIA Southern California Agency pending the hearing.

In the meantime, CILS had also been contacted by attorneys for Wind River Legal Services, who requested our assistance in the Superior Court proceedings on behalf of the natural father. Also, Barbara Woodall of Wilkinson, Cragun & Barker offered Ms. Bevill assistance in preparing the legal arguments under the newly enacted provisions of the Indian Child Welfare Act. The Northern Arapahoe Tribe had declined to intervene, apparently because of sovereign immunity considerations, but wanted to lend the support of its legal staff to assist in the California custody proceedings. This was March 22, 1979.

During the next few days, contacts were made with Ms. Bevill, Ms. Woodall, the natural father, and Steve Unger of the Association on American Indian Affairs, an organization which participated in the drafting of the Indian Child Welfare legislation. Background information on the provisions of the newly enacted legislation was obtained. Also, affidavits were executed by the natural father, detailing his efforts to get in touch with the non-Indian couple and expressing his desire that the child be returned to her mother on the Wind River Reservation; by Elizabeth Freedman detailing her contacts with the mother and other members of her family, their joint efforts to contact the couple, and the history of the tribal court proceedings; by the mother stating the circumstances and substance of her understanding with the couple at the time they took the child with them on vacation, and explaining her unsuccessful attempts to get them to return the child; and by other members of the mother's family explaining how the couple had been known to and were considered friends of the family, how they had been given custody of the child only for the duration of their vacation but had refused to return the child, and that there was never any intent by the mother to abandon or give the child up; by the Chairman of the Northern Arapahoe Tribe, advising that he had not been notified of the California custody proceedings in compliance with the Indian Child Welfare Act [see §102(a) of the Act, 25 U.S.C. §1912(a)], and requesting that the California proceedings be transferred to the Wind River Court; by the custodian of the Arapahoe Census and Enrollment Records,

certifying that the child and her mother were enrolled members of the Northern Arapahoe Tribe; and by a judge of the Wind River Court of Indian Offenses, detailing the jurisdiction of the tribal court and stating that the tribal court would accept a transfer of the case from the California court pursuant to the provisions of the Indian Child Welfare Act. Certified copies of the relevant tribal court orders were also obtained through the cooperation of Ms. Freedman of the BIA Wind River Agency.

Through a series of telephone calls, the attorneys involved developed a strategy to raise the jurisdictional issue immediately. We felt that it was too risky to let the case proceed to a hearing on the merits, and that a motion attacking the jurisdiction of the California court should be made immediately, thus forcing the court to consider separately the jurisdictional questions raised by the Indian Child Welfare Act. At the time, we also were unsure whether any funds would be made available by the BIA to fly the mother and Ms. Freedman to California for the hearing on the merits. Without these witnesses, we thought it was doubtful that the court would grant custody to the mother and remove the child from a reasonably stable situation to one with which the child had not had any contact for more than 2 years.

On April 17, 1979, CILS filed demurrers (a California procedure similar to a motion to dismiss) to both the guardianship and the abandonment petitions arguing that (1) the Northern Arapahoe Tribe, through its tribal court, had exclusive jurisdiction over the custody of the child under the provisions of the Indian Child Welfare Act because she was a ward of the tribal court [25 U.S.C. §1911(a)]; (2) that the child's domicile on the Wind River Reservation was a jurisdictional fact vesting exclusive jurisdiction in the Tribe to determine her custody [again, reliance was placed on 25 U.S.C. §1911(a) since this provision reflects the prevailing caselaw which had developed prior to the Act in three major cases: *Wisconsin Potwatomies v. Houston*, 393 F.Supp. 719 (1973); *Wakefield v. Little Light*, 276 Md. 333 (1975); and *In Re Adoption of Buehl (Duckhead v. Anderson et al.)*, 87 Wn.2d 649, 555 P.2d 1334 (1976)]; (3) that the inherent right of tribes to regulate matters of "essential tribal relations," including matters determining custody of Indian children, precluded the exercise of jurisdiction by the Superior Court; and (4) that California was an inconvenient forum because the tribal court was more familiar with the history of the case, and the persons involved, and in fact had already assumed jurisdiction.

At the same time that CILS filed its demurrers on behalf of the father, Inland Counties Legal Services, with the assistance of Barbara Woodall, filed a Motion to Dismiss raising essentially the same issues and arguments under the Indian Child Welfare Act as had been presented by demurrer.

Judge Gerald F. Schulte of the Riverside Superior Court granted our motion to shorten time, consolidated the guardianship and abandonment proceedings, and set the hearing on the jurisdictional issues for April 24, 1979.

