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STAFF REPORT

SOUTH DAKOTA INDIAN HEARING

U. S. Commission on Civil Rights

July 1978

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I. History

> As a rule, in their wars with the whites The Sioux Indians have been moved by a high and patriotic impulse creditable to any people. This fact the whites, and particularly the military, have lost sight of at the critical periods. No people are more attached to the land of their birth and to the graves of their kindred than are these Indians, and they have willingly sacrificed their lives in the defense of their homes or in the protection of what they deemed their rights. They are a reasonable people of great intelligence, and most of the wars might have been averted by negotiations creditable alike to the government and to the Indians.[1]

The Sioux Indians were once many tribes which shared a common origin and similar languages (Dakota, Lakota, and Nakota).[2] The name Sioux is a term applied to the Dakota tribes by other Indians and the French. The Sioux use the name "Dakota" for themselves when speaking in their own languages; the term "Sioux" is generally used by them when speaking of themselves in English.[3] Regardless of name, "the cultural, linguistic, territorial, and political distinctions found among the various Sioux divisions are /today/ practically unknown to the general public."[4]

1/ Robinson, Doane, A History of the Dakota or Sioux Indians (Minneapolis: Ross and Haines, 1904) p. 14 (hereafter cited as Robinson, A History of the Sioux).

2/ Ibid.

3/ U.S. Department of the Interior, Indian Arts and Crafts Board, Sioux Indian Museum and Crafts Center, The Sioux, undated, p. 2 (hereafter cited as Sioux Indian Museum, The Siuox).

4/ Ibid.

"Dakota" translates as "friends" or "allies", and the Sioux originally lived as a culturally unified people in the Western Great Lakes or Woodland areas (now Minnesota and parts of bordering states).[5] Until the 17th century the Sioux engaged almost solely in fishing, hunting, gathering, and the cultivation of corn. The later westward white expansion well as pressure from other Indian tribes (i.e., the Chippewa) who had been armed by the whites, eventually led the Sioux to move westward into areas now comprising South Dakota, half of the State of Minnesota and portions of North Dakota, Iowa, and Wisconsin.[6]

As many Sioux moved west, there appeared the Eastern, Middle, and Western groupings which later came to represent distinct political, linguistic, and cultural differences. As early as 1750, Lakota speaking Teton Sioux Indians had moved beyond the Missouri River, mid-point of the present State of South Dakota, and had reached the Black Hills.[7] Here, they became an equestrian plains tribe: living as buffalo hunters and warriors using firearms and traditional

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5/ Ibid.

6/ Robinson, A History of the Sioux, p. 27.

7/ Sioux Indian Museum, The Sioux, p. 2.

weapons.[8] Other Teton and some Wiciyela Sioux (Nakota - speaking) Indians settled in the prairie country east of the Missouri where their economy was based on the river and on corn.[9] The Santee Sioux and some Wiciyela retained lands in the Southern Minnesota area.[10] One history of the Sioux emphasizes that regardless of where they "settled," the Sioux remained "distinctly a ranging people, adventuresome ... . /T/heir excursions took them anywhere from Hudson's Bay to the Gulf of Mexico and between the Alleghenies and the Rockies. This roving propensity accounts for much of the conflicting accounts of their location which are found in the early relations of the explorers."[11]

The French were the first whites to encounter the Sioux and today many Sioux retain French names passed down through the generations.

Even in the seventeenth century, the French, like the other Europeans and whites who followed, were anxious to induce the Indians to establish more permanent settlements in order to make trading easier for the whites. The majority of the Sioux were indifferent to these ploys.

8/ Ibid.

9/ Ibid.

10/ Ibid.

11/ Robinson, A History of the Sioux, p. 27.

Nevertheless, the French did establish trading and missionary outposts. The Sioux, however, routinely joined forces and harassed and fought the French (who in no sense could be said to have "controlled" the territory in which they traded).[12/]

From 1725 to 1765 fighting with the Chippewa Indians led to the general westward migration of the Santee Sioux and and others. In 1766, the first recorded instance of "American" exploration of land occupied by Dakota Sioux took place when an explorer from Connecticut traveled in Indian Country and lived for a time with a large band of the Sioux. Even this early exploration was to later lead to claims by the man's heirs for hundreds of square miles of Indian lands.[13/] The mid-eighteenth century marked the beginning of more than two hundred years during which white land claims, government treaties, and Federal Indian policies unrelentingly stripped the Sioux of their lands.

Sioux - American Relations: Wars and Treaties

During the War of 1812 groups of the Sioux fought on both sides of the conflict, but in 1815 and 1816 the Sioux collectively signed treaties of "peace and friendship" with the United States and "acknowledge/d/ themselves to be under /its/ protection" and confirmed to the United

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12/ Ibid, pp. 48-67.

13/ Ibid, p. 56.

States "all and every cession...of land heretofore made by their tribes to the British, French, or Spanish...."[14/] (No such cessions had been made.) Some accounts argue that this act recognized the "sovereignty" of the United States but no language to this effect is included in the treaties.

In 1825, a treaty with the United States delineated boundaries for the Sioux and other Indians who had warred with one another over territory. This treaty made reference to a vaguely worded "controlling power of the United States." In turn, the United States agreed to "recognize" the boundaries which it had established with the "tribes."[15/]

Subsequent to these treaties, the Western or Teton Sioux (including the Oglala) continued to live as free and independent peoples and to participate in the fur trade in an area stretching from western Iowa almost to the Rocky Mountains.[16/] The Sioux in Iowa and Minnesota were the first to feel the full pressure of land hungry American expansionism. In a treaty signed in 1851 the Sisseton and

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14/ Treaty with the Sioux, 1816, St. Louis, Articles 2, 3, and 4.

15/ Treaty with the Sioux, Etc., 1825, Prairie des Chiens, Territory of Michigan, Articles 2-10.

16/ Ortiz, Roxanne Dunbar, The Great Sioux Nation: Sitting in Judgment on American. (Berkeley: American Indian Treaty Council Information Center/Moon Books, 1977) p. 21.

Wahpeton Sioux were induced by the Federal government to give up all their lands in Minnesota and Iowa and move to reservations. For half the State of Minnesota and much of Iowa, these Sioux received six cents an acre.[17/]

To the west, the Teton Sioux (with the Oglalas) were designated in 1851 by the Federal government as the "Sioux or Dahcotah Nation" under a treaty which recognized that Nation's "territories" and under which the Indians recognized the government's right to establish roads, military and other posts."[18/] This and other provisions of the treaty opened trails by which those seeking gold and land could push westward through Indian homelands and hunting grounds.

Despite the 1851 treaty, the Oglala (with the Brules) carried on a campaign of harassment against the white travelers who were frightening and scattering the buffalo herds upon which Sioux life depended. In 1855, General W.S. Harney slaughtered a group of 136 Indians and thus temporarily broke the back of Indian resistence.

17/ Robinson, A History of the Sioux, p. 213. See the treaty with the Sioux - Sisseton and Wahpeton Bands, 1851, Traverse des Sioux, Territory of Minnesota.

18/ Treaty of Fort Laramie with Sioux, etc. 1851, Fort Laramie, Indian Terr.tory.

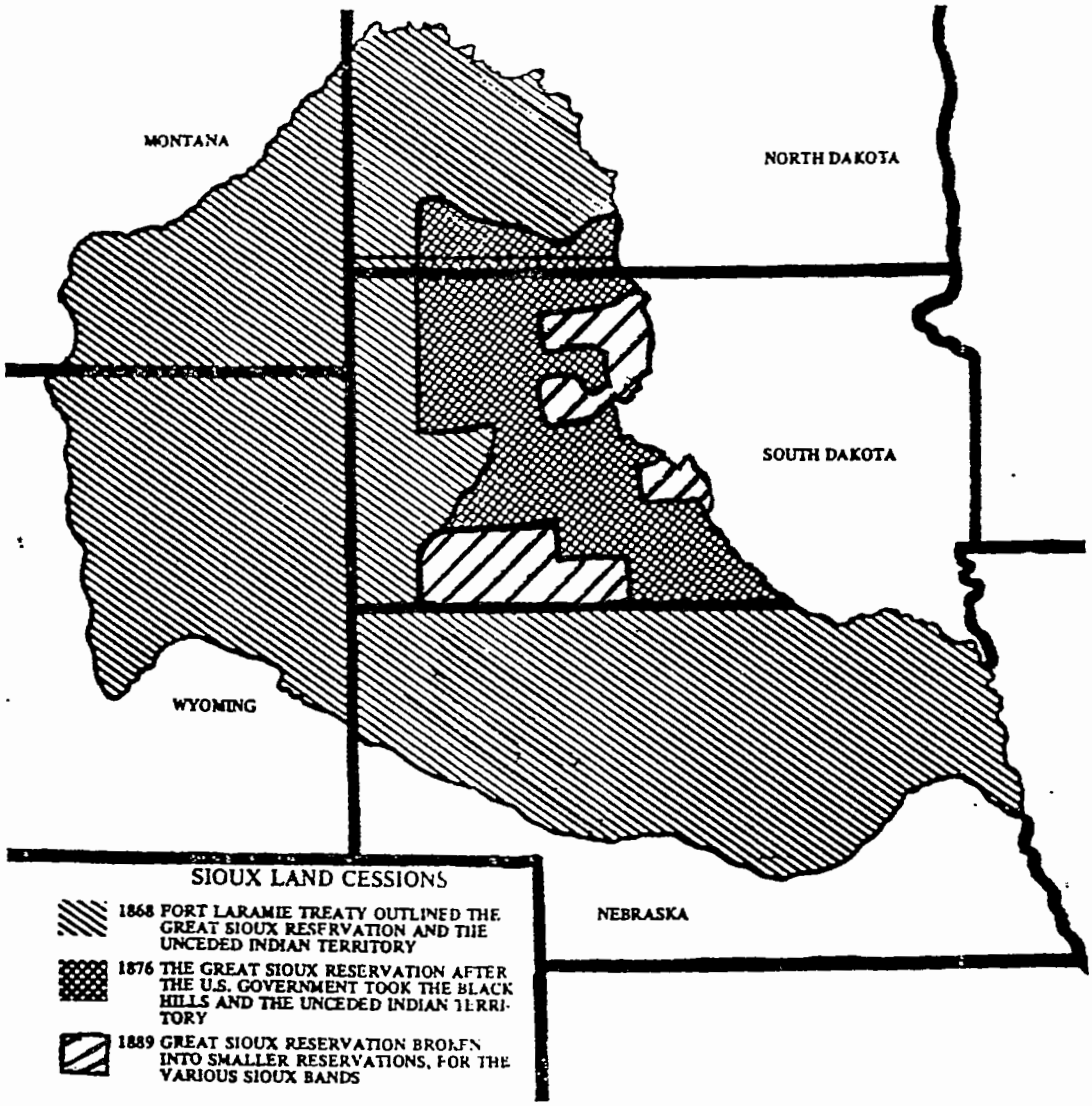
19/ Robinson, A History of the Sioux, p. 225.

The Sioux, however, continued their resistence in the ensuing years. The arrival of thousands of Scandinavian and German immigrants in Minnesota lead to continuing conflict between Indians and whites. When debts for land payment and rations where not made available to the Sisseton and Wahpeton Sioux and others in 1862, a fierce rebellion by the Sioux resulted in the Minnesota Uprising in which many whites were killed and their houses burned. Many Indians also died, and eventually 38 Indians were hanged under the judgment of President Abraham Lincoln.[20/]

In 1867-68 the Federal government in the wake of the civil war years moved to give away Indian lands in the form of grants and created rights-of-way for the railroad and a new wagon road into Montana and the west. The Sioux resisted under Red Cloud, and the Army's men and forts were heavily and successfully attacked by them until in 1868 the Treaty of Laramie granted the Sioux all of the western half of South Dakota as a reservation as well as portions of Montana, Wyoming, Nebraska, and North Dakota as "unceded Indian territory," an undefined term which later proved to have no effective meaning in Indian land claims.[21/]

20/ Ibid, pp. 266-303.

21/ Treaty with the Sioux - Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee - and Arapaho, 1868, Fort Laramie, Dakota Territory.



Taken from: Ortiz, Roxanne Dunbar, The Great Sioux Nation: Sitting in Judgment on America (Berkeley: American Indian Treaty Council Information Center/Moon Books, 1977), p. 92.

The Indians in their turn granted to the government rights-of-way and safe passage on roads and railroads. The Sioux also agreed to the establishment of a permanent Indian agency on the Missouri River. As many Sioux settled into a sedantary life near the agency, they found themselves for the first time living on subsistence payments from the government.

Conflict with the white travelers, military, and railroad surveyers-attacks on forts and columns of men were frequent as the Sioux fought white intrusions into reservation land and the "unceded Indian lands."[22/] Finally, the discovery of gold in the Black Hills of the Sioux brought deeper violence. The government in 1875 was determined to open the Hills to mining and exploration.

Some Indians were willing to sell the Black Hills but demanded payment commensurate with the value of the gold within them. The government's offer was less than a tenth of the Indians' price for the Black Hills and the United States also demanded other major concessions on land and roads.[23/]

22/ Dunbar, The Great Sioux Nation, p. 25.

23/ Robinson, A History of the Sioux, pp. 420-421.

The government quickly acted to overcome Indian resistence. The Black Hills were simply "opened" to the gold-hungry miners by the government, and all Indians were ordered back to their reservations.[24] The Black Hills soon swarmed with whites seeking gold. More than 11,000 were in Custer City alone. Soon the Army moved "to reduce /the/ Indians to subjection."[25] The Indians responded by using their forces sparingly and hid their numbers in parts of the Black Hills, emerging only to defeat General George Crook near the Rosebud River (in South Dakota).[26]

In late-June 1876, General George A. Custer moved from West Dakota territory into the Montana Crew Reservation seeking to track and defeat the Sioux assembled in camps on the Little Big Horn. Custer and his troops were drawn into a trap where the General and his 261 soldiers were killed.[27]

24/ Fleming, Janice M., ed., People of the Seven Council Fires (Pierre, South Dakota: Historical Resource Center, 1975) pp. 12-13.

25/ Robinson, A History of the Sioux, p. 423.

26/ Ibid, p. 425.

27/ Ibid, p. 431.

Following this fight, the Sioux successfully fought the Army and settlers in country near the Big Horn and in the Black Hills. The Indians dispersed following their show of strength.

But a series of army attacks soon broke Indian resistence, and in 1876 a treaty commission met with Red Cloud and other chiefs to arrange final sale of the Black Hills and permanently to move the Sioux out them.[28] One elder chief recalled earlier fighting, "If you white men had a country which was very valuable, which had always belonged to your people, and which the Great Father had promised should be yours forever, and men of another race came to take it away by force, what would your people do? Would they fight?"[29] Spotted Tail of the Brule commented with sarcasm, "I hear that you have come to move us. Tell your people that the Great Father /the President/ promised that we should never be removed. We have been moved five times. I think you had better put the Indians on wheels and then you can run them about whenever you wish."[30]

28/ Ibid, p. 440.

29/ Ibid.

30/ Ibid.

The Sioux were forced onto agency reservations to become "farmers" (with the exception of several "renegade" bands under Gall, Crazy Horse, and Sitting Bull who escaped across the Canadian border[31]). The reservations functioned under the authority of a white agent, regardless of the power or stature of the individual Sioux chiefs residing there. The loss of the buffalo herds had left the Sioux with no alternative to the reservation system-BIA rations and farming had become the only means of avoiding starvation.

Between 1882 and 1889 the Federal government pressed the Sioux to give up large portions of their reserved lands in South Dakota (see map p. 8), and the Dawes Act of 1887 was instrumental to this process. This assimilationist piece of legislation parceled out reservation land in 160 acre allotments to individual Indians, undercutting tribal organization and imposing economically unviable ownership patterns.[32] The allotment concept also provided that land not allotted to Indians was surplus and

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31/ Ibid.