On April 24, 1979, the main arguments advanced by the non-Indian couple were that they had not been given proper notice of the proceedings in the

Wind River Court, and that to take the child from them would not be in the best interests of the child. As to the first argument, our response was one of "unclean hands" -- that they had knowingly evaded contact with the mother and her family in order to prevent a court, tribal or otherwise, from adjudicating custody of the child. The second argument was the toughest one to deal with because the couple, apart from their evasive and unlawful conduct in taking the child, had given the child their love and care and the child had become quite attached to them. Our most persuasive response to this aspect was the presence of the mother in the courtroom along with Ms. Freedman of the BIA Wind River Agency. Though the judge seemed impressed by the weight of the legal arguments, it was evident that the presence of the natural mother, who had been deprived of any personal contact with the child for more than two years, heavily influenced his decision.

In discussions prior to the hearing the attorneys involved had tried to put themselves in the position of the Judge -- a man who had no previous contact with the Indian Child Welfare Act, and who was not attuned to the concept of tribal courts and tribal governments displacing the jurisdiction of the States and their courts -- and to anticipate his concerns. As far as we knew, he was unversed in Indian law and unfamiliar with the unique status of tribes as dependent, sovereign nations. The concerns which he expressed during the course of the hearing are probably exemplary of the concerns which any non-Indian judge in any state might express when confronted with the prospect of transferring jurisdiction of an Indian child custody proceeding to an unfamiliar tribal court system which very likely will apply different cultural values and approaches in determining custody than a state court.

The primary concern of the Judge, as it rightfully should have been, was the welfare of the child (the child was not in court during the hearing). The presence of Ms. Freedman and the mother, and the assurances given by Ms. Freedman under oath that the child would be delivered to the custody of the Wind River Court for further proceedings, seemed to alleviate this concern. He also expressed concern about, and questioned both counsel and the witnesses regarding, the nature of the tribal court and its previous proceedings relating to the child's custody. Certified copies of the tribal court orders and the federal regulations [25 C.F.R. §11.22] and tribal ordinance defining the jurisdiction of the Wind River Court satisfied the Judge that the tribal court had jurisdiction over child custody proceedings. In oral argument, it was emphasized that the couple would have the opportunity to present their case to the tribal court and to have the issue of custody determined in a manner which was, from a procedural standpoint, quite similar to that of the state courts.

In summary, the Judge was primarily concerned with the welfare of the child and the jurisdiction and viability of the tribal court to make the determinations necessary to protect the child.

The numerous affidavits from individuals with knowledge of the case reflected their interest in the child's welfare and were indicative of the extended family aspect of the Northern Arapahoe culture. These were persuasive, as

were the affidavits from tribal officials, including a judge of the Wind River Court. Ultimately, though, the most persuasive factor was the presence of the mother, who was flown out to the court hearing at the expense of the BIA.

At the conclusion of the hearing, on April 25, 1979, Judge Schulte issued his order directing that the child be produced in his courtroom the following day and that she be taken into custody by Ms. Freedman for further proceedings before the tribal court. The Court's order (*see* Appendix A) specifically found that the Wind River Court had exclusive jurisdiction under Section 101(a) of the Indian Child Welfare Act [25 U.S.C. §1901 *et seq.*] and, further, that the Superior Court declined whatever jurisdiction it might otherwise have since it was an inconvenient forum, relying on California Civil Code §5156.

The non-Indian couple then sought a writ of mandamus, or, in the alternative, prohibition, from the California Court of Appeal, Fourth Appellate District. On April 30, 1979, the Court of Appeal stayed the order of the Superior Court pending the appellate court's review of the petition for writ of mandate/prohibition. Inland Counties Legal Services, on behalf of the child's mother, and CILS, on behalf of the father, opposed the petition. On May 4, 1979, the Court of Appeal denied the writ of mandamus/prohibition.

The final scene of the state court proceedings was a hearing before Judge Schulte on May 7, 1979, in which he released Madeline to the custody of her mother pending a hearing on June 11, 1979 in the Wind River Court of Indian Offenses. The non-Indian couple were granted reasonable visitation.

The non-Indian couple later participated in the hearing held in the Wind River Court. That court entered its order on June 8, 1979, making the child a ward of the court and granting temporary custody to her mother. The court declined to award visitation rights to the non-Indian couple. In its order, the court stated the reasons for this refusal expressly. The court feared that the non-Indian couple might again attempt to remove the child during a visitation period and that visitation might upset the child physically and mentally. The court noted, moreover, that the non-Indian couple were not in any way related by blood to the child. (*See* Appendix B.)

The *Standing Elk* case raised important social and cultural, as well as legal, issues. It was an educational process for everyone involved because it required new perspectives and new approaches to a situation which has existed for many years without any significant steps (prior to the Indian Child Welfare Act) being taken to resolve what has become a matter of crisis proportions for Indian tribes and parents -- the unlawful and oftentimes state-sanctioned removal of Indian children from their parents and from the tribal group and culture which is their heritage.