32/ Fleming, People of the Seven Council Fires, p. 16. and Dunbar, The Great Sioux Nation, p. 26.

could be opened for white settlement. In 1889 additional legislation provided for an "agreement" under which the Sioux gave up almost half the Great Sioux reserve-the remainder was divided into six smaller reservations.[33]

During the same period of time, the government moved again to undercut the power of tribal chiefs by lessening their authority. Indian beliefs were attacked in order to "elevate /the Indians/ in the scale of humanity":

> /T/he Commissioner of Indian Affairs... distributed a set of rules designed to stamp out "demoralizing and barbarous" customs. The directive defined a number of "Indian offenses." It was an offense to hold feasts and dances, including the Sun Dance. It was an offense to have more than one wife. All practices of medicine men, medical and religious, were offenses. "Purchase" of wives by leaving property at the father's door was an offense. Willful destruction of property, the traditional way of showing grief over the death of a relative, was an offense.[34]

In 1889, following poor farming years, many Sioux began "Messiah" dancing, seeking to overcome the deaths, loss of land, and poverty which had overtaken them. The belief spread among some Indians that the dancing would

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33/ Fleming, People of the Seven Council Fires, p. 16.

34/ Utley, Robert M., The Last Days of the Sioux Nation (New Haven: Yale University Press, 1963), p.31.

remove the whites from the earth, "resurrect all the dead Indians, bring back the buffalo and other game, and restore the supremacy of the aboriginal race."[35/] White authorities became alarmed and sought to halt the dancing. Local reservation agents declared matters to be beyond their control, and United States cavalry rode into Sioux Country in large numbers.[36/] Sitting Bull was killed at this time when Indian police sought to arrest him as a leader of hostile Indians engaged in the "Messiah Craze."

After Sitting Bull's death only Big Foot (Sitanka) remained as a threatening figure to white authorities. When Big Foot and 340 men, women, and children sought to go to Pine Ridge Reservation rather than be arrested and taken to Cheyenne River Reservation, they were chased and surrounded on December 29, 1890 by large numbers of troops armed with light artillery.

Big Foot was generally understood to be an advocate of peace, but when the army moved to disarm his people, tensions ran high and fighting began. The Indians were

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35/ Robinson, A History of the Sioux, p. 461.

36/ Ibid, p. 473.

outnumbered and outgunned at Wounded Knee, and some 220 to 300 men, women, and children were killed in a massacre "where fleeing women, with infants in their arms, were shot down after resistence had ceased and when almost every warrior was stretched dead or dying on the ground."[37/] From the time of Wounded Knee onward, the days of the Sioux as warriors and hunters were over.

The years following Wounded Knee were marked by unrelenting hardship. The Federal government adopted policies aimed at rapidly acculturating the Sioux to white values and thought. Indian ceremonies and dancing were discouraged or forbidden. Indian languages were forbidden by law. Indian children were taken from the parents to white foster homes or boarding schools. Economic self-sufficiency was never fully supported by the Bureau of Indian Affairs and never achieved. Indian diet, housing and sanitation remained the worst on the North American continent. Indian health and life-expectancy were undercut by ravaging TB, dysentary, diabetes, coronary diseases, rampant alcoholism and other serious problems.

37/ Ibid, p. 487.

Early Sioux attempts to develop farming and ranching were dealt crushing blows by the dust-bowl era and the depression.

In 1924, Congress conferred United States citizenship on all Indians, an action which some have felt undercut the status of Indians as sovereign people. The Indian economic picture was also bleak at this time: the 1928 Merriam report issued by the Institute for Gorvernment Research reported that the South Dakota Sioux had per capita annual incomes which averaged less than $200.[38/]

The Indian Reorganization Act in 1934 helped restore a degree of self-government to the Sioux and established elected tribal councils. It also lessened (to a degree) the powers of the local BIA agent, and ended the allotment system under which Indian lands had been sold off by the desparately poor. The continual loss of Indian lands was in fact, halted and reversed for a time.[39/]

Flooding along the Missouri during World War II led to the Federal Pick-Sloan Plan under which dams were to be built on the river to control its flow downstream.

38/ Ibid, p. 190.

39/ Ibid, pp. 191-92.

The plan was a blow to the Sioux and other Indians whose reservation homes were located along the river terraces. First, the Fort Randall Dam "required purchase of a large part of the Yankton Reservation; a latter dam was to flood 800 acres of the Lower Brule Reservation. At Crow Creek /Reservation/ even more land was inundated. Up river, the Oahe Dam reservoir flooded much of the Cheyenne River Reservation and parts of Standing Rock Reservation."[40/]

The government compensated the tribes with cash payments and new land; the Indian viewed the government terms as inadequate, and today many Sioux continue to lament the loss of their lands during the 1950's. As the dams slowed the Missouri and water inundated reservation lands, the Sioux found themselves displaced once again for the public good. Twenty-five years later, the loss of the Sioux lands to the dam is recalled as one more act of government bad faith.[41/]

40/ Ibid, p. 204.

41/ Staff interviews.

During the 1950's the Eisenhower Administration adopted a policy aimed at ending the Federal government's special relationship with the Indian people - reservations were to be terminated. A "relocation" program under Dillon Meyer (who headed the removal of Japanese citizens to relocation camps during the second World War recruited Indians to be moved into the cities.[42/] Many Sioux were scattered to urban centers, such as Omaha, Chicago, and Denver. The Oglala Sioux, in particular, relocated to Minneapolis. In 1968, the American Indian Movement developed in Minneapolis under the leadership of George Mitchell and Dennis Banks. Later leaders included Clyde and Vernon Bellecourt and Russell Means.[43/] In tune with the mood of the late 1960's AIM and its leadership adopted a militant political posture, seeking to force change on behalf of Indians through highly publicized confrontations and public speaking. Among these actions were a 1971 attempt to "arrest" in Washington a top BIA education official and the head of the BIA; a 1972 march by more than 1000 Indians through Gordon, Nebraska demanding justice for the killing of an Indian; the seizure of the ship Mayflower II on

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42/ Burnette, Robert and Koster, John, The Road to Wounded Knee (Bantam: New York, 1974), p. 17

43/ Ibid, p. 196.

Thanksgiving Day in 1970; and the occupation of Mount Rushmore in June 1971.

In 1972, the trail of Broken Treaties crossed America to Washington, demanding change in Federal Indian and BIA policies and leadership. In the Capitol, resentment boiled over, and the BIA building was seized by hundreds of Indians.

Following the BIA takeover, some AIM leaders returned to South Dakota where they confronted both white authorities and conservative tribal leaders-of note is the fighting which broke out in February 1973 in Custer, South Dakota when AIM pressed for the conviction of the white killer of a local Indian.

Pine Ridge tribal chairman Richard Wilson, strongly opposed AIM, its ideology, and tactics. He declared his determination to drive AIM off the reservation, but on February 27, 1973 AIM members and Oglala Sioux numbering 200 in all seized the town of Wounded Knee, the scene of the massacre 84 years earlier and declared there determination to stay and to die. The Federal government responded by surrounding Wounded Knee with a total of 250 FBI agents, U.S. Marshals, and BIA police equipped with armored personnel carriers, 50-caliber machine guns, and rifles.

The seige at Wounded Knee dragged on for weeks and was punctuated by nightly firefights as the surrounded Sioux were illuminated by flares dropped by the government over Pine Ridge. The entire stand-off was observed by reporters from all parts of the United States and several foreign countries. Light planes flown by AIM supporters skimmed over Wounded Knee dropping supplies to the occupiers. Government helicopters gave chase, firing shots. During the occupation, two Indians died. Both Indians and government agents received serious wounds as thousands of rounds were fired over a period of almost two-and-a-half months.

On May 7, AIM and the Oglala Sioux occupiers abandoned their defense. Some escaped, some surrendered after protracted negotiations with Justice Department officials. Some 428 persons faced possible charges as a result of Wounded Knee. Many of the leaders, were under arrest. Negotiations were later begun with White House representatives regarding AIM political demands and alleged government violations of treaty obligations.[44/]

Senator James Abourezk held hearings in Rapid City to examine conditions on Pine Ridge Reservation, but in their wake, a period of conflict and violence began on the reservation as AIM and its sympathizers clashed with

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44/ Ibid, pp. 251-252.

tribal officials, BIA police, and the FBI. A series of shootings and deaths followed as various factions contended for control of day-to-day affairs on the reservation- many of these cases remain unsolved. Two FBI agents were killed at Pine Ridge, and the FBI has been a regular armed presence on the reservation since that time.

The ferment at Pine Ridge was reflected among Indians throughout the United States. Activist Indians pushed long-standing land claims against the government- in South Dakota the Rosebud Sioux sued in Rosebud v. Kneip to assert jurisdiction over Tripp County which was a portion of the Rosebud Reservation. The tribe lost, under a ruling which declared that the reservation had been diminished by the land area of the county and that it was no longer part of the reservation. But land claims persisted elsewhere. Among the Sioux and other Indians, the pursuit of identity and preservation of Indian self-determination was also pressed forward.

In 1975, the Congress passed the Indian self-Determination and Education Assistance Act[45/] which among other matters, authorized tribal governments to act under contract to the

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45/ 88 Stat. 2203, 1975 ed.

BIA for the delivery of services formerly provided by the BIA. The tribes thus today find themselves in a delicate balancing act in which they must move to assume new governmental responsibilities while at the same time retaining the support and assistance of the BIA.

II. Demographics

A. State Population

According to 1975 Census estimates, there were 683,000 people in South Dakota, an increase of 17,000 since 1970. Although the 1970 Census showed that the South Dakota Indian population was approximately 32,000 (or 5% of the state's population), that figure is generally conceded to be low. Furthermore, there has been a dramatic recent growth in the Indian population. Data gathered by the Bureau of Indian Affairs suggests that the number of Indians living on or near South Dakota reservations in 1975 was over 37,000 and was near 45,000 in 1977.[1/] Apart from Indians, the non-white population is less than 1%.

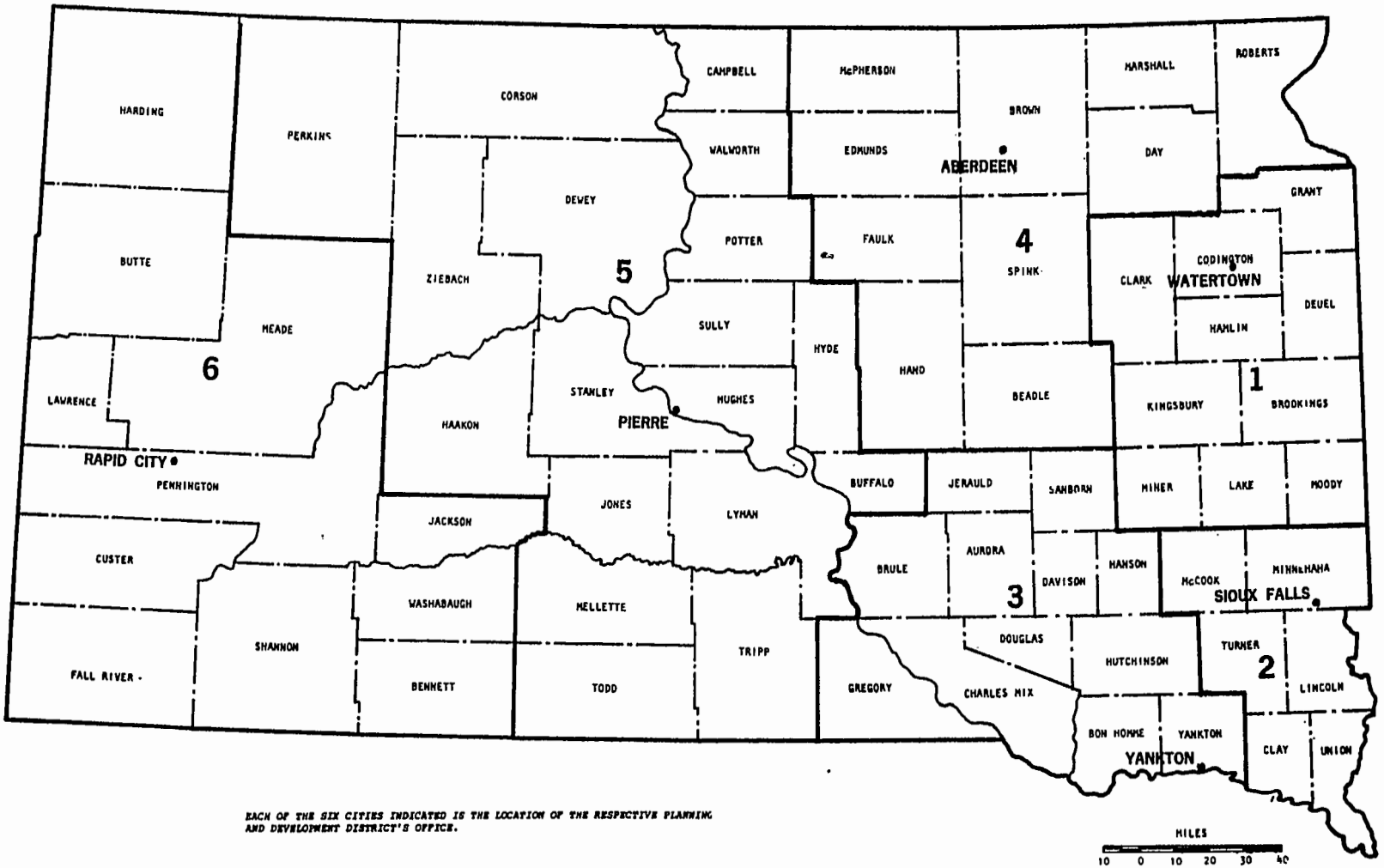
B. County Population

Map 1 shows the location of each county in South Dakota and the State's six planning districts.

Table 1 depicts the population in South Dakota by county from 1930 to 1975 and Table 2 shows the percentage change by county population for those same years.

1/ The BIA data includes an undetermined number of Standing Rock and Sisseton-Wahpeton Sioux living in North Dakota and Pine Ridge Reservation Indians living in Nebraska. It does not count urban Indians living in Rapid City or Sioux Falls or other urban areas not near reservations. See Table 5.