The favorable result was not achieved solely through the efforts of the attorneys. It was a cooperative effort between attorneys, parents, tribal officials, and BIA representatives to achieve a common goal -- the return of an Indian child to her parents and to the tribal culture of which she is a part. We

were fortunate to have a state judge who was willing to listen and to look beyond his own background and experience to examine concepts of tribal sovereignty and the critical need for tribes to have control over matters of "essential tribal relations," especially matters involving the custody of Indian children. It was the beginning of a process which I hope will be repeated in future cases of a similar nature which arise in other courts throughout the country.

***Steven Quesenberry is presently the Directing Attorney of the Escondido Office of California Indian Legal Services. He is a graduate of Loyola University School of Law (Los Angeles) and has been practicing in the area of Indian Law for the last three-and-a-half years.**

APPENDIX A

**Steven V. Quesenberry, Lester J. Marston, George Forman, Bruce Friedman,
California Indian Legal Services
Attorneys for Defendant, Benno Standing Elk**

**Before The Superior Court of the State of California
For The County of Riverside**

**Guardianship of the Person and Estate of
MADELINE JANE STANDING ELK, a minor
and**

**In the Matter of MADELINE JANE STANDING ELK,
a person who should be declared free from the custody and control of her
parent or parents.**

This matter came on for hearing before the Honorable GERALD F. SCHULTE, Judge of the above-entitled court, on April 24, 1979, on the demurrers of the father of BENNO STANDING ELK, to the petitions in the above-entitled proceedings. JOHN K. CARMACK, appeared on behalf of the petitioners, EUGENE AND CLARA GREEN; STEPHEN V. QUESENBERY appeared on behalf of the father and demurring party, BENNO STANDING ELK; and PAULINE DAY BEVILL, of Inland Counties Legal Services, appeared on behalf of the mother, DEBRA STANDING ELK JENKINS. Present in court were CLARA GREEN, one of the petitioners for Guardianship; DEBRA STANDING ELK JENKINS, mother of the minor above named; and ELIZABETH FREEDMAN, Bureau of Indian Affairs Social Service Supervisor, Wind River Agency, Wyoming. The court having read the points and authorities filed by counsel for the respective parties, having heard the argument of counsel thereon, and otherwise having reviewed the files and records in these proceedings, makes the following findings and order:

FINDINGS

1. That the minor, MADELINE JANE STANDING ELK, is an Indian child and is a ward of the Wind River Court of Indian Offenses, Wind River Indian Reservation, Ft. Washakie, Wyoming, pursuant to that court's order of February 4, 1977;
2. That as a ward of the Wind River Court, the minor is subject to the exclusive jurisdiction of the Wind River Court pursuant to Section 101(a) of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, *et seq.*
3. That in the event an appellate court should determine that this Court has jurisdiction over these proceedings, this Court nevertheless declines to exercise its jurisdiction because this Court is an inconvenient forum and the

Wind River Court is the more appropriate forum to make orders affecting the custody of this minor. Pursuant to California Civil Code § 5156 (Uniform Child Custody Jurisdiction Act).

4. That the Wind River Court, by Order dated April 20, 1979, (a certified copy of which is attached hereto), has authorized ELIZABETH FREEDMAN, Social Services Supervisor of the Bureau of Indian Affairs Wind River Agency, to take physical custody of the minor for the purpose of transporting the minor back to the Wind River Court on the Wind River Reservation.

5. That the petition in Riverside Superior Court Number 129617 is premature, as admitted by counsel for the petitioners in open court, and that the proceedings thereon should be taken off the Court's calendar.

ORDER

Based on the above findings and the files and records herein, the Court makes its order as follows:

1. The demurrers to the petition for guardianship in Riverside Superior Court No. 40999, are sustained and the petition for Guardianship is hereby dismissed with prejudice; the hearing scheduled thereon for April 27, 1979, is removed from the Court's Calendar.

2. The petition for abandonment in Riverside County Superior Court No. 129617, scheduled for hearing on April 27, 1979, is removed from the Court's calendar.

3. This matter is hereby transferred to the Wind River Court of Indian Offenses on the Wind River Reservation in Wyoming, for further proceedings.

4. The petitioners, EUGENE and CLARA GREEN, are hereby ordered to physically produce the minor, MADELINE JANE STANDING ELK, to the undersigned judge in the courtroom of Department 2, of the above-entitled Court, at 9:00 a.m. on April 25, 1979, for the purpose of transferring physical custody of said minor to ELIZABETH FREEDMAN, who is hereby directed to take custody of and to deliver said minor to the Wind River Court in accordance with that Court's Order of April 20, 1979.