SOUTH DAKOTA COUNTIES AND PLANNING DISTRICTS



EACH OF THE SIX CITIES INDICATED IS THE LOCATION OF THE RESPECTIVE PLANNING AND DEVELOPMENT DISTRICT'S OFFICE.

source: *S. D. STATE PLANNING BUREAU*

TABLE 1.
SOUTH DAKOTA TOTAL POPULATION BY COUNTY, 1930-1975

COUNTY	1920	1930	1940	1950	1960	1970	1975
AURORA	7246.	7139.	5387.	5020.	4749.	4183.	3996.
BEADLE	19273.	22917.	19648.	21082.	21682.	20877.	20046.
BENNETT	1924.	4590.	3983.	3396.	3053.	3088.	3334.
BONHOMME	11940.	11737.	10241.	9440.	9229.	8577.	7887.
BROOKING	16119.	16847.	16560.	17851.	20046.	22158.	22558.
BROWN	29509.	31458.	29676.	32617.	34106.	36920.	37804.
BRULE	7141.	7416.	6195.	6076.	6319.	5870.	5785.
BUFFALO	1715.	1931.	1853.	1615.	1547.	1739.	1829.
BUTTE	6819.	8589.	8004.	8161.	8592.	7825.	8382.
CAMPBELL	5305.	5629.	5033.	4046.	3531.	2866.	2503.
CHARLMIX	16256.	16703.	13449.	15558.	11785.	9994.	10477.
CLARK	11136.	11022.	8955.	8369.	7134.	5515.	5778.
CLAY	9654.	10088.	9592.	10993.	10810.	12923.	13413.
CODNGTON	16549.	17457.	17014.	18944.	20220.	19140.	19882.
CORSON	7249.	9535.	6755.	6168.	5798.	4994.	5007.
CUSTER	3907.	5353.	6023.	5517.	4906.	4698.	5309.
DAVISON	14139.	16821.	15336.	16522.	16681.	17319.	17785.
DAY	15194.	14606.	13565.	12294.	10516.	8713.	8478.
DEUEL	8759.	8732.	8450.	7689.	6782.	5686.	5746.
DEWEY	4802.	6556.	5751.	4968.	5257.	5170.	5951.
DOUGLAS	6993.	7236.	6348.	5636.	5113.	4569.	4499.
EDMUNDS	8336.	8712.	7814.	7275.	6079.	5548.	5600.
FALLRIVR	6985.	8741.	8089.	10439.	10688.	7505.	8372.
FAULK	6442.	6895.	5168.	4752.	4397.	3893.	3612.
GRANT	10880.	10729.	10552.	10233.	9913.	9005.	9709.
GREGORY	12700.	11420.	9554.	8556.	7399.	6710.	6474.
HAAKON	4596.	4679.	3515.	3167.	3303.	[illegible]	2718.
HAMLIN	8054.	8299.	7562.	7058.	6303.	5529.	5464.
HAND	8778.	9405.	7166.	7149.	6712.	5883.	5361.
HANSON	6202.	6131.	5400.	4896.	4584.	3781.	3649.
HARDING	3953.	3589.	3010.	2289.	2371.	1855.	1880.
HUGHES	5711.	7009.	6624.	8111.	12725.	11632.	13529.
HUTCHSON	13475.	13904.	12668.	11423.	11085.	10379.	9746.
HYDE	3315.	3690.	3113.	2811.	2602.	2515.	2439.
JACKSON	2472.	2636.	1955.	1768.	1985.	1531.	1646.
JERAULD	6338.	5816.	4752.	4476.	4048.	3310.	3011.
JONES	3004.	3177.	2509.	2281.	2066.	1882.	1641.
KINGSBRY	12802.	12805.	10831.	9962.	9227.	7657.	7109.
LAKE	12257.	12379.	12412.	11792.	11764.	11456.	1v643.
LAWRENCE	13029.	13920.	19093.	16648.	17075.	17453.	16737.
LINCOLN	13893.	13918.	13171.	12767.	12371.	11761.	12517.
LYMAN	6591.	6335.	5045.	4572.	4428.	40e0.	4688.
MCCOOK	9990.	10316.	9793.	8828.	8268.	7246.	6938.
MCPHERSN	7705.	8774.	8353.	7071.	5021.	5022.	4637.
MARSHALL	9596.	9540.	8880.	7835.	6663.	5965.	5655.
MEADE	9367.	11482.	9735.	11516.	12044.	17020.	18313.
MELLETTE	3850.	5293.	4107.	3046.	2664.	2420.	2392.
MINER	8560.	8376.	6836.	62e0.	5398.	4454.	4139.
MINNEHAH	42490.	50872.	57697.	70910.	86575.	95209.	1v0074.
MOODY	9742.	9603.	9341.	9252.	8810.	7e22.	7594.
PENNINGT	12720.	20079.	23799.	34053.	58195.	59349.	67384
PERKINS	7993.	8717.	6585.	6776.	5977.	4769.	4750
POTTER	4382.	5762.	4614.	4680.	4926.	4449.	4214.
ROBERTS	16514.	15782.	15887.	14929.	13190.	11678.	11799.
SANBORN	7877.	7326.	5754.	5142.	4641.	3697.	3426.
SHANNON	3524.	5085.	7155.	5669.	6000.	3196.	9423.
SPINK	15768.	15304.	12527.	12204.	11706.	10e9e.	9e0v.
STANLEY	2908.	2381.	1959.	2055.	4085.	2457.	2537.
SULLY	2831.	3852.	2668.	2713.	2607.	2362.	2179.
TODD	2784.	5898.	5714.	4758.	4661.	6e06.	7216.
TRIPP	11970.	12712.	9937.	9139.	8761.	8171.	8391.
TURNER	14871.	14891.	13270.	12100.	11159.	9872.	93e
UNION	11099.	11480.	11675.	10792.	10197.	9643.	10426.
WALWORTH	8447.	8791.	7274.	7648.	8097.	7842.	7846.
WASHHAUG	1166.	2474.	1980.	1551.	1042.	1309.	1536.
YANKTON	15233.	16589.	16725.	16804.	17551.	19039.	17949.
ZIEBACH	3718.	4039.	2875.	2606.	2495.	2221.	2671.
DISTR1	114858.	116249.	108513.	107418.	105597.	98213.	98683.
DISTR2	101997.	111565.	115198.	126390.	139380.	146e54.	152735.
DISTR3	125540.	128238.	111809.	109549.	103184.	97428.	94684.
DISTR4	137115.	143473.	128684.	127208.	120872.	115091.	112953.
DISTR5	91171.	105986.	85931.	81168.	85530.	78957.	81920.
DISTR6	65866.	87338.	92826.	101007.	125951.	129911.	142316.
FULLSTAT	636547.	692849.	642961.	652740.	680514.	666257.	683291.

Source: South Dakota Facts, S.D. State Planning Bureau

TABLE 2

PERCENT CHANGE IN SOUTH DAKOTA
TOTAL POPULATION BY COUNTY, 1930-1975

COUNTY	1930-1940	1940-1950	1950-1960	1960-1970	1970-1975	1950-1975
AURORA	-24.64	-6.81	-5.42	-11.92	-4.47	-20.40
BEADLE	-14.34	7.30	7.85	-3.71	-3.98	-4.91
BENNETT	-17.23	-14.74	-10.10	1.15	7.97	-1.83
BONHOMME	-12.75	-7.92	-3.24	-7.06	-8.04	-16.45
BROOKINGS	-1.73	7.80	12.70	10.54	1.81	26.37
BROWN	-7.65	9.91	4.57	8.25	2.39	15.90
BRULE	-16.45	-1.92	4.50	-7.11	-1.45	-4.79
BUFFALO	-6.54	-12.64	-4.21	12.41	5.18	13.25
BUTTE	-6.81	1.56	6.29	-3.93	7.12	2.71
CAMPBELL	-10.59	-19.81	-11.73	-18.83	-12.67	-38.14
CHARLES MIX	-19.44	15.61	-24.27	-15.20	4.83	-32.66
CLARK	-18.75	-6.34	-14.76	-22.69	4.77	-30.96
CLAY	-4.92	14.61	-1.66	19.55	3.79	22.01
CODINGTON	-2.54	11.34	4.74	-5.34	3.88	4.95
CORSON	-29.16	-9.60	-6.50	-13.87	0.26	-18.82
CUSTER	1.52	-9.40	-11.07	-4.24	13.01	-3.77
DAVISON	-8.83	7.77	3.96	3.82	2.69	7.64
DAY	-7.13	-9.37	-14.46	-17.15	-2.70	-31.04
DEUEL	-6.23	-9.01	-11.80	-16.16	1.06	-25.27
DEWEY	-1.78	-13.62	5.82	-1.65	15.11	19.79
DOUGLAS	-12.37	-11.22	-8.28	-10.64	-1.53	-20.17
EDMUNDS	-1.31	-6.90	-16.44	-9.73	0.94	-23.02
FALL RIVER	-7.46	29.05	2.79	-29.78	11.55	-19.80
FAULK	-25.05	-8.05	-7.47	-11.46	-7.22	-23.99
GRANT	-1.65	-3.02	-3.13	-9.16	7.82	-5.12
GREGORY	-16.31	-10.45	-13.52	-4.31	-3.52	-24.33
HAAKON	-24.88	-9.90	4.29	-15.17	-3.00	-14.18
HAMLIN	-8.88	-6.66	-13.70	-12.42	-1.01	-22.58
HAND	-24.46	-9.24	-6.31	-12.35	-8.87	-25.01
HANSON	-11.62	-9.39	-6.37	-17.52	-3.49	-25.47
HARDING	-14.13	-23.98	3.58	-21.76	1.35	-17.87
HUGHES	-5.49	22.45	56.89	-8.59	16.31	66.80
HUTCHINSON	-8.89	-9.89	-2.98	-6.37	-6.10	-14.68
HYDE	-12.64	-9.70	-7.44	-1.34	-3.02	-13.23
JACKSON	-25.83	-9.57	12.27	-22.87	7.51	-6.90
JERAULD	-18.29	-5.81	-9.56	-18.22	-9.03	-32.73
JONES	-21.03	-9.09	-9.43	-8.91	-12.81	-28.06
KINGSBURY	-15.42	-8.02	-7.38	-17.02	-6.11	-27.84
LAKE	0.27	-5.00	-9.24	-2.62	-7.10	-9.74
LAWRENCE	37.16	-12.81	2.56	7.21	-4.10	0.53
LINCOLN	-5.37	-3.07	-3.10	-4.93	6.43	-1.96
LYMAN	-20.36	-9.38	-3.15	-5.31	0.69	-10.59
MCCOOK	-5.07	-9.85	-6.74	-12.36	-4.25	-21.41
MCPHERSON	-4.80	-16.15	-17.68	-13.73	-7.63	-34.39
MARSHALL	-6.92	-11.77	-14.56	-13.48	-5.20	-27.82
MEADE	-15.32	18.29	4.58	41.32	7.60	59.02
MELLETTE	-22.41	-25.63	-12.54	-9.16	-1.16	-21.47
MINER	-14.36	-8.51	-13.88	-17.49	-7.50	-34.27
MINNEHAHA	13.42	22.89	22.09	9.97	5.11	41.13
MOODY	-2.73	-3.95	-4.76	-13.48	-0.37	-17.92
PENNINGTON	15.53	43.75	70.90	1.98	13.54	97.88
PERKINS	-24.45	2.90	-11.79	-20.21	-0.23	-29.78
POTTER	-19.92	1.60	5.08	-9.68	-5.28	-10.11
ROBERTS	0.67	-9.03	-11.65	-11.46	1.04	-20.97
SANBORN	-21.46	-10.64	-8.74	-20.34	-7.33	-33.37
SHANNON	21.59	-25.77	5.84	36.63	14.94	66.22
SPINK	-18.15	-2.59	-4.05	-9.49	-6.00	-18.40
STANLEY	-17.72	4.90	96.76	-39.85	3.26	23.45
SULLY	-30.74	1.69	-3.91	-9.40	-7.75	-19.68
TODD	-3.12	-16.77	-2.04	41.73	10.76	53.78
TRIPP	-21.89	-8.03	-4.14	-6.73	1.59	-9.17
TURNER	-10.59	-9.82	-7.74	-11.53	-5.12	-22.59
UNION	1.73	-7.56	-5.51	-5.42	8.12	-3.39
WALWORTH	-17.26	5.14	5.67	-3.15	0.05	2.59
WASHABAUGH	-15.97	-21.97	-37.82	33.70	10.58	-0.97
YANKTON	0.32	9.47	4.45	8.48	-5.73	6.81
ZIEBACH	-7.45	-5.26	-6.76	-10.98	20.26	2.49
DIST 1	-1.48	-1.01	-1.70	-4.99	0.48	-8.13
DIST 2	3.24	4.72	11.38	5.22	4.15	20.84
DIST 3	-12.41	-2.01	-5.41	-5.58	-2.82	-13.57
DIST 4	-10.31	-1.15	-4.98	-4.78	-1.86	-11.21
DIST 5	-14.92	-5.24	5.37	-7.69	3.75	0.93
DIST 6	1.78	9.81	24.70	3.14	9.55	40.90
ALLSTATE	-7.20	1.52	4.75	-2.10	2.56	4.68

Source: South Dakota Facts, S.D. State Planning Bureau

The Indian population in South Dakota by county and the percent change by county from 1930 to 1970 are portrayed in Tables 3 and 4. There were no census estimates for Indians in 1975.

TABLE 3

INDIAN POPULATION, 1930-1970

COUNTY	1930	1940	1950	1960	1970
AURORA	0.	0.	21.	75.	98.
BEADLE	0.	0.	36.	18.	70.
BENNETT	1246.	1319.	931.	612.	897.
BONHOMME	70.	31.	60.	86.	95.
BROOKING	0.	0.	0.	17.	39.
BROWN	0.	0.	54.	163.	319.
BRULE	10.	17.	0.	52.	74.
BUFFALO	721.	854.	760.	781.	1050.
BUTTE	5.	0.	49.	49.	61.
CAMPBELL	0.	0.	0.	1.	3.
CHARLMIX	1544.	1695.	1422.	1463.	926.
CLARK	0.	0.	0.	5.	15.
CLAY	0.	0.	11.	40.	93.
CODNGTON	0.	0.	30.	46.	71.
CORSON	1850.	1477.	1585.	1668.	1476.
CUSTER	73.	11.	55.	107.	117.
DAVISON	0.	17.	17.	106.	94.
DAY	204.	209.	186.	269.	292.
DEUEL	0.	0.	0.	7.	10.
DEWEY	1707.	2052.	1801.	1995.	2457.
DOUGLAS	0.	0.	0.	2.	5.
EDMUNDS	0.	0.	0.	1.	1.
FALLRIVR	0.	0.	392.	521.	325.
FAULK	0.	0.	0.	0.	8.
GRANT	0.	0.	0.	11.	17.
GREGORY	415.	314.	195.	269.	318.
HAAKON	10.	21.	0.	36.	51.
HAMLIN	0.	0.	0.	6.	5.
HAND	0.	0.	0.	1.	6.
HANSON	0.	0.	0.	1.	1.
HARDING	0.	0.	0.	4.	10.
HUGHES	169.	210.	623.	631.	575.
HUTCHSON	0.	0.	0.	5.	6.
HYDE	0.	0.	52.	23.	45.
JACKSON	10.	21.	43.	150.	86.
JERAULD	0.	0.	0.	1.	4.
JONES	0.	0.	17.	54.	40.
KINGSBRY	0.	0.	0.	3.	5.
LAKE	0.	0.	0.	10.	11.
LAWRENCE	44.	23.	21.	100.	249.
LINCOLN	0.	0.	0.	4.	27.
LYMAN	353.	371.	492.	526.	588.
MCCOOK	0.	0.	0.	4.	17.
MCPHERSN	0.	0.	0.	2.	8.
MARSHALL	359.	380.	270.	132.	138.
MEADE	50.	10.	53.	128.	145.
MELLETTE	1471.	1269.	997.	793.	822.
MINER	2.	0.	0.	1.	6.
MINNEHAH	40.	78.	128.	375.	591.
MCCODY	219.	188.	716.	715.	666.
PENNINGT	300.	273.	1024.	1063.	2471.
PERKINS	14.	13.	0.	14.	28.
POTTER	24.	11.	14.	26.	24.
ROBERTS	582.	1252.	1342.	1503.	1447.
SANBORN	0.	0.	0.	1.	1.
SHANNON	4616.	5645.	4765.	5042.	7865.
SPINK	0.	0.	17.	71.	82.
STANLEY	113.	82.	79.	133.	142.
SULLY	0.	0.	0.	9.	19.
TODD	2775.	3858.	2666.	2718.	4600.
TRIPP	471.	430.	414.	481.	501.
TURNER	0.	0.	0.	4.	25.
UNION	0.	0.	0.	10.	10.
WALWORTH	3.	14.	41.	192.	467.
WASHBAUG	860.	917.	909.	1372.	772.
YANKTON	45.	29.	149.	286.	507.
ZIEBACH	830.	861.	915.	998.	1139.
DISTR1	319.	384.	746.	821.	747.
DISTR2	40.	74.	179.	443.	783.
DISTR3	2096.	2041.	1875.	2349.	2819.
DISTR4	1945.	1841.	1912.	2163.	2461.
DISTR5	10517.	11005.	10388.	11104.	14027.
DISTR6	7219.	8119.	8247.	8413.	12198.
FULLSTAT	21131.	23147.	21194.	25791.	32365.