Dated: April 25, 1979

GERALD F. SCHULTE
Judge of the Superior Court

WIND RIVER COURT OF INDIAN OFFENSES
Shoshone and Arapahoe Tribes, Wind River Indian Reservation
Fort Washakie, Wyoming

SHOSHONE AND ARAPAHOE TRIBES
Court of Indian Offenses

ORDER OF THE COURT

TO WHOM IT MAY CONCERN:

The Wind River Court of Indian Offenses hereby empowers, Elizabeth N. Freedman, Bureau of Indian Affairs, Wind River Agency, Social Service Supervisor to take temporary custody of Madeline Jane Standing Elk, DOB: 1-15-75 for the purpose of returning said minor child to the Wind River Reservation for further disposition of said minor child by the Wind River Court of Indian Offenses.

/s/ Judge of Court of Indian Offenses

Dated in Court this 20th day of April, 1979

APPENDIX B

**IN THE TRIBAL COURT
SHOSHONE AND ARAPAHOE TRIBES COURT OF INDIAN OFFENSES
County of Fremont, State of Wyoming
Fort Washakie, Wyoming**

In the Matter of Custody and Guardianship of:
Madeline Jane Standing Elk, DOB. 01/15/75
Northern Arapahoe Tribal Enrollment No. U11304
Wind River Indian Reservation Wyoming
A Minor Child
Indian Child Welfare Act of 1978/Case No. 0091

ORDER OF COURT**TO WHOM IT MAY CONCERN:**

The Court of Indian Offenses held a hearing in reference to the custody and guardianship of Madeline Jane Standing Elk, DOB 01/15/75. The parents of said minor child are Benno Standing Elk and Deborah (Brown, Standing Elk) Jenkins — divorced on June 11, 1976.

Those present in court were as follows: Deborah Jenkins, represented by counsel, David C. Marion; Eugene and Clara Green, represented by counsel, John K. Kormac; Elizabeth Freedman, BIA Social Services; and Linda (Brown) Munnell.

The court after hearing from those present, hereby issues the following orders:

- 1) That Madeline Jane Standing Elk is a ward of the Wind River Court of Indian Offenses, and pursuant to Section 101 (a) of the Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978), U.S.C. 25, §1901 et seq, provides in part:

Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

- 2) That since Madeline Jane Standing Elk is a ward of the Wind River Court of Indian Offenses, this court has exclusive jurisdiction over the custody proceedings involving said child.
- 3) That the Wind River Indian Reservation, Wyoming, is the child's domicile.
- 4) That the Northern Arapahoe Tribe which exercises jurisdiction on the Wind River Indian Reservation has a close connection to the child and her

natural parents.

- 5) That the child's present and future care, protection, training and personal relationships are more readily available on the Wind River Indian Reservation, Wyoming.
- 6) Based upon the foregoing conclusions of law and findings of facts, the court finds generally for the plaintiff, Deborah (Brown, Standing Elk) Jenkins; and against the defendants, Eugene and Clara Green (non-Indians).
- 7) That Madeline Jane Standing Elk is to be placed in the temporary custody and care of her natural mother, Deborah (Brown, Standing Elk) Jenkins, until further orders of the court.
- 8) That Deborah Jenkins is authorized to give her consent for any medical, dental or surgical procedures deemed to be in the best interest of said minor child.
- 9) That the Per Capita Dividend of Madeline Jane Standing Elk is to be held in the Bureau of Indian Affairs IIM Office, and will be under the supervision of the BIA Social Services.
- 10) That any monies previously accrued in Madeline's IIM Account at the Wind River Indian Agency are not to be released unless authorized by a Judge of the Court of Indian Offenses.
- 11) That Eugene and Clara Green are prohibited from visiting with Madeline Jane Standing Elk at any time or place, due to the following reasons:
 - a) They may try to remove said child from the jurisdiction of the Wind River Court of Indian Offenses.
 - b) They are not blood related to Madeline Standing Elk and are further restrained from interfering in any way with the rehabilitation of said child in her natural home and the Arapahoe Tribe.
 - c) That any visitations by Eugene and Clara Green with Madeline may upset her in the extreme, and be detrimental to her health, both physically and mentally.

NOW THEREFORE, IT IS HEREBY ORDERED, CONSIDERED, ADJUDGED AND DECREED that:

- 1) Madeline Jane Standing Elk will remain in the temporary custody and care of her natural mother, Deborah Jenkins, until further orders of the court.
- 2) That Madeline Jane Standing Elk will remain a ward of the Wind River Court of Indian Offenses, and this court retains exclusive jurisdiction over any proceedings involving said minor child.
- 3) That the court having taken into consideration the health and welfare of said minor child, feels its decision justified, due to the apparent need of supervision and security for said child and said action is deemed to be in

the best interest of said minor child.

- 4) That all previous court orders concerning Madeline Jane Standing Elk are hereby this day rescinded.

Dated in court this 8th day of June, 1979.

Vida B. Haukaas, Associate Judge
Wind River Court of Indian Offenses

VII. THE TRIBAL JUSTICE CENTER CONCEPT

THE TRIBAL JUSTICE CENTER

I. The Tribal Justice Center Concept

The activities of tribal law enforcement and judicial personnel occur in a unique and complex setting. The functions of the tribal court and related agencies and officials take place within the context of and implement the tribe's self-governing status. That quasi-sovereign status is unparalleled in any other entity within the United States. Its unique character and the political history which surrounds it endow reservation legal disputes with issues and problems which transcend the substantive and procedural questions posed by events and parties. More specifically, fluctuating federal policy with regard to tribal self-determination has prohibited consistent development of tribal judicial mechanisms. During the past decade, however, federal policy has generally favored and fostered tribal self-determination. That posture has seen a return of judicial and governmental responsibility to the tribe.

The current state of tribal judicial and governmental institutions reflects that vacillating policy. Entities within any single reservation have achieved various stages of development and organization. The individuals performing these important tribal functions have varied backgrounds and vastly differing levels of training and commitment. Codes and procedures vary in coverage, form and quality.

Unquestionably, the awareness and ability of the individuals involved in the administration of tribal justice determine its quality. Thus, tribal judicial and law enforcement entities must consist of personnel responsive to the community which they serve, and the effect of such factors as geographical and political containment, culture and tradition, and the economic realities of reservation life. These individuals must also be equipped to deal with the legal substance of their responsibilities.

The Indian Civil Rights Act poses both a legal and a political responsibility to the arbiters of tribal justice. In particular, the Indian Bill of Rights contains limitations on the self-government powers which tribal justice personnel must both obey and enforce. In its larger political sense, the Indian Civil Rights Act affirms tribal powers of self-government within the context of its mandate that certain safeguards limit the exercise of these powers. As interpreted by the United States Supreme Court in *Martinez v. Santa Clara Pueblo*, the Act's failure to provide for federal court review in civil cases reflects congressional intent to leave such matters to the tribes. However, the caution of the Court that legislation could provide for such review notifies tribes of their obligation to understand and enforce these provisions.

During recent years, training for individuals involved in many facets of the tribal justice system has increased. Nevertheless, a 1976-1977 survey report entitled *Indian Self-Determination and the Role of Tribal Courts* reveals that sixty-nine percent of tribal court judges-responding to the survey indicated that they had assumed their positions without any training. Nearly two-thirds indicated a need for increased training. The survey also documents the need for training for other tribal judicial personnel, as well as a need for consultants, resource materials, law libraries, and community education. The

American Indian Lawyer Training Program (AILTP) has endeavored to provide such training and resource materials.

For the most part, AILTP has directed its efforts toward filling the need for trained representatives in tribal courts through its paralegal training project. The trainees complete intensive sessions on the procedure of civil and criminal law, as well as legal research and writing. They serve as "advocates" in over sixty tribal courts. In addition, AILTP publishes the *Indian Law Reporter*, the *Manual of Indian Criminal Jurisdiction*, the *Manual of Indian Law* and other resource materials for individuals involved in the administration of tribal justice.

The response to AILTP's training programs and resource materials documents their importance to tribal justice systems, and in the larger picture, to tribal self-determination. During AILTP site visits to the reservations, tribal law enforcement personnel, judges, council members, residents, and advocates alike have expressed the need for training at all levels.

A great interest in such training now exists at the reservation level. Council members readily reveal gaps and problems in their tribal codes and seek advice. Judicial and law enforcement personnel express frustration with the attitudes and legal background of their colleagues. They express, as well, dedication to implementing and exercising powers of self-government and decision-making.

The reservations are communities of various sizes, populations, and demographics. As do municipalities and other politically unified areas, they share a need for structures, standards, and mechanisms to ensure peace and order. The reservations need safeguards to ensure that the quest for peace and order does not interfere unduly with the personal liberties of their citizens. In adopting a policy of tribal self-determination, Congress provided that these structures, mechanisms, and standards come from the community they serve. In enacting the Indian Bill of Rights, Congress added a guarantee of fundamental civil rights. However, these powers and safeguards become real only when meaningfully implemented and enforced. Thus, without functioning tribal courts, tribal law can exist in theory only. Without aware lawmakers these powers and limitations remain unexercised. In the reservation context, the absence of standards, structures and mechanisms takes on great significance.