TABLE 4

INDIAN POPULATION PERCENT OF TOTAL, 1930-1970

COUNTY	1930	1940	1950	1960	1970
AURORA	0.0	0.0	0.42	1.58	1.39
BEADLE	0.0	0.0	0.17	0.08	0.14
BENNETT	27.1%	30.61	27.41	20.05	29.05
BONHOMME	0.60	0.30	0.64	0.92	0.29
BROOKING	0.0	0.0	0.0	0.08	0.18
BROWN	0.0	0.0	0.17	0.48	0.86
BRULE	0.11	0.21	0.0	0.82	1.26
BUFFALO	17.1%	45.5%	47.08	50.49	60.38
BUTTE	0.0%	0.0	0.60	0.57	0.78
CAMPBELL	0.0	0.0	0.0	0.03	0.10
CHARLMIX	9.24	12.34	9.27	12.41	9.27
CLARK	0.0	0.0	0.0	0.07	0.27
CLAY	0.0	0.0	0.10	0.37	0.72
CODNGTON	0.0	0.0	0.16	0.23	0.38
CORSON	19.40	24.90	25.70	28.77	29.56
CUSTER	1.1%	0.1%	1.00	2.1%	2.49
DAVISON	0.0	0.11	0.10	0.63	0.54
DAY	1.40	1.14	1.51	2.56	3.35
DEUEL	0.0	0.0	0.0	0.10	0.18
DEWEY	21.04	25.68	36.29	37.95	47.52
DOUGLAS	0.0	0.0	0.0	0.04	0.11
EDMUNDS	0.0	0.0	0.0	0.02	0.02
FALLRIVR	0.0	0.0	3.76	4.88	4.33
FAULK	0.0	0.0	0.0	0.0	0.21
GRANT	0.0	0.0	0.0	0.11	0.19
GREGORY	3.63	2.29	2.28	3.64	4.76
HAAKON	0.21	0.45	0.0	1.09	1.82
HAMLIN	0.0	0.0	0.0	0.10	0.09
HAND	0.0	0.0	0.0	0.02	0.10
HANSON	0.0	0.0	0.0	0.02	0.03
HARDING	0.0	0.0	0.0	0.17	0.54
HUGHES	2.41	1.17	7.68	4.96	4.94
HUTCHSON	0.0	0.0	0.0	0.05	0.06
HYDE	0.0	0.0	1.85	1.08	1.79
JACKSON	0.18	1.07	2.43	7.56	5.62
JERAULD	0.0	0.0	0.0	0.02	0.12
JONES	0.0	0.0	1.62	2.61	2.13
KINGSBRY	0.0	0.0	0.0	0.03	0.07
LAKE	0.0	0.0	0.0	0.08	0.10
LAWRENCE	0.46	0.11	0.13	0.59	1.41
LINCOLN	0.0	0.0	0.0	0.03	0.23
LYMAN	4.57	7.1%	8.75	11.88	14.48
MCCOOK	0.0	0.0	0.0	0.05	0.23
MCPHERSN	0.0	0.0	0.0	0.09	0.16
MARSHALL	1.76	4.28	3.45	1.98	2.31
MEADE	0.44	0.10	0.46	1.06	0.85
MELLETTE	27.79	30.40	32.73	29.77	33.97
MINER	0.0	0.0	0.0	0.02	0.13
MINNEHAH	0.09	0.14	0.18	0.43	0.62
MCCODY	2.28	2.01	7.74	8.12	8.74
PENNINGT	1.49	1.15	3.02	3.20	4.16
PERKINS	0.17	0.20	0.0	0.57	0.59
POTTER	0.49	0.22	0.30	0.53	0.54
ROBERTS	2.22	3.88	9.04	11.40	13.42
SANBORN	0.0	0.0	0.0	0.02	0.03
SHANNON	78.46	78.98	84.05	84.03	86.18
SPINK	0.0	0.0	0.14	0.61	0.77
STANLEY	4.7%	4.49	1.84	3.26	4.78
SULLY	0.0	0.0	0.0	0.35	0.80
TODD	47.8%	51.42	55.61	58.31	69.61
TRIPP	4.7%	4.17	4.7%	5.49	6.13
TURNER	0.0	0.0	0.0	0.04	0.25
UNION	0.0	0.0	0.0	0.16	0.11
WALWORTH	0.03	0.47	0.54	2.37	5.96
WASHBAUG	11.30	40.41	48.61	32.34	55.58
YANKTON	0.27	0.17	0.87	1.65	2.66
ZIEBACH	10.5%	21.00	35.11	40.00	51.28
DISTR1	0.19	0.17	0.69	0.78	0.86
DISTR2	0.84	0.87	0.11	0.32	0.53
DISTR3	1.71	1.74	1.71	2.28	2.07
DISTR4	1.17	1.41	1.58	1.79	2.16
DISTR5	9.1	11.99	12.98	12.98	17.77
DISTR6	8.39	8.76	8.19	7.08	9.19
FULLSTAT	4.09	4.61	3.98	4.79	4.86

C. Resident Reservation Indian Population

Map 2 shows the location of the nine reservations scattered around the state. The vast majority of Indian people in South Dakota live on or near these reservations.

Table 5 is the Bureau of Indian Affairs count of the Indian population on or near the nine reservations.

All nine tribes within the state are federally-recognized. Their lands, possessed either by the tribe or individual Indians, are held in trust by the Federal Government. Due to Federal land policies, major parts of nearly all reservations are now owned by non-Indians resulting in a "checkerboard" pattern of land ownership. Table 6 shows county land ownership in acres by state, Federal, Indian or private ownership.

After Map 2 and Tables 5 and 6 are brief descriptions of the nine Sioux tribes in South Dakota and their property still in trust status.

MAP 2

SOUTH DAKOTA INDIAN RESERVATIONS

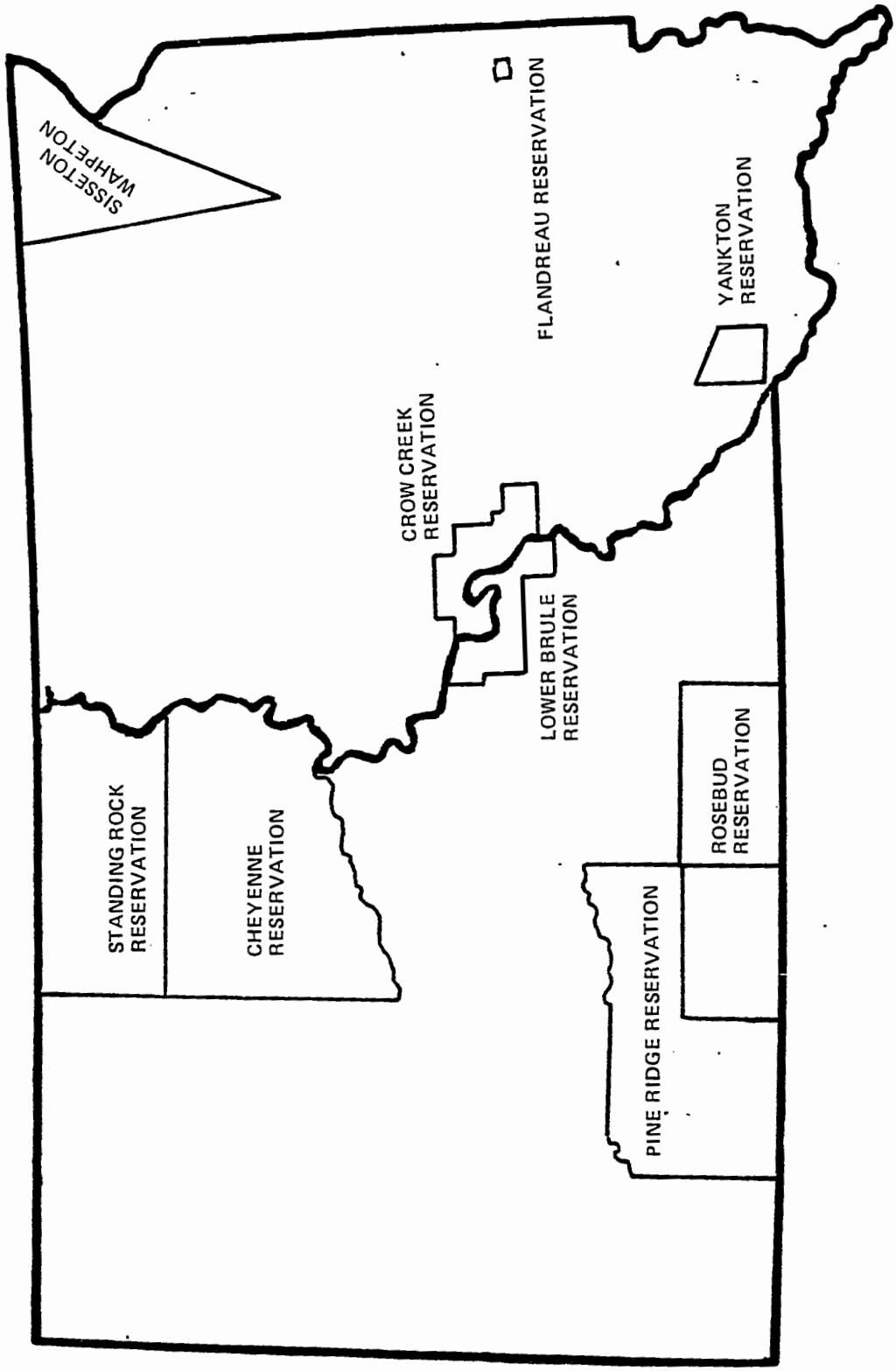


Table 5

SOUTH DAKOTA INDIAN POPULATION BY RESERVATION, 1971-1977[1]

	71	72	73	74	75	76	77	1971 - 1977 % Difference + Increase - Decrease
Cheyenne River	4,232	4,308	4,335	4,504	4,583	4,629	5,133	21.3 %
Flandreau	267	267	283	293	293	300	314	17.6
Pine Ridge	11,500	11,353	11,478	11,660	11,842	11,977	12,260	6.6
Rosebud	7,403	7,488	7,538	7,671	8,410	8,498	12,186	64.6
Yankton	926	1,338	1,425	1,425	1,425	1,425	1,436	55.1
Sisseton	2,117	2,434	2,979	3,486	3,533	3,533	3,578	69.0
Standing Rock	4,892	4,690	4,868	4,874	5,133	5,781	6,957	42.2
Crow Creek	1,183	1,230	1,242	1,236	1,429	1,475	1,702	43.9
Lower Brule	616	710	702	783	753	753	817	32.6
TOTAL	33,136	33,809	34,850	35,932	37,356	38,371	44,383	33.9

Source: Aberdeen Area Statistical Data, Service population on or near reservations.

TABLE 6

LAND OWNERSHIP IN ACRES

COUNTY	STATE	% STATE	FEDERAL	% FEDERAL	INDIAN 1/	% INDIAN	PRIVATE 2/	% PRIVATE
AURORA	21333.000	4.701	2741.000	0.604	0.0	0.0	429686.000	94.695
BEADLE	20978.000	2.604	3372.000	0.418	0.0	0.0	781410.000	96.978
BENNETT	27386.000	3.623	20099.000	2.659	292105.000	38.646	416250.000	55.071
BONHOMME	10112.000	2.821	16973.000	4.736	40.000	0.011	331275.000	92.432
BROOKING	25588.000	4.998	3205.000	0.626	0.0	0.0	483207.000	94.376
BROWN	37913.000	3.539	21861.000	2.040	0.0	0.0	1011586.00	94.421
BRULE	20321.000	3.882	15333.000	2.929	149.000	0.028	487717.000	93.161
BUFFALO	3981.000	1.291	21507.000	6.972	60328.000	19.557	222664.000	72.181
BUTTE	102308.000	7.105	161732.000	11.231	0.0	0.0	1175960.00	81.664
CAMPBELL	20236.000	4.320	23927.000	5.107	0.0	0.0	424317.000	90.573
CHARLMIX	25705.000	3.661	32582.000	4.641	34017.000	4.845	609776.000	86.853
CLARK	22248.000	4.416	2485.000	0.493	0.0	0.0	587227.000	95.181
CLAY	7825.000	3.019	51.000	0.020	0.0	0.0	251324.000	96.961
CODNGTON	38717.000	8.806	2013.000	0.458	1002.000	0.228	397948.000	90.509
CORSON	54225.000	3.430	80335.000	5.082	541705.000	34.268	904535.000	57.220
CUSTER	92490.000	9.282	404082.000	40.551	0.0	0.0	499908.000	50.167
DAVISON	7824.000	2.830	228.000	0.082	0.0	0.0	268428.000	97.088
DAY	49290.000	7.477	8028.000	1.218	9278.000	1.407	592604.000	89.897
DEUEL	21918.000	5.359	2382.000	0.582	0.0	0.0	384660.000	94.058
DEWEY	22233.000	1.478	118637.000	7.885	843317.000	56.048	520453.000	34.590
DOUGLAS	7381.000	2.651	1589.000	0.571	0.0	0.0	269430.000	96.778
EDMUNDS	29051.000	3.933	1853.000	0.251	0.0	0.0	707656.000	95.816
FALLRIVR	39438.000	3.535	294162.000	26.370	0.0	0.0	781920.000	70.095
FAULK	32822.000	5.149	679.000	0.107	0.0	0.0	603939.000	94.744
GRANT	15435.000	3.541	2199.000	0.505	600.000	0.138	417606.000	95.816
GREGORY	16226.000	2.543	28879.000	4.526	16976.000	2.660	575999.000	90.271
HAAKON	27319.000	2.351	3652.000	0.314	0.0	0.0	1131269.00	97.335
HAMLIN	29642.000	9.064	728.000	0.223	131.000	0.040	296539.000	90.674
HAND	28478.000	3.107	1288.000	0.141	0.0	0.0	886714.000	96.752
HANSON	9207.000	3.346	709.000	0.258	0.0	0.0	265284.000	96.397
HARDING	330531.000	19.256	103521.000	6.031	0.0	0.0	1282428.00	74.713
HUGHES	9694.000	2.025	45711.000	9.549	27857.000	5.819	395458.000	82.607
HUTCHSON	14880.000	2.853	257.000	0.049	0.0	0.0	506463.000	97.098
HYDE	27901.000	5.052	5687.000	1.030	17332.000	3.138	501400.000	90.781
JACKSON	15060.000	2.912	121033.000	23.405	0.0	0.0	381027.000	73.682
JERAULD	9185.000	2.723	640.000	0.190	0.0	0.0	327455.000	97.087
JONES	13873.000	2.228	20115.000	3.230	0.0	0.0	588732.000	94.542
KINGSBRY	43570.000	8.323	2158.000	0.412	0.0	0.0	477792.000	91.265
LAKE	20003.000	5.512	3687.000	1.016	0.0	0.0	339190.000	93.472
LAWRENCE	10760.000	2.102	273975.000	53.511	0.0	0.0	227265.000	44.388
LINCOLN	13507.000	3.664	250.000	0.068	0.0	0.0	354883.000	96.268
LYMAN	32420.000	3.010	119317.000	11.077	95914.000	8.905	829469.000	77.008
MCCOOk	13695.000	3.721	2526.000	0.686	0.0	0.0	351779.000	95.592
MCPHERSN	40435.000	7.450	5078.000	0.936	0.0	0.0	497207.000	91.614
MARSHALL	36923.000	5.030	2812.000	0.383	26993.000	3.677	667352.000	90.910
MEADE	94753.000	4.273	72880.000	3.286	160.000	0.007	2049807.00	92.434
MELLETTE	21066.000	2.520	0.0	0.0	284732.000	34.065	530042.000	63.414
MINER	11844.000	3.247	1302.000	0.357	0.0	0.0	351654.000	96.396
MINNEHAH	23998.000	4.610	3407.000	0.655	0.0	0.0	492925.000	94.735
MOODY	9950.000	2.973	1366.000	0.408	0.0	0.0	323404.000	96.619
PENNINGT	46505.000	2.615	809784.000	45.530	640.000	0.036	921631.000	51.819
PERKINS	85917.000	4.694	159530.000	8.716	640.000	0.035	1584313.00	86.556
POTTER	35875.000	6.450	19139.000	3.441	0.0	0.0	501146.000	90.108
ROBERTS	35241.000	4.970	3988.000	0.562	65513.000	9.239	604378.000	85.229
SANBORN	11265.000	3.088	93.000	0.025	0.0	0.0	353442.000	96.887
SHANNON	8328.000	0.670	133780.000	9.954	904882.000	67.328	297010.000	22.099
SPINK	31211.000	3.240	1539.000	0.160	0.0	0.0	930450.000	96.600
STANLEY	20401.000	2.254	114788.000	12.684	15801.000	1.746	753970.000	83.315
SULLY	29814.000	4.640	70112.000	10.911	0.0	0.0	542634.000	84.449
TODD	9408.000	1.059	12.000	0.001	551206.000	62.050	327694.000	36.889
TRIPP	25422.000	2.452	4.000	0.0	74544.000	7.190	936830.000	90.358
TURNER	11731.000	2.995	222.000	0.057	0.0	0.0	379727.000	96.948
UNION	11065.000	3.825	1886.000	0.650	0.0	0.0	276335.000	95.525
WALWORTH	29599.000	6.441	16549.000	3.601	0.0	0.0	413372.000	89.957
WASHBAUG	4799.000	0.707	0.0	0.0	446298.000	65.725	227943.000	33.568
YANKTON	10976.000	3.304	3667.000	1.104	0.0	0.0	317517.000	95.592
ZIEBACH	31489.000	2.484	2684.000	0.212	555278.000	43.797	678389.000	53.507
DISTR1	243915.000	5.638	21525.000	0.498	1733.000	0.040	4059227.00	93.825
DISTR2	81811.000	3.724	8336.000	0.379	0.0	0.0	2106973.00	95.897
DISTR3	164415.000	3.248	103691.000	2.049	51182.000	1.011	4742472.00	93.692
DISTR4	342342.000	4.401	50498.000	0.649	101784.000	1.309	7283296.00	93.641
DISTR5	500873.000	3.096	821706.000	5.079	3068654.00	18.968	11786687.0	72.857
DISTR6	772358.000	5.908	2395048.00	18.321	1644085.00	12.577	8261149.00	63.194
FULLSTAT	2105714.00	4.332	3400804.00	6.996	4867438.00	10.012	38239792.0	78.660

1/ *THESE FIGURES INCLUDE BOTH ALLOTTED TRUST AND TRIBAL TRUST LANDS.*

2/ *THE AMOUNT OF PRIVATELY OWNED LAND WAS CALCULATED BY SUBTRACTING STATE, FEDERAL, AND INDIAN LANDS FROM THE TOTAL LAND AREA. CONSEQUENTLY, THE FIGURES FOR PRIVATE LAND MAY INCLUDE CITY AND/OR COUNTY LANDS.*

source: *S.D. STATE PLANNING BUREAU*

Cheyenne River Sioux

Including all of Dewey and Ziebach counties, the Cheyenne River Reservation originally covered nearly 3 million acres. Congressional actions near the turn of the century and the construction of the Oahe Dam in 1948-1962 (forcing 30% of the tribe to be relocated and reimbursed) has reduced Indian trust lands to 1.4 million acres. The bulk of this land --915,100--is tribally-owned.

Crow Creek Sioux

Enclosing 285,000 acres east of the Missouri near the Fort Randall and Big Bend Dams, the Crow Creek Reservation was among the earliest reservations to be created and among the first to start allotments to individuals. 105,500 acres are now in trust status; 69,300 are held by individual Indians and the remainder is tribally-owned. Another 19,000 acres bordering the river are federally-owned but preserved for Indian use. The reservation covers parts of Hughes, Hyde and Buffalo Counties and 150 acres in Brule County.

Flandreau Santee Sioux

The Santee Sioux, originally from Minnesota, split and were moved or chose to settle in the Crow Creek Reservation, the Santee Reservation in Nebraska, and on the Big Sioux River near the present day town of Flandreau about 40 miles north of Sioux Falls. By the 1930's the Flandreau Santee

Sioux's land base was gone. In 1935-1936, 2,180 acres were bought for the tribal government and the area was declared a reservation. The Flandreau Boarding School, a Bureau of Indian Affairs secondary education institution, was located in Flandreau in 1893 and continues as the heart of the reservation's economic life.

Lower Brule Sioux

The Lower Brule Sioux in 1865 came to terms with the Federal Government. The Lower Brule Reservation was subsequently defined and diminished by congressional acts near the turn of the century. Its boundaries now encompass 235,000 acres. As with its neighbor directly across the river, the Crow Creek Reservation, Indian land holdings have been substantially reduced due to congressional acts, land sales and the building of the Fort Randall and Big Bend Dams on the Missouri. Nearly 70% of the tribe had to be relocated to higher land and reimbursed when the Missouri was flooded to its present state. Approximately 106,000 acres are now in trust status, 76,700 of which are tribally-owned. About 13,000 acres of land bordering the river is federally-owned but reserved for Indian use. Most of the reservation lies in Lyman County; a small part falls within Stanley County.

Oglala Sioux

The Pine Ridge Reservation is the largest Indian reservation in the state in terms of population and land holdings. Formerly encompassing Bennett County, present reservation boundaries cover all of Shannon and Washabaugh Counties. Of the original 2.8 million acres provided under the 1889 treaty, Indian land holdings include 1,151,000 acres of allotted land and 432,000 of tribal property.

The Rosebud Sioux

In 1889, the Rosebud Sioux Reservation was created out of an area which now comprises Todd, Tripp, and Mellette Counties and a portion of Gregory County in south central South Dakota, an area of 3.3 million acres. The Supreme Court ruled in 1977 in Rosebud v. Kneip that various settlement acts from 1904 to 1910 had diminished the original reservation boundaries to those of just Todd County. In 1973, Indian land holdings, which extend beyond the present day reservation boundaries, include 439,900 acres which are tribally-owned and 439,600 acres of allotted lands.

Sisseton-Wahpeton Sioux

The Sisseton-Wahpeton Sioux live on the former[2/] Lake Traverse Reservation located in the northeast corner of South

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2/ In DeCoteau v. District County Court, 420 U.S. 425 (1975), the Supreme Court ruled that Congress had "terminated" the reservation, that is, diminished the reservation boundaries to the remaining lands still retained by Indians in trust status. The tribe, however, was not terminated; it still receives Federal Indian services as a federally-recognized tribe.

Dakota. The reservation, small parts of which extend into North Dakota was formerly a triangle covering nearly all of Roberts County, South Dakota and pieces of four other northeast South Dakota counties. About 10% of the land (118,000 acres) within the original reservation boundaries is now in trust status; due to recent land-buying efforts, the tribe owns 12,000 acres.

Standing Rock Sioux

Approximately half of the Standing Rock Sioux Reservation lies in North Dakota; the other half includes all of Corson County, South Dakota. Slightly less than 35% of Corson County property is Indian-owned. Of the 2.3 million acres within the boundaries of the entire reservation, 323,000 acres are held by the tribe and 511,200 acres are allotted trust lands.

Yankton Sioux

The first reservation established by treaty in South Dakota, the Yankton Sioux Reservation occupies a part of Charles Mix County east of the Missouri in south central South Dakota. Of the original 431,100 acres within the original boundaries of the reservation, only 8%, or 34,000 acres, are held in trust for Indians; 8,000 acres are tribally-owned and 26,000 are individually allotted.

D. Income

Apart from the notable year 1973, South Dakotan's per capita personal income has hovered around 80% of U.S. per capita income. See Table 7. Table 8 shows the county order for per capita personal income for the years 1972-1974.

TABLE 7: South Dakota per capita personal income as a percent of U.S. per capita income, 1965-1974

TABLE 8: South Dakota per capita personal income by county rank order, three year average, 1972-1974

SHANNON	2029.000	LAKE	4470.000
TODD	2545.667	BEADLE	4482.664
DEWEY	3347.000	SANBORN	4511.664
ZIEBACH	3456.333	JACKSON	4562.664
CORSON	3536.000	PENNINGT	4566.000
BUFFALO	3629.667	CLARK	4646.332
WALWORTH	3632.000	SPINK	4655.664
BROOKING	3690.667	BONHOMME	4672.000
CUSTER	3697.000	JERAULD	4720.000
LAWRENCE	3741.000	LINCOLN	4726.664
FALLRIVR	3857.000	YANKTON	4727.664
WASHBAUG	3934.667	MINNEHAH	4742.332
BUTTE	3945.000	FAULK	4780.332
DEUEL	4042.333	POTTER	4810.664
CHARLMIX	4045.667	TURNER	4927.332
EDMUNDS	4107.332	KINGSBRY	5010.332
ROBERTS	4111.664	HYDE	5019.332
HANSON	4126.664	HUGHES	5025.332
MCCOOK	4134.000	BRULE	5088.332
DAY	4200.000	PERKINS	5091.664
CLAY	4215.332	MARSHALL	5098.664
DAVISON	4239.332	HUTCHSON	5240.000
BENNETT	4246.000	STANLEY	5248.664
MELLETTE	4286.000	TRIPP	5280.332
CAMPBELL	4321.000	UNION	5332.000
GREGORY	4329.332	HAND	5798.332
MEADE	4346.664	HAAKON	5877.664
CODNGTON	4352.664	JONES	6555.664
MOODY	4391.000	LYMAN	6738.332
HARDING	4393.332	SULLY	9528.000
DOUGLAS	4394.332	DISTR6	3938.029
BROWN	4403.000	DISTR1	4397.863
MCPHERSN	4423.000	DISTR3	4544.719
MINER	4441.332	DISTR4	4605.863
AURORA	4441.664	DISTR2	4679.609
HAMLIN	4466.332	DISTR5	4885.016
GRANT	4467.664	FULLSTAT	4535.824

Source: South Dakota Facts, S.D. State Planning Bureau

Nearly 30% of South Dakota's income arises from farming. See Table 9.

Authoritative current statistics on Indian income are not available. Analysis of Table 8, however, indicates that those counties with the lowest income are those within Indian reservations. In 1970, state family median income was $7,494; Indian family median income for that year was $3,795.

TABLE 9

PERCENT OF PERSONAL INCOME BY MAJOR SOURCE, 1962-1974

	1962	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974
TOTAL LABOR AND PROPRIETORS' INCOME BY PLACE OF WORK											
BY TYPE											
WAGE AND SALARY DISBURSEMENTS	59.6	60.2	58.1	61.5	62.0	63.3	66.4	65.6	61.0	50.7	62.6
OTHER LABOR INCOME	2.2	2.5	2.4	2.6	2.7	2.9	3.3	3.3	3.4	2.8	3.5
PROPRIETORS' INCOME	38.2	37.3	39.5	35.9	35.3	33.7	30.3	31.1	35.6	46.5	33.9
FARM	27.5	26.1	28.7	25.2	25.3	24.9	21.2	22.0	28.5	39.8	26.1
NONFARM	10.7	11.2	10.8	10.7	10.0	8.9	9.1	9.1	7.2	6.7	7.8
BY INDUSTRY											
FARM	29.5	27.5	30.0	26.6	26.5	26.3	22.6	23.3	29.6	40.9	27.8
NONFARM	70.5	72.5	70.0	73.4	73.5	73.7	77.4	76.7	70.4	59.1	72.2
PRIVATE	54.1	52.9	50.7	53.2	53.3	53.1	54.9	54.5	49.2	42.4	52.9
MANUFACTURING	7.1	6.9	6.9	7.6	7.7	7.7	8.1	8.1	7.7	6.5	8.2
MINING	1.3	1.4	1.2	1.2	1.3	1.4	1.3	1.3	1.1	1.0	1.2
CONTRACT CONSTRUCTION	8.3	5.1	4.6	4.6	4.7	4.7	4.6	5.0	4.6	4.4	5.5
WHOLESALE AND RETAIL TRADE	17.8	18.2	17.7	18.3	18.1	17.8	18.3	18.0	15.5	13.3	16.9
FINANCE, INSURANCE, AND REAL ESTATE	3.3	4.0	3.8	4.0	4.0	3.8	3.9	3.8	3.4	2.8	3.5
TRANSPORTATION, COMMUNICATION, AND PUBLIC UTILITIES	5.9	5.9	5.5	5.8	5.6	5.7	6.1	6.2	5.8	4.8	6.0
SERVICES	10.0	10.8	10.5	11.4	11.4	11.5	12.2	11.7	10.7	9.2	11.2
OTHER INDUSTRIES	0.4	0.5	0.5	0.5	0.5	0.5	0.5	0.5	0.4	0.4	0.5
GOVERNMENT	16.4	19.6	19.3	20.3	20.2	20.6	22.4	22.2	21.1	16.7	19.4
FEDERAL, CIVILIAN	5.1	5.5	5.2	5.3	5.4	5.1	5.7	5.6	5.4	4.3	5.2
FEDERAL, MILITARY	2.5	3.4	3.4	3.5	3.2	3.2	3.6	3.7	3.5	2.8	3.3
STATE AND LOCAL	8.8	10.7	10.7	11.5	11.7	12.3	13.1	12.9	12.2	9.6	10.9
TOTAL LABOR AND PROPRIETORS' INCOME BY PLACE OF WORK	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: South Dakota Facts, S.D. State Planning Bureau

E. Employment

According to the Bureau of Indian Affairs, in 1977 in South Dakota 54.5% of the Indian labor force was unemployed. See Table 10. Although there has been new jobs on many reservations, employment openings have not kept pace with the rapid increase in Indian population.

By contrast, South Dakota's overall employment rate through 1975 remained below 5% and below the overall U.S. unemployment rate.

TABLE 10
UNEMPLOYMENT RATES ON
SOUTH DAKOTA INDIAN RESERVATIONS, 1977

RESERVATION	TOTAL INDIAN POPULATION No.	% in Labor Force	LABOR FORCE TOTAL No.	UNEMPLOYED No.	%
Cheyenne River	5,133	39.2	2,012	524	26.0
Crow Creek	1,702	40.5	690	466	67.5
Flandreau	314	48.4	152	10	6.5
Lower Brule	817	30.5	249	103	41.4
Pine Ridge	12,260	30.3	3,717	1,783	48.0
Rosebud	12,186	49.0	5,970	4,059	68.0
Sisseton	3,578	28.7	1,026	543	52.9
Standing Rock**	3,409	30.3	1,105	615	55.7
Yankton	1,436	31.3	450	280	62.2
TOTAL	40,835	37.7	15,371	8,383	54.5

** South Dakota portion only

Source: BIA Aberdeen Area Statistics, Labor Force Statistics, May, 1977.

F. Law Enforcement

A major source of funding for all law enforcement operations of the various South Dakota governmental jurisdictions is the Law Enforcement Assistance Administration of the U.S. Department of Justice. LEAA money not only goes to police agencies, but also to the courts, correctional institutions and facilities and juvenile justice operations.

Funding procedures under LEAA are complex and are likely to be changed within the next year. Currently, LEAA gives "block" action grants under "Part C" on a formula basis to each state for a variety of programs. It also gives block grants to states under "Part E" for correctional programs. The block grants are administered and allocated within the state by state planning agencies-- in South Dakota, by the State Criminal Justice Commission in conjunction with the Division of Law Enforcement Assistance of the Department of Public Safety-- which in turn are federally funded. In addition to Part C and E block grants and planning funds, "discretionary" grants are awarded by the LEAA outside of the state block grant procedure. By law, LEAA may use 15% of all Part C money and 50% of all Part E funds for discretionary grants.

From 1969 to 1977, nearly $19.5 million was awarded to the state. After four years of receiving around $1.9 million, in FY1977, South Dakota received only 1.2 million in Part C and E funds. Total Part C and E money from 1969 to 1977 was $12.5 million.

Under LEAA, for purposes of funding eligibility, tribal criminal justice systems are given equal status with South Dakota's local criminal justice operations. Consequently, the nine reservations were eligible for Part C and E money. Of $6.8 million allocated to local government units from 1969 to 1977, the nine tribes received $608,000. Of $4.4 million awarded to South Dakota out of discretionary money by LEAA, $2.9 million went to seven tribes.