The reservation context intensifies the impact of unimplemented or unenforced self-government powers in the civil area as well. The low income level of most reservation Indians intensifies the impact of consumer problems. Lack of tribal self government in the custody area has contributed to the disproportionate placement of Indian children off the reservation. Congress recently recognized that these matters are best handled by the tribe. The comprehensive provisions of the Indian Child Welfare Act of 1978 reaffirm tribal jurisdiction in child custody matters.

Congress has recognized that the tribal communities can best govern themselves—can best respond to the unique combination of cultural, political, and legal issues which a government must confront. However, the earlier stance of the federal government has left the tribes ill-prepared to implement these powers smoothly. The capability exists, as does the desire for self-determination.

Efforts to realize the inherent capacity and appropriateness of tribal self-government have been too sporadic in approach and coverage. Several groups have emerged for various periods of time to serve different functions in this regard. The record and the problems emphatically express the need for a coordinated, centralized approach. The Community Services Administration has taken the initial step in responding to that need. In 1978, CSA approved a one-year planning grant to the American Indian Lawyer Training Program, Inc., to enable it to extend its curriculum, training, and resources to all facets of the tribal justice system by creating and operating a Tribal Justice Center. The Center will house and furnish training sessions, resource materials and support activities to personnel of tribal courts and law and other agencies. As outlined in AILTP's proposal to CSA, activities during the one year grant period include the development, testing, and revision of materials for the training and support of tribal court personnel, a search for a permanent site for the training and support center, and a long-term development plan. (A detailed description of the structure, scope and purpose of the Tribal Justice Center follows.)

CSA's laudable commitment of funds to the Tribal Justice Center project has initiated this important endeavor. Continued progress of the Tribal Justice Center, and through its efforts, the administration of tribal justice, now depends on the ongoing participation of the Community Services Administration in conjunction with other agencies concerned with Indian affairs.

II. Overview

The Tribal Justice Center will centralize training and support activities with regard to the administration of justice on Indian reservations. The Center's projects will address both the substantive and procedural issues facing tribal courts and will, in addition, provide appropriate training and materials for officials whose activities affect, directly or indirectly, the administration of justice on Indian reservations.

The Tribal Justice Center will utilize training, technical assistance, and research to achieve its goals. The American Indian Lawyer Training Program (AILTP) has already implemented this approach successfully in its advocate training program. The Tribal Justice Center will make these services available to a wider audience on a larger scale. Individuals and entities envisioned as recipients of these projects include tribal court judges, law enforcement personnel, community groups, and tribal council members, as well as advocates.

As has AILTP in the past, the Center will use primers, discussion materials, video cassettes, and feature length films developed specifically for training purposes. The sessions will vary in length in order to permit the participation of individuals without undue interference with their family and work obligations. Training of individuals will be separate, but at times concurrent, to allow optimum use of available staff and materials and to permit the exchange of ideas.

The support component of the Tribal Justice Center will again build on the AILTP model. Tribal Justice Center staff members will respond to requests for assistance from participants by performing research, discussing

issues, or preparing documents. This service will help to alleviate the problems caused by lack of access to legal reference materials. In addition, this component will provide consulting services to tribal justice personnel and entities in such areas as court procedure and code revision.

Finally, the Center will produce a variety of legal reference materials tailored specifically to the needs of participants in various facets of the administration of tribal justice. These will include publications presently prepared by AILTP, such as the *Indian Law Reporter* and the *Tribal Court Reporter*.

III. Activities During the Initial Grant Period

A. Overview

Projects and decisions to be initiated or completed during the first funding year of the Tribal Justice Center have progressed on schedule. A Steering Committee was established to provide direction and suggestions during the early stages of the grant and to review materials developed for the Center. Serving on that Committee are:

Richard Trudell, Executive Director
American Indian Lawyer Training Program, Inc.
Oakland, California
(Santee Sioux)

Edward Halbach, Professor of Law
University of California, Berkeley
School of Law, Boalt Hall
Berkeley, California

David Getches, Esq.
Getches & Green
Boulder, Colorado

Hilda A. Manuel, Chief Judge
Papago Tribal Court
Sells, Arizona
(Papago)

Douglas Hutchinson, Esq.
Portland, Oregon
(Osage)

Brenda Lee, Prosecutor
Warm Springs Tribal Court
Warm Springs, Oregon
(Cheyenne River Sioux)

Blaine Edmo
Tribal Prosecutor
Fort Hall, Idaho
(Shoshone Bannock)

Members of the Steering Committee met in AILTP's Oakland office on December 21, 1978 to discuss the structure, format, curriculum and site of the Tribal Justice Center. At that meeting, the Committee decided to hold a Spring meeting in the Washington, D.C. area so that it would be convenient for representatives from federal agencies to attend. On April 30, 1979, members of the Steering Committee conducted a working meeting at the Keybridge Marriott Hotel in Arlington, Virginia. Federal agencies represented there included the Bureau of Indian Affairs, the Economic Development Administration, the Endowment for the Humanities, the Community Services Administration and the Administration for Native Americans of the Department of Health, Education and Welfare.

The most extensively debated issue at the meeting concerned the Bureau of Indian Affairs' intention to create a "National Indian Training Center." A representative of the Bureau informed the Committee and those in attendance

at the meeting that the proposed Training Center would eventually house all of the Bureau's law and order training responsibilities. The Bureau plans to locate the Training Center in Brigham City, Utah.

The Committee found this plan to be extremely detrimental to the proper development of the justice systems on Indian reservations. The Training Center would isolate law and order training from critical resources such as law schools, judicial councils, law libraries and accessible air travel facilities. Members of the Committee expressed great concern that the Bureau plan would prove a drastic mistake. The attempt to incorporate into a multi-purpose training program the differing training needs of tribal court and law enforcement personnel would definitely leave both with inadequate programs.

B. Site Selection

The initial grant calls for the exploration of alternative sites during the first three quarters of the grant period, with transition to a Tribal Justice Center facility during the fourth. These activities have progressed on schedule.

At its meeting, the Committee emphasized access to a good library and airport and the availability of personnel as primary factors in the selection process. A site in Indian country would not have these features, nor adequate printing, film development and other related services. As AILTP has found the Bay Area to afford all of the necessary facilities and services, the search for a site has now centered on that region.

The Tribal Justice Center facility will house, at one site, all of the Center's activities. Thus, it must have classroom space for fifty people, as well as meeting rooms for small groups and an auditorium suitable for model trials and film presentations. These must be situated so as to permit training sessions without undue interruption of the day to day operations of the Center.

C. Pilot Program

The initial grant provides for five on-site training sessions as tests of this facet of the Center's curriculum. A session conducted recently has demonstrated the effectiveness and viability of such sessions.

On March 12, 1979, AILTP presented a model trial at the Papago Reservation. Approximately twenty judges and law enforcement personnel from reservations throughout Arizona and New Mexico attended, along with several members of the Papago Council, law enforcement and judicial personnel and community members. Following the model trial, the participants heard a panel discussion regarding the resolution of issues facing tribal courts. Classes on the civil jurisdiction of tribal courts and the Indian Bill of Rights completed the session.

Sessions at the Warm Springs and Northern Cheyenne Reservations took place during the week of April 15, 1979, and at Fort Hall during the week of April 23, 1979. AILTP presented workshops for various law enforcement entities, members of the tribal judiciary and tribal councilpersons. The roles, activities, and relationships of these individuals were discussed, as were substantive and procedural issues. The sessions provided education and information and fostered constructive communication among and within these groups.

D. Films

Progress has been made on each of the five films to be completed under the initial funding contract. Work has begun on the scripts of the two feature films. These will cover the history, structure, and jurisdiction of tribal courts, and the welfare and legal status of the Indian child. The script for a short film on interviewing techniques is almost complete, as is the script for a short film on the advantages, disadvantages, and procedures of plea bargaining in tribal courts. Finally, discussion of the content and format of a film on ethical problems in the administration of justice has begun.

E. Resource Materials

AILTP continuously revises, updates, and creates curriculum materials for training purposes. The initial grant provides funding for these activities and they have progressed apace. The proposal foresees the initiation of work on materials regarding administrative hearings, law reform and community development, as well as a book length collection of self-contained essays on Indian law. This book will serve as a resource tool to both lay persons and attorneys practicing Indian law. Its format will facilitate its use by these sometimes diverse groups. The text of each chapter will be clear and practical. Programmed study materials and extensive footnotes will enable each individual to supplement the text according to his or her own needs and background. The individual authors have begun their respective chapters and publication is anticipated in mid-summer.

The proposal also calls for the continuation of publications now produced by AILTP and for the initiation of books on termination, Indian tax law, and a quarterly *Tribal Court Reporter*. Research has begun on each of the books. The first issue of the *Tribal Court Reporter*, a quarterly publication reporting and analyzing tribal court opinions and containing articles of tribal court administration and substantive and procedural legal issues, came out on March 1, 1979. The *Indian Law Reporter* has continued to provide on a monthly basis the reporting service which AILTP began six years ago.

IV. Conclusion

Although the Tribal Justice Center has not yet begun operation, the Center concept and the CSA grant have already enabled AILTP to prepare and provide materials and programs of value to participants in the administration of justice on Indian reservations. These activities have widened both the scope and the audience of AILTP's programs. Hopefully, continued funding will permit the continuation of these accomplishments.