Table 11 is a listing of the discretionary grants and the programs for the tribes which received such funds.

TABLE 11

LAW ENFORCEMENT
ASSISTANCE ADMINISTRATION
DISCRETIONARY AWARDS

1969-1976

CHEYENNE RIVER SIOUX TRIBE	
Swiftbird Feasibility	$ 15,000
Criminal Justice System Re-employment Program	119,945
Criminal Justice Training Coordinator	15,000
Law Enforcement Improvement	47,763
Juvenile Delinquency Corrections	44,056
Manpower and Equipment	35,496
Manpower and Equipment	24,623
	$302,783
$69.85 per capita expenditure	
CROW CREEK SIOUX TRIBE	
Manpower and Equipment	$ 74,328
Police Improvement	28,885
Criminal Justice Improvement	44,853
	$148,066

LOWER BRULE SIOUX TRIBE

Manpower and Equipment	$ 67,546
Manpower and Equipment	65,372
Criminal Justice Improvement	33,975
Correctional Facility	25,000
Corrections Center	100,000
Criminal Justice Personnel	10,000
	$301,893

OGLALA SIOUX TRIBE

Architectural Services	$120,000
Adult Correctional Facility	315,000
Criminal Justice Improvement Program	89,954
	$424,954

ROSEBUD SIOUX TRIBE

Juvenile Diversion	$432,858
Police Manpower and Training	68,581
Manpower and Equipment	52,302
Attention Center Manpower and Equipment	58,392
Rosebud Attention Center	80,201
Manpower and Equipment	85,305
	$777,639

SISSETON-WAHPETON SIOUX TRIBE

Manpower and Equipment	$ 78,736
Manpower	89,491
Rehabilitation Center	139,245
Manpower and Equipment	99,991
	$407,463

UNITED SIOUX TRIBES

New Careers	$146,000
New Careers	150,828
	$296,828

YANKTON SIOUX TRIBES

Adult Correctional Facility	$ 50,000
Adult Correctional Facility	100,000
Manpower and Equipment	19,871
	$169,871

Source: Nine Years of LEAA in South Dakota: FY 1969-1977, Division of Law Enforcement Assistance of the Department of Public Safety

III. Legal

A. Overview:

There is a relatively consistent body of law whose origins flow from pre-colonial America to present day. This body of law is neither well known nor well understood by the American public. This body of law--Federal Indian Law--or more accurately, United States constitutional law concerning Indian tribes and individuals---is unique and separate from the rest of American jurisprudence. Analogies to general constitutional law, civil rights law, public land law, and the like are misleading and often erroneous. Indian law is distinct--it encompasses Western European International Law, specific provisions of the United States Constitution, pre-colonial treaties, treaties of the United States, an entire volume of the United States Code, and numerous decisions of the United States Supreme Court and inferior federal courts.

Although the precise origins for many of the operative concepts in Indian law are murky and the parameters are not definable with ultimate precision, concepts can be broadly defined. An understanding of some of these concepts is a basic prerequisite to functioning in Indian affairs.

1. Indian Tribes are governmental units that have a "special" political (trust) relationship with the government of the United States.

In the 1830's the United States Supreme Court decided a series of cases which articulate the analytical framework upon which Indian Law rests today. The cases arose in a situation that has been repeated many times in this nation's history and one which has its current day counterparts.

The state of Georgia and the Cherokee Nation, located within the geographic boundaries of Georgia,[1] were in a state of conflict. Although all of the original 13 colonies had explicitly transferred whatever authority they once had with respect to Indian Tribes and claims on Tribal land to the Federal Government in the Constitution, the state of Georgia was attempting to dominate and destroy the Cherokee nation by imposing its laws on the Cherokees. The Cherokees filed suit with the U.S. Supreme Court under Article III of the Constitution which gives the Court original jurisdiction in cases and controversies involving states and foreign nations. The key issue facing the Court in Cherokee Nation v. Georgia,[2] was whether the "Cherokees constitute a foreign nation in the sense of the constitution" and hence could maintain the suit. Chief Justice John Marshall's opinion in the case held that the Cherokees, and other Tribes, were not foreign nations, but rather "domestic dependent nations."

The concept of "domestic dependent nations" is crucial for it encompasses two major elements: government or nation-state status of Tribes and a special Tribal relationship with the United States. In Cherokee Nation John Marshall discussed in some detail the political relationship of Tribes with the Federal government. The decision characterizes this special relationship, known as the trust relationship, as one which "resembles that of a ward to his guardian." This "fiduciary" relationship has been consistently recognized by the Federal courts ever since and has been variously described as "special," "unique," "moral," and "solemn."

1/ Also within the geographic boundaries of the states of North Carolina, Alabama and Tennessee.

2/ 30 U.S. (5 Pet.) 1 (1831).

Although the decision of the Marshall Court was not popular with the citizens of Georgia and others who wanted Tribal assets,[3] the decision and others to follow are politically consistent not only with the policy the United States had been following since its establishment, but also with the policies of the European colonizers who predated the United States. John Marshall's opinions in the early cases relied heavily, albeit, selectively on the writings of Emerick Vattel. Vattel's Law of Nations, published in 1760 was viewed as the authorative text in International law and morality by many in the colonial period. Vattel's thesis in simplified terms is: all people who govern themselves are sovereign nations; no nation has a right to more land than its people may settle and cultivate; where a nation has a need for land, it has a right to the excess lands of another; weaker nations who submit themselves to alliances with more powerful nations are still sovereign; and quoting Aristole, "the more powerful (nation) is given more honor, and to the weaker (nation), more assistance."[4]

An application of this philosophy is found in the advice given to and accepted by President George Washington by Secretary of War Henry Knox in a report of July 7, 1789. Knox reviewed the options available to the new republic in dealing with the various tribes and recommended continuation of the policy of treaty making. The benefits for the United States were: (1) the political and military loyalty of the tribes to the U.S. against the European powers, (2) the legal acquisition of lands for white settlers,

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3/ Georgia would ultimately win the battle against the Cherokees when the National legislature and Andrew Jackson arranged for the removal of most East Coast tribes to the western territories.

4/ Sections 4-6 and 206.

and (3) a more peaceful frontier with defined boundaries. The Tribes would receive recognition of their exclusive right to use and occupy defined geographic areas, and the protection of the United States.

These policies, reflected in numerous treaties between the United States and the various Tribes, were codified by the first Congress in the Indian Trade and Intercourse Act of 1790.[5/] The Act prohibited any land transactions with any "Indian nation or tribe of Indians" without the participation by the United States. This statute was recently held to form a basis of the trust relationship in Joint Tribal Council of the Passamaquoddy Tribe v. Morton.[6/]

In the treaty relationship Tribes commonly divested themselves of external sovereignty--the right to go to war with or make treaties with other foreign powers--in return for the protection of the United States. Not all Tribes have treaties. This, however, does not bar the trust relationship. The Supreme Court has made it clear that the trust relationship extends to all Tribes with whom the United States has had relations. The court in United States v. Kagama[7/] spoke of a "duty of protection" the United States owed to Tribes which came about from treaties and "the course of dealings of the federal government with them ..." leaving the Tribes in "a condition of weakness and helplessness."

Today, it is generally recognized that the United States has a trust relationship with Indian Tribes. The exact parameters of the relationship are, however, not entirely clear and perhaps never will be. One commentator has likened the trust relationship to the Bill of Rights in the Constitution.

5/ 25 U.S.C. §177.

6/ 528 F.2d 370 (1st Cir. 1975)

7/ 118 U.S. 375 (1886).

> It ... "cannot be defined with precision in all respects. It is an evolving, dynamic doctrine which has been expanded over the years as changing times have brought changing issues."

There are three components to the trust relationship: land, tribal self-government, and social services. The first--land--is the clearest and the one about which there is most agreement. Title to Indian land, both tribal and individual is generally held in trust by the United States. The United States holds technical legal title while equitable title or the right to use the land is held by the beneficiary--the Indians. Trust lands are to be managed for the benefit of the equitable or Indian owners. Damages can be assessed against the U.S. for violations of the trustee's responsibilities. The Secretary of the Interior has been designated as the prime agent of the United States for management of the trust. It is, however, clear that the trust relationship extends to the entire Federal Government and is not limited to the Department of the Interior.

Some observers argue that land and other physical assets are the only cognizable components of the trust relationship. The Department of the Interior and the Department of Justice have at times taken this view.

A broader, more rational view is found in the recent report of the American Indian Policy Review Commission of the Congress of the United States which argues:

> The purpose behind the trust is and always has been to insure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society. This duty has long been recognized implicitly by Congress

> in numerous acts, including the Snyder Act of 1921, the Indian Reorganization Act of 1934, the Johnson O'Mally Act of 1934, the Native American Programs Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, and the Indian Health Care Improvement Act of 1976. In fact, as early as 1818 Congress established a general civilization fund to aid Indians in achieving self-sufficiency within the non-Indian social and economic structure. (Footnotes omitted.)
>
> The Commission has found that Indian people are unanimous and consistent in their own view of the scope of the trust responsibility. Invariably they perceive the concept to symbolize the honor and good faith, which historically the United States has always professed in their dealing with the Indian tribes. Indian people have not drawn sharp legal distinctions between services and custody of physical assets in their understanding of the application of the trust relationship. Consequently, at its core, the trust relationship has meant to them . . . the guarantee of the U.S. that solemn promises of federal protection for lands and people would be kept. 8/

2. Indian Tribes retain domestically most powers of Government.

One year after Cherokee Nation Chief Justice John Marshall further detailed the meaning of "domestic dependent nations" in the context of the governmental status of tribes, the case Worcester v. Georgia, 9/ is still the single most important decision in Federal Indian law. It arose as part of the continuing conflict between the state of Georgia and the Cherokees. Georgia by legislation had attempted to abolish the Cherokee government and impose its own laws within Tribal boundaries. One such law forbade any non-Indian to live on Cherokee land without a permit from the Georgia Governor. Worcester was one of several non-Indian missionaries

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8/ American Indian Policy Review Commission of the U.S. Congress Final Report, Vol. 1 at 130, (May 17, 1977).

9/ 31 U.S. (6 Pet.) 515 (1832).

living with Cherokee permission on Cherokee land. Georgia, under state law, prosecuted and convicted the missionaries; they appealed to the U.S. Supreme Court. The Court, with the Chief Justice writing, reversed the convictions holding that Worcester and other non-Indians were properly subject to tribal law because Tribes were:

> /d/istinct, independent, political communities having territorial boundaries within which their authority is exclusive ....

This doctrine--of inherent sovereign powers of Tribes--barred the operation of state law within the boundaries of the Cherokee Nation.[10/] It was as if New York had attempted to impose its laws within the boundaries of Pennsylvania. The opinion again drew on International law (primarily Vattel), treaties, the Constitution, and the Trade and Intercourse Act.

The doctrine of domestic Tribal sovereignty recognized in Worcester is perhaps best described by Felix Cohen in his classic often quoted work on Indian law:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government. [11/]

10/ Federal Law, however, is operative, see Section 4 infra.

11/ F. Cohen, Handbook of Federal Indian Law, 123 (U.N. Mex. ed. 1971).

This doctrine although not intact in its entirety is still viable law. In McClanahan v. Arizona Tax Commission,[12/] the U.S. Supreme Court viewed tribal sovereignty as the starting point against which interpretative analysis begins:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution .... but because it provides a backdrop against which the applicable treaties and statutes must be read.

The case involved an attempt by Arizona to tax the personal income of a Navajo on the reservation. The Court found that Arizona had no such taxing jurisdiction and pointed out the reservation was subject to the "exclusive sovereignty of the Navajos under general Federal supervision."

In United States v. Mazurie,[13/] the Supreme Court was again squarely faced with the question of whether tribes are governments. The case involved a Wind River regulation which required Tribal liquor licenses of any persons selling alcoholic beverages on the reservation. A non-Indian who was refused a liquor license by the Tribe continued to operate. A prosecution followed. The Tenth Circuit held that the Tribe had no power to regulate liquor licenses as it was not a government. The Supreme Court unanimously reversed the decision of the Circuit Court. Citing Worcester v. Georgia, the Court stated:

> ... it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territories ....

12/ 411 U.S. 164 (1973).

13/ 419 U.S. 544 (1975).

As with any government whose power is inherent rather than delegated with specificity, it is not possible to precisely catalogue all the powers that the Tribes retain. Some powers may not have been exercised in recent years, others may become apparent only in the context of changing needs and circumstances. It is, however, safe to say that such Tribal powers include most normal powers incidental to internal governmental functioning; for example, the power to define and enforce criminal laws; the power to determine matters of family law; the power to regulate hunting and fishing; the power to tax; the power to zone and otherwise determine land use; and the power to determine the form of their governmental institutions.

3. States do not have inherent power (jurisdiction) within Indian Reservations.

In affirming the existence of inherent governmental powers of Tribes in Worcester v. Georgia, Chief Justice John Marshal recognized an additional fundamental point in Federal Indian law:

> The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force ...." (emphasis added).

This concept that states do not possess jurisdiction in Indian Country was premised on the Court's understanding, pursuant to International law, of Tribal status, and of the constitutional fact that Tribal relations were a matter of Federal jurisdiction to the exclusion of the states. Prior to the revolutionary war, the power to deal with Tribes resided in the British Crown; such power was transferred to the Federal Government, first in the Articles of Confederation and then in the Constitution. In fact, many of the states admitted to the Union, after the original 13 colonies, came into the Union with the express understanding,

contained in either their enabling legislation or constitution that they had no jurisdiction over Tribal lands. States and their non-Indian citizens have been viewed as representing interests that were in direct conflict with Tribal survival; the Federal Government was viewed as being responsible to protect Tribes from states:

> They (Tribes) owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection 14/

The original total proscription against any state jurisdiction has been eroded in several distinct ways in the century and a half since Worcester v. Georgia.

The foremost manner in which states have obtained jurisdiction with respect to Indian country is through express grants of such jurisdiction from Congress. The actions of Congress have occurred in several different ways: transfers of jurisdiction in particular subject areas to all states;[15/] and transfers to individual states with respect to specific subject areas and/or tribes.[16/] These statutes, and others,[17/] have permitted states to exercise jurisdiction over tribal members in reservation areas. Absent

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14/ United States v. Kagama, 118 U.S. 375 (1886).

15/ E.g., enforcement of sanitation and quarantine regulations and compulsory school attendance.

16/ E.G., Act of June 8, 1940, 62 Stat. 249 (Criminal jurisdiction to Kansas).

17/ P.L. 83-280 is perhaps the most pervasive transfer of Federal jurisdiction to states outside of the Oklahoma Acts. See Section II.C.1, infra.

such specific congressional authorization, however, it is clear that states have no jurisdiction with respect to Indians and their property within reservation boundaries.[18/]

The issue of what jurisdiction states have over non-Indians within reservation boundaries is less clear. In the area of criminal jurisdiction, a line of cases has recognized state jurisdiction over crimes committed on Indian reservations that exclusively involve non-Indians.[19/] Similarly, state jurisdiction over the civil activities of non-Indians can be subject to state jurisdiction.[20/] In the criminal area the U.S. Supreme Court recently held that tribal courts do not possess jurisdiction over non-Indians.[20a/]

The theory of the state jurisdiction cases has been that state jurisdiction can operate where Federal action has not preempted the state or where no Federal Indian interest conflicts with state jurisdiction. The Federal courts recently have been utilizing what is known as the "infringement test" to determine whether or not "state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[21/]

18/ Bryan v. Itasca County, 426 U.S. 373 (1976).

19/ United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896); and United States ex rel Ray v. Martin, 326 U.S. 496 (1946).

20/ E.g., Thomas v. Gay, 169 U.S. 264 (1898).

20a/ See Section C 2. infra, at

21/ Williams v. Lee, 358 U.S. 217 (1959)

4. Congress is viewed in American Jurisprudence as possessing plenary power with respect to Indian affairs.

Although Indian Tribes were not parties to the United States Constitution, much of Federal Indian law is controlled by a single clause in the Constitution:

> ...(to) regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes.

This single clause, coupled with other implicit bases provides Congress with extraordinary power to legislate, free from most judicial scrutiny, in the area of Indian affairs:

> Not only does the Constitution expressly authorize Congress to regulate commerce with Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States ... the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within or without the limits of a state. 22/

This power belongs to Congress and not the Executive branch; Executive branch agencies have only that power which Congress authorizes. 23/

The language of the Commerce clause has been broadly construed to recognize congressional authority in most areas not normally denoted as commerce. This has been accomplished in part by reference to other collateral sources of power. Included in this are the power of Congress legislatively to implement treaties, the political function of the Federal Government as trustee for Indian interests, the power of Congress to spend for the general welfare, and the war powers of Congress.

22/ United States v. Sandoval, 231 U.S. 28 (1913).

23/ Ruiz v. Morton, 415 U.S. 199 (1973).

Although the fact of such congressional power appears to be universally recognized by the courts, knowledgeable commentators, Indian and non-Indian, have questioned the legitimacy of such sweeping powers. Many Indian leaders have indicated their belief that plenary power is premised on military-political fact rather than on natural right or law. Felix Cohen indicated that congressional power may in fact be more limited than is generally acknowledged:

> Reference to the so-called "plenary" power of Congress over Indians, or. more qualifiedly, over "Indian Tribes or Tribal Indians," becomes so frequent in recent cases that it may seem captious to point out that there is excellent authority for the view that Congress has no constitutional power over Indians except what is conferred by the commerce clause and other clauses of the Constitution. 24/

The plenary power of Congress has both positive and negative consequences for Indian people. On the affirmative side, for example, pursuant to its trust and treaty obligations, Congress has legislatively created special protections and benefits 25/ for Indian Tribes and Tribal Indians. Some of this legislation, if designed for any other group or class of person, might otherwise be deemed unconstitutional discrimination. On the negative side Congress has used its power to unilaterally abrogate Indian treaties, 26/ to restrict the governmental powers of tribes, 27/ to subject tribes to state jurisdiction, 28/ and to terminate tribal political existence. 29/

24/ F. Cohen, Handbook of Federal Indian Law, 90, (U.N. Mex. ed. 1971).

25/ E.g., 25 U.S.C. § 45. (employment preference).

26/ Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

27/ E.g., 25 U.S.C. § 1302 et. seq. (Indian Civil Rights Act of 1968).

28/ E.g., P.L. 83-280.

29/ E.G., 25 U.S.C. § 564 (Termination of the Klamath Tribe).

The plenary power of Congress is subject to few restrictions, most notably that where tribal or individual Indian rights, which can be economically calculated (such as land or fishing rights) are taken, the tribe or the individual has a right to just compensation.[30] There is also some authority for the proposition that the Bill of Rights generally applies to Congressional authority to legislate in Indian affairs.[31]

The United States Supreme Court has been the main source for both recognition of plenary power and for defining narrowly the judiciaries' role in reviewing congressional enactments. One of the earliest statements on judicial restraint is found in Johnson v. M'Intosh[32] where the Supreme Court resolved conflicting claims to Indian land in accordance with Federal Law. The Court stated:

> However, this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispenable to that system by which this country has been settled, and be adapted to the actual condition of the two peoples, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

The classic or leading case on plenary power is Lone Wolf v. Hitchcock.[33] This case involved the 1867 treaty of Medicine Lodge between the Kiowas and Commanches, and the United States. The treaty provided for a specific mechanism whereby "excess" Indian lands could be sold. A subsequent agreement in direct contradiction of the treaty arranged for the sale of Indian lands. Congress legislatively enacted the agreement. The tribes sued to have the sale set aside as violating the treaty and also for

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30/ United States v. Creek Nation, 295 U.S. 103 (1935).

31/ F. Cohen, Handbook of Federal Indian Law, 91, (U.N. Mex. ed. 1971).

32/ 21 U.S. (8 Wheat) 543 (1823).

33/ 187 U.S. 553 (1903).

having been fraudulently obtained. The U.S. Supreme Court specifically refused to look beyond the congressional enactment which it held abrogated the Medicine Lodge treaty.

In the long history of congressional legislation concerning Indian Tribes and individuals, now encompassing an entire volume of the United States Code, there is only one example of a congressional enactment which failed to pass judicial scrutiny.[34] The usual response of the Courts to possible abuses of congressional power has been hortatory:

> Great nations, like great men, should keep their word. [35]

34/ United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1974). The case involved amendments 18 U.S.C. §1153 which made state law applicable in a Federal prosecution to assaults by an Indian against an Indian. State penalities were more severe than Federal penalities would be. The Court held that such a scheme, without any government jurisdiction, violated equal protection standards.

35/ F.P.C. v. Tuscarora Indian Nation, 362 U.S. 996, 1426 (1960). (Justice Black dissenting).

B. Indians and Civil Rights [36/]

The phrase "Civil Rights" as commonly used covers a range of rights and privileges that people perceive as belonging to them as citizens of the United States or perhaps as a matter of natural law or right. Some of the characterizations of "civil rights," however, may be broader than the actual constitutional status of these rights.

In this country the United States Constitution (and statutes passed pursuant to it) is the source for determining the nature of civil rights. The Constitution does not, however, contain a definitive listing of all rights and privileges retained by the people. The fact that such a listing is not contained in the Constitution is however not a limitation of rights. What the Constitution does provide for is restraints on the Federal and State Governments from acting in certain areas or in particular ways. For example, nowhere in the Constitution is there language which reads "the people have the right to be free from a racially segregated education." However, interpretation of the "equal protection" clause has made public school desegregation a constitutional fact of the last two decades.

The equal protection clause of the Fourteenth Amendment is the primary source for determining what constitutes unconstitutional discrimination. The word "discrimination" is connotatively used to refer to differing treatment of groups of people; however, not all, and in fact probably most discrimination is not unconstitutional, or necessarily evil. The provision of special educational

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36/ This section deals only with governmental actions and the Constitution. It does not treat the range of federal and state civil rights statutes and some of the more complex current issues of controversy such as the intent to discriminate.

benefits for veterans, for example, discriminates against non-veterans, but is not unconstitutional. Similarly, the provision of special benefits for Indians discriminates against non-Indians, but, again, is not unconstitutional.

To determine what is illegal or unconstitutional discrimination, it is necessary to examine the scope of the Equal Protection Clause and the standard utilized by the Courts in interpreting it:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

By its terms, the Fourteenth Amendment applies only to actions of the States. The U.S. Supreme Court has, however, adopted the theory of the Fourteenth Amendment into the Fifth Amendment as a proscription against the Federal Government:

> While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. 37/

Generally equal protection issues arise when some Federal or State action, often legislative, but not limited to legislation, treats one class of persons differently than other persons. Three basic parts are involved in an equal protection analysis: what is the nature of classification that is used; what is the nature of the right or privilege that is being affected; and what is the governmental interest or purpose that is sought to be achieved.

37/ Frontiero v. Richardson, 411 U.S. 677-380 (1973).

The Courts, in a sense, balance these three elements in determining the constitutionality of any governmental action which affects one class of persons differently from another.

Classification

The right of the government to classify persons within its jurisdiction into different classes is well settled. "The Constitution does not require things which are different in fact ... to be treated as though they were the same."[38] The Constitution, however, does require "some relevance to the purpose for which the classification is made."[39] There must be "some rationality in the nature of the class singled out."[40] Any distinction that is arbitrary or invidious is viewed as unconstitutional.[41] This standard of review is known as the "rational basis" standard.

Certain classifications by their inherent nature are deemed by the courts to be constitutionally suspect. These "suspect classifications" include alienage,[42] ancestry,[43] and race.[44] Where the classification is suspect, Courts utilize the "strict scrutiny" standard of review.[45] Most times such classifications fail to pass constitutional muster. Suspect classifications are "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose."[46]

38/ Tigner v. Texas, 310 U.S. 141 (1910).

39/ Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

40/ Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1966).

41/ Avery v. Midland County, 380 U.S. 474 (1967).

42/ Graham v. Richardson, 403 U.S. 365 (1971).

43/ Oyama v. California, 332 U.S. 633 (1948).

44/ McLaughlin v. Florida, 379 U.S. 184 (1964).

45/ Ibid.

46/ Id., at 192 quoting in part from Hirabayashi v. United States, 320 U.S. 81, 100.

The Nature of the Right

The nature of the right that the government is seeking to regulate or vindicate affects the standard of review that will be utilized by the Courts. The inquiry is whether the right involved is fundamental. Currently fundamental rights include: rights guaranteed by the First Amendment;[47/] the right of interstate travel;[48/] the right to vote;[49/] the right to procreate;[50/] and the right of privacy which justifies a woman's decision concerning her own abortion.[51/] If a fundamental right is involved, the strict scrutiny standard of review will be utilized. If the right or privilege is not fundamental then the courts only require that the government action be "rationally related" to the effectuation of a legtimate governmental interest.

Government Purpose

Governments, of course, have no authority to act in any manner beyond their respective constitutions. Within their constitutional authority governments may seek to achieve a range of objectives, some of which are clearly more important than others. The courts in a sense define the status of the governmental interest or purpose involved when undertaking an equal protection analysis. Where the Government seeks to regulate a fundamental right, it must show a "compelling interest" and the regulation scheme utilized must be the least restrictive one available.[52/]

47/ Williams v. Rhodes, 393 U.S. 23 (1968).

48/ Shapiro v. Thompson, 394 U.S. 618 (1969).

49/ Bullock v. Carter, 405 U.S. 134 (1972).

50/ Skinner v. Oklahoma ex rel Williams. 316 U.S. 535 (1942).

51/ Roe v. Wade, 410 U.S. 113 (1973).

52/ Roe v. Wade, 410 U.S. 113,155 (1973).

Simply put, whenever a governmental scheme involves a suspect class, or a fundamental right, or both, the Courts will require the government to justify its action at the highest level -- such justification is frequently impossible and the action may be found to be unconstitutional discrimination. Where neither a suspect class nor a fundamental right is involved, the justification required is less, and frequently can be substantiated. There is, of course, grey area between these levels of review. For example, classifications based on sex are not viewed as suspect, however, such a classification is viewed as more serious than many other classifications and the Courts use a higher standard of review than the rational basis standard, but a lesser standard than "strict scrutiny" which is applied to suspect classifications.

Where do Indians fit within the legal concept of the equal protection of the laws? A simple or unilateral answer is not possible.

Indian Tribes and Equal Protection:

The equal protection clause of the 14th Amendment applies by its own terms to the actions of states; actions of the Federal government with respect to the equal protection of the laws, are controlled by the 5th Amendment. No specific provision of the Constitution is written to regulate the conduct of Tribal governments. The Courts have held that the constitutional protections people are given against the Federal and State governments do not apply to tribal governments.[53/] Although many tribes had provisions[54/] in their

53/ See, e.g., Native American Church v. Navajo Tribal Council, 272 F. 2d 131 (10th Cir. 1959).

54/ 117 tribes had constitutional provisions, Hearings on Constitutional Rights of American Indians before the Subcommittee on Judiciary, 87 Cong., 1 sess. pt. 1 (1961) at 121.

own constitutions, similar to the Bill of Rights, Congress in 1968 under its plenary power, passed the Indian Civil Rights Act.[55/]

The Indian Civil Rights Act applies to tribes similar constitutional standards to those contained in the Bill of Rights and the 14th Amendment. The pertinent provision with respect to "discriminatory" action by a tribal government is that tribes may not:

> Deny any person the equal protection of the law or deprive any person of liberty or property without due process of law. 56/

It is clear from the legislative history of the Act that even though in places the language may be identical to constitutional language, the Act is to be interpreted in the tribal context. As orginally proposed, the Indian Civil Rights Act would have made tribal governments subject to identical constitutional prohibitions applicable to the Federal Government.[57/] The Act as passed was not identical, but rather a modification of constitutional principles; for example, tribes are prohibited from interfering with the free exercise of religion, however, there is no prohibition against the establishment of religion; and the Act provides

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55/ 25 U.S.C. § 1301 et. seq.

56/ 25 U.S.C. § 1302(8).

57/ S. 961-968, 89th Cong., 1 Sess. (1965).

the right of counsel only at an individual's own expense rather than the broader right constitutionally available in state and Federal courts.

Although the Indian Civil Rights Act had been in existence for a decade, until very recently the U.S. Supreme Court had not addressed issues arising under the Act. In the interim numerous lower federal court decisions had interpreted the scope of the Act. Generally these cases got to federal court under a theory whereby the federal courts obtained jurisdiction to hear civil disputes under 28 U.S.C. § 1343 (4) -- injunctive relief for the violation of federally protected rights.

This term, the U.S. Supreme Court squarely addressed the issue of remedies in relation to the Indian Civil Rights Act. In the criminal area, the language of the Act specified the availability of a Writ of Habeas Corpus; however, in the civil area the Act was silient. In Santa Clara Pueblo v. Martinez[58/] the Court decided that the Indian Civil Rights Act does not subject tribes to the jurisdiction of Federal Courts in civil actions for injunctive or remedial relief.

The Martinez case arose on the Santa Clara Pueblo in Northern New Mexico and involved a Pueblo woman married to a Navajo . The tribal ordinance made eligible for tribal membership only the children of male tribal members married to non-members, but not the chidren of female tribal members married to non-members. Mrs. Martinez and her children sued

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58/ 46 U.S.L.W. 4412 (May 16, 1978).

the Pueblo and its Governor in Federal District Court contending that the Pueblo's membership ordinance violated the equal protection and due process provisions of the Indian Civil Rights Act. The Supreme Court's opinion began by reaffirming the theory that Indian tribes possess immunity from suit traditionally enjoyed by sovereigns and that a "waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' "[59/] Since Congress did not provide an express waiver of sovereign immunity in the Indian Civil Rights Act, or anywhere else, "suits against tribes under the Indian Civil Rights Act are barred... ."[60/] Suit against the Governor of the Pueblo, however, was not barred by the doctrine of sovereign immunity and therefore the Court addressed the jurisdiction of the federal courts under the Act. To determine "whether a cause of action is implicit in a statute not expressly providing one,"[61/] the Court utilized a four part test.

First, is the plaintiff one of a class for whose benefit the statute was enacted? The Court noted that there was no doubt that plaintiffs, "American Indians living on the Santa Clara Reservation,"[62/] are among those to be benefited by the Act.

59/ 46 U.S.L.W. at 4412, 4414.

60/ 46 U.S.L.W. at 4415

61/ 46 U.S.L.W. at 4415

62/ 46 U.S.L.W. at 4415

Second, is there any indication of legislative intent, explicit or implicit, either to create or deny such a remedy? The Court concluded that the legislative history of the Act suggests "that Congress' failure to provide remedies other than habeas corpus was a deliberate one."[63/]

Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? The Court noted that there are:

> Two distinct and competing purposes... manifest in the provisions of the Indian Civil Rights Act: In addition to its objective of strengthening the position of individual tribal members vis-a vis the tribe, Congress also intended to promote the well established federal "policy of furthering Indian self-government." (at 4415).

Conceding that creating a Federal cause of action would be "useful in securing compliance," the Court nevertheless decided that it would unduly interfere with tribal self-government.

Fourth, is the cause of action one traditionally relegated to tribal law, in an area basically of concern to tribes, so that it would be inappropriate to infer a cause of action based soley on federal law? The Court concluded that "Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" and that " Tribal forums are available... ."[64/]

63/ 46 U.S.L.W. at 4415

64/ 46 U.S.L.W. at 4416

This, however, is not the state of the law. This issue was squarely faced in Morton v. Mancari 417 U.S. 535 (1974). Non-Indian employees of the Bureau of Indian Affairs challenged the statutory policy of Indian employment preference as constituting invidious discrimination based on race. The Court found that Indian preference was not racial.