VIII. PROFILE OF THE AMERICAN INDIAN
LAWYER TRAINING PROGRAM

PROFILE OF THE AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC.

The American Indian Lawyer Training Program, Inc. (AILTP) is an Indian founded and administered non-profit corporation. Since its inception in 1973 AILTP has designed and implemented programs to promote tribal sovereignty and self-determination through provision of training and resources to Indian attorneys, law students and advocates committed to serving the legal exigencies of Indian people.

PROGRAMS FOR INDIAN ATTORNEYS AND LAW STUDENTS

Indian Attorney Fellowship Program

From 1975 through mid-1978, AILTP administered a Fellowship Program for Indian attorneys. In that program a total of eleven Indian attorneys were provided with the financial, logistical and legal support necessary to establish themselves in private practice on or near Indian reservations. The program was based on the perception that Indian attorneys generally lack the financial resources necessary to establish a sole practice on or near an Indian reservation. This, together with the prospect of isolation from the expertise of other lawyers, had the net effect of driving Indian attorneys into government jobs or urban law firms where their skills were largely lost to their tribes. The Fellowship Program was designed to create more favorable conditions for Indian attorneys who wished to base their professional careers on or near reservations.

Law Associate Program

In 1978 AILTP initiated the Law Associate Program for recent Indian law school graduates. Through the Law Associate Program, Indian law school graduates received stipend support while serving one-year associate terms with Indian attorneys in private practice on or near Indian reservations. During their associate periods, law associates provide pro bono legal services to tribal clients or to indigent Indian clients who would, without these services, have no access to legal assistance. To date, seven Indian law graduates have participated in the Law Associate Program.

Indian Law Seminar and Intern Project

AILTP also administers an Indian Law Seminar and Intern Project for Indian law students. A total of

seventy Indian law students have received basic instruction in Indian law and placed with tribal governments, court systems, reservation legal services, and AILTP fellows to allow the students to become acquainted with the practice of Indian law. This project was implemented in 1974 and has been conducted during the summers of 1974, 1975, 1976 and 1979.

TRIBAL COURT ADVOCATE TRAINING PROGRAM

Since September, 1976, AILTP has administered a Tribal Court Advocate Training Program in which Indian prosecutors and defenders are trained for the tribal court systems on reservations. Approximately 250 advocates have received training through the Tribal Court Advocate Training Project. Trainees receive skills training over a one-year period in the following areas: investigation, interviewing, opening statements, direct and cross examination, and closing arguments. In addition, trainees are provided instruction on due process, equal protection, evidence, and, most recently, the Indian Child Welfare Act of 1978.

PUBLICATIONS

Complementing its education programs, AILTP has produced several publications.

Indian Law Reporter

Since 1974 AILTP has published the Indian Law Reporter, a monthly reporter service devoted to reporting recent developments in the field of Indian law. The Reporter contains a digest of recent federal and state court decisions pertaining to Indians. In addition, the Reporter contains a description of the status of on-going litigation, a summary of legislative information, and reports from various federal agencies of import to Indians.

Tribal Court Reporter

This quarterly publication reports and analyzes tribal court opinions to enable tribal judicial personnel from all parts of the country to benefit from the resolution of issues by other tribal courts. The Reporter serves as a source of precedent and persuasive authority from tribal courts aware of and responsive to the unique character of issues involved in reservation legal disputes.

The Reporter also contains articles dealing specifically with the increasingly complex responsibilities and issues facing tribal courts. The Tribal Court Reporter fills the otherwise unmet need for a reporter service dealing specifically with tribal court developments.

Other Publications

AILTP also publishes the Manual of Indian Law (now in its fifth edition), Manual of Indian Criminal Jurisdiction, Issues in Mutuality (dealing with the enforcement of tribal court judgments in other jurisdictions), and The Indian Child Welfare Act of 1978: A Law for our Children (which presents a summary and analysis of this newly enacted law). In preparation is a Manual on Indian Taxation, which will fill an urgent need for a work on this important area. Other publications include Indian Self-Determination and the Role of Tribal Courts (1977), a survey of some ninety-eight tribal court systems; and Indian Tribes as Governments (1975), produced by the first group of law student interns. This latter work includes a brief survey of the state of readiness of six tribal governments for economic development.

CONFERENCES AND SEMINARS

AILTP periodically sponsors seminars, conferences and workshops dealing with such areas as Indian natural resources (May, 1979), tribal judicial systems (June, 1978), Indian taxation (Sept., 1977), tribal governments (March, 1974), and other areas of import to Indian people.

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AILTP Office Locations

AILTP maintains its main office at 319 MacArthur Boulevard, Oakland, California 94610 (415-834-9333); its D.C. branch office is located at 1712 N Street, N.W., Washington, D.C. 20036 (202-466-4085).