> The preference as applied to Indians not a discrete racial group, but rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. 65/

Since the classification was not racially based, but rather in the unique legal and historical context, a political classification, the Court utilized the rational basis standard of review. The governmental purpose to be obtained in the classification was the fulfillment of the Federal government's trust responsibility. The Court noted that all special Indian legislation was similarly situated:

> If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire volume of the United States Code [25 USC] would be effectively erased and the solemn commitment of the government toward the Indians would be jeopardized. 66/

The Court had no problem finding that the governmental purpose was rationally related to the separate treatment:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. 67/

65/ Id. at 554.

66/ Id., at 552.

67/ Id., at 555.

The Court noted that Congress retained the authority to provide federal remedies for violations of the Indian Civil Rights Act, if it so chose. The effect of the decision was to invalidate the case law that had developed in the lower federal courts concerning the substantive meaning of the Act's provisions and make clear that for civil matters tribal courts are the exclusive forum for resolving complaints against the operations of tribal governments and their officials.

Special Treatment for Indians and Equal Protection

At first blush it might seem that government schemes which provide benefits to Indians to the disadvantage of non-Indians would involve a suspect racial classificiation requiring the strict scrutiny standard of judicial review and probably would not be sustained as constitutional.

Where Congress is not acting to further its trust obligations a different analysis is presented. Where Indians are denied benefits made generally available to similarly situated persons, the classic equal protection analysis is pertinent. In that setting, Indians will be considered a suspect classification and the government responsible bears a heavy burden in justifying its classification. The fact that Indians were in some sense "wards" of the Federal government did not justify a county in Arizona in denying the right to vote to members of the Mohave-Apache Tribe.[68/] Similarly San Diego County, California could not justify its denial of public assistance to indigent Indians because they were reservation residents and entitled to special services:

> Many non-Indians in San Diego County live upon tax exempt property belonging to federal or local government agencies or to religious institutions, but in no such case has this fact been considered a justification for the withholding of any public services.
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> . . . . . .
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> In no case has the enjoyment of such special rights or privileges served as a justification for the exclusion of any such favored groups from participationin the ordinary rights of citizenship, including the right to equal treatment under state welfare laws. 69/

68/ Harrison v. Laveen 67 Arz. 337, 196 P. 2d (456 (1948).

69/ Acosta v. San Diego County 126 Cal. App. 2d 455, 272 P. 2d 92 (1954).

C. Selected Legal Issues

1. Diminishment

DeCoteau v. District County Court

The U.S. Supreme Court held that the Lake Traverse Reservation of the Sisseton-Wahpeton tribe was terminated by Congress in cession and allotment legislation in the late 19th century. In 1867, the United States government entered into a treaty[70] with the Sisseton and Wahpeton bands of the Great Sioux Nation which gave the Sisseton-Wahpeton a permanent reservation of 918,000 acres in the form of a triangle in the Lake Traverse region of what has become the northeast corner of South Dakota.

Several decades after the treaty, there was significant pressure on Congress to make Indian land available for white settlement. Because of this pressure, as well as a viewpoint that Indians should be farmers, Congress enacted the General Allotment (or Dawes) Act in 1887 which empowered the President to allot reservation land to individual tribal members and with their consent to sell other land to non-Indians.[71] The profits from these sales were to benefit the tribal members.

At the request of a South Dakota banker, negotiations took place in 1889 between the Sisseton-Wahpeton Tribe and representatives of the United States government to sell the

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70/ Act of February 19, 1867, 15 Stat. 505.

71/ Act of February 8, 1887, c. 119, 24 Stat. 388.

unallotted land on the Lake Traverse Reservation. According to the majority opinion of Mr. Justice Stewart in DeCoteau:

> /T/he records show that the Indians wished to sell outright all of their unallotted lands, on three conditions: that each Tribal member, regardless of age or sex, receive an allotment of 160 acres; that Congress appropriate moneys to make good on the Tribe's outstanding "loyal scout claim"; and that an adequate sales price per acre be arrived at for all of the unalloted land. 72/

The agreement between the government and a required majority of male adult tribal members was reached and signed in December 1889. The United States agreed to pay $2.50 per acre for the unallotted land. Congress passed an act in 1891 ratifying the agreement approved by the tribe two years earlier.[73] In addition, Congress voted to make good on the Tribe's "loyal scout claim" from 1862 and appropriated $2,203,000 to pay the Tribe for land.[74]

Following the passage of the 1891 act, State jurisdiction over the unallotted portions of the reservation went unchallenged until the 1960's. Government maps of the area eliminated the reservation boundaries until 1908. Since then, some maps have referred to the area as "open" or "former" reservation.

72/ 420 U.S. 425, 435(1975).

73/ Act of March 3, 1891, c. 543, § 30, 26 Stat. 1039.

74/ § 27, 26 Stat. 1038.

Recently, the maps have simply said "reservation."[75/] The tribal constitution, which first appeared in 1946, extended jurisdiction only to "Indian-owned lands lying in...the original confines of the...reservation."[76/] In 1963, the Eighth Circuit Court of Appeals held that the 1891 Act had terminated the reservation and found that the South Dakota Supreme Court and the Department of Justice concurred with that opinion.[77/]

This view of the Lake Traverse Reservation began to change in 1966 when the Bureau of Indian Affairs approved a new tribal constitution which extended jurisdiction "to lands lying...within the original confines of the Lake Traverse Reservation...."[78/] Six years later, a Department of Interior field solicitor opined that the tribe retained jurisdiction over the boundaries of the 1867 reservation[79/] and in 1973, the Eighth Circuit reversed itself and found that the Lake Traverse Reservation still existed.[80/]

75/ 420 U.S. at 442.

76/ Article I, Constitution and Bylaws of the Sisseton-Wahpeton Sioux Tribe, approved by the Commissioner of Indian Affairs, October 16, 1946.

77/ DeMarrias v. State of South Dakota, 319 F.2d 845, 846.

78/ Article I, Revised Constitution and Bylaws of the Sisseton-Wahpeton Sioux Tribe, approved by the Commissioner of Indian Affairs, August 26, 1966.

79/ Boundaries of the Lake Traverse Indian Reservation, Field Solicitor's Opinion, Aberdeen Office, BIA, August 17, 1972.

80/ Feather v. Erickson, 489 F.2d 99.

The ruling of the Eighth Circuit was one of two cases before the Supreme Court in DeCoteau. In each case, South Dakota had assumed jurisdiction over tribal members for acts which occurred within the boundaries of the 1867 reservation but on land sold to non-Indians as a result of the 1891 Act.

In DeCoteau, the U.S. Supreme Court took pains to distinguish the two cases relied on by the Eighth Circuit. In Mattz v. Arnett, 412 U.S. 481 (1973), the Court found that Congress had not terminated the Klamath River Indian Reservation in 1892 because the statute was a unilateral action by Congress which only benefited the tribe "indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers."[81] The Court found in DeCoteau that the 1891 Act was:

> the ratification of a previously negotiated agreement, to which a tribal majority consented. (In addition), the Act does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain...in payment for the express cession and relinquishment of 'all' of the Tribe's 'claim, right, title and interest' in the unallotted lands.[82]

In the other case cited by the Eighth Circuit, Seymour v. Superintendent, 368 U.S. 351 (1962), the Court held that Congress did not terminate the southern part of the Colville Indian Reservation because the 1906 Act was unilateral and did not provide for specific proceeds to be applied for the benefit

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81/ 420 U.S. at 448.

82/ Id.

of Indians. Reservation status may survive the mere opening of a reservation to settlement. It was the opinion of the Court, that in accordance with Mattz, "the fact of the act," its "surrounding circumstances and "legislative history" point to the termination of the Lake Traverse Reservation in 1891. According to the Court, the language of the 1889 Agreement made this clear:

> The Sisseton and Wahpeton band of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments provided...shall have been made.[83]

In conclusion, the Court remarked that the Congress and the Tribe spoke clearly in the 1889 Agreement and the 1891 Act. The decision concluded, "Some might wish they had spoken differently, but we cannot remake history."[84]

The dissent, written by Mr. Justice Douglas, disagreed with the majority's interpretation of Mattz and Seymour. Mr. Justice Douglas wrote that there is not a word in either the 1889 agreement or the 1891 act to suggest that the boundaries of the Lake Traverse Reservation had been changed. He emphasized that in accordance with Mattz, the Congress

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[83] Agreement of 1889, Art. 1, 26 Stat. 1036.

[84] 420 U.S. at 449.

must use "clear language of express termination" to diminish an Indian reservation.[85] In addition, he noted that the ruling of the Court in DeCoteau will result in "checkerboard" jurisdiction which not only hampers tribal self-government guaranteed by the 1867 treaty, but also contradicts the finding of the Court in Seymour that "such an impractical pattern of checkerboard jurisdiction" would "recreate confusion Congress specifically sought to avoid" in defining "Indian Country" in 18 U.S.C. §§ 1151.[86]

85/ 420 U.S. at 463.

86/ 420 U.S. at 466-467.

Rosebud v. Kneip

Two years after deciding DeCoteau, the U.S. Supreme Court found in Rosebud v. Kneip[87] that Congress had diminished the Rosebud Sioux Reservation by the Acts of 1904, 1907 and 1910. The three acts reduced the size of the reservation from its original 3.2 million acres to less than one million. Once composed of Mellette, Todd and Tripp Counties, in addition to parts of Gregory and Lyman, the reservation is now made up solely of Todd County.

The Rosebud Sioux Tribe as part of the Great Sioux Nation was a party to the treaty with the United States in 1868, which set aside as a reservation approximately 25 million acres west of the Missouri River in what is now South Dakota.[88] Although the treaty prohibited the removal of any land from the reservation without the written approval of three-fourths of the adult male Indians, 7.5 million acres in the Black Hills were taken unilaterally by Congress in 1877.[89] Twelve years later, half of the remaining reservation was "restored to the public domain" with the concurrence of the adult male population and the rest was made into six separate reservations.[90]

87/ 430 U.S. 584 (1977).

88/ Act of April 29, 1868, 15 Stat. 635.

89/ Act of February 28, 1877, 19 Stat. 254.

90/ Act of March 2, 1889, 25 Stat. 896.

As with the Lake Traverse Reservation, non-Indians asked that the Rosebud Reservation be opened to white settlers. In 1901, a negotiator was instructed by the Commissioner of Indian Affairs to meet with the Rosebud Indians concerning the cession of the eastern portion of their reservation. Later that year, three-fourths of the male Indian adults agreed to cede 416,000 acres of unallotted land in Gregory County to the United States. The agreement was never approved by Congress. Although three-fourths of the adult male Indians failed to consent to a similar agreement for the same parcel of land in 1903, a majority did approve the agreement whose only change from the 1901 document was the manner of payment.[91/] As passed by Congress in 1904, the Act to approve the 1903 proposal contained verbatim the cession language of the 1901 Agreement:

> The said Indians belonging on the Rosebud reservation... do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted...within...Gregory County....[92/]

91/ 430 U.S. at 590-91.

92/ Act of April 23, 1904, 33 Stat. 254.

In 1906, pressure surfaced again to open up more of the Rosebud Reservation. An agreement signed that year by a majority but not three-fourths of the adult male Indians provided for the cession to the United States of "all claim, right, title, and interest" in all of the Rosebud Reservation in Tripp and Lyman Counties except for that portion that has been or may be allotted to Indians. Congress ratified the agreement in 1907.[93/]

Even though no agreement was negotiated with the Rosebud Sioux concerning the final diminishment of their reservation, Mellette County was opened up to white settlers. The bill removing Mellette from the reservation was passed by Congress in 1910.[94/] This last act used the same operative language as that in 1907 which directed the Secretary of the Interior to sell and dispose of land in Mellette County except for that allotted to Indians. In addition, the 1910 Act did allow Indians to exchange allotments they owned in Mellette County for land on the diminished reservation in Todd County.

In bringing its suit against the State of South Dakota in 1972, the Rosebud Sioux Tribe contended that the boundaries of the reservation established by the Act of 1889 had not been altered by the Acts of 1904, 1907 or 1910. The U.S. District Court denied the declaratory judgment sought by

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93/ Act of March 2, 1907, 34 Stat. 1230.

94/ Act of May 30, 1910, 36 Stat. 448.

the tribe because it found that since the three acts Gregory, Lyman, Tripp and Mellette counties had been "treated as outside the Rosebud Sioux Reservation by the settlers, their descendants, the State of South Dakota and the Federal courts."[95/] The Eighth Circuit Court of Appeals affirmed that judgment[96/] The U.S. Supreme Court affirmed and ruled that the three Acts satisfy the requirement that "a congressional determination to terminate (an Indian reservation) must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."[97/]

As in DeCoteau, three members of the Court dissented including Mr. Justice Stewart who wrote the DeCoteau decision. In his dissent, Mr. Justice Marshall noted that the tribal constitution, approved in 1935, states that the jurisdiction of the Rosebud Sioux extend to the boundaries established by the 1889 Act.[98/] In addition, he noted that until the

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95/ 375 F. Supp. 1065, 1084.

96/ 521 F. 2d 87.

97/ Mattz v. Arnett, 412 U.S. at 505.

98/ Art. I, Constitution of the Rosebud Sioux, approved by the Secretary of the Interior in 1935, App. 1396-1397.

Rosebud decision it was clear that in interpreting statutes "legal ambiguities are resolved to the benefit of the Indians."[97] In this case, he contended that it is far from certain that the three acts were intended to diminish the size of the Rosebud Reservation. If that was Congress's intent, the boundaries of many other reservations must be in doubt since 21 other statutes opening up surplus reservation land to settlers were passed during the 10 year period beginning in 1904.[98]

97/ DeCoteau v. District County Court, 420 U.S. at 447.

98/ National Indian Law Library, Allotment Cession Statutes, Doc. No. 002279.

2. Tribal Criminal Jurisdiction over Non-Indians

Oliphant v. Suquamish Indian Tribe [99]

In Oliphant, a question of Indian Law which has been unclear for almost a hundred years was squarely presented; if a non-Indian commits a crime within the boundaries of the reservation, does the Indian tribe have jurisdiction over the non-Indian? A U.S. District Court and the Ninth Circuit Court of Appeals [100] answered the question affirmatively; however, the U.S. Supreme Court in a 6-2 opinion held that Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians.

The case arose on the Port Madison Reservation, of the Suquamish Tribe, an area of some 7276 acres, of which 37 percent is in the trust status and the remainder is held in fee simple title by non-Indians. The population of Port Madison is approximately 3000 non-Indians and 50 Indians.

Petitioner Oliphant, a non-Indian reservation resident, [101] was arrested by tribal authorities during a tribal celebration and charged with assaulting a tribal officer and resisting arrest. He was arraigned in Tribal Court and released on his own recognizance.

99/ 46 U.S.L.W. 4210 (March 6, 1978).

100/ Oliphant v. Schlie, 544 F.2d 1007 (Cir. 1976), cert. granted sub nom. Oliphant v. Suquamish Indian Tribe, 431 U.S. 964 (1977).

101/ A companion case combined for review involved a non-Indian resident of Port Madison named Belgarde who was arrested by the tribe after a high speed chase and collision and charged with "recklessly endangering another person."

Oliphant applied for a writ of habeas corpus to the U.S. District Court, which denied the petition. The Ninth Circuit affirmed the denial. The Circuit Court using the classic formulation or analysis found that the tribe possessed the inherent power of criminal jurisdiction over non-Indians:

> The power to preserve order on the reservation... is a sine qua non of the sovereignty that the Suquamish originally possessed... (at 1009)

and that no treaty or congressional statute had removed such powers.

The U.S. Supreme Court disagreed with the Circuit Court's reasoning and result. The Supreme Court found that both Congress and the Executive Branch had historically operated on the assumption that such jurisdiction did not exist, at least in part because tribes did not have justice systems similar to or recognizable by the United States: this assumption was given significant weight by the Court in interpreting the purpose and effect of jurisdictional provisions in the early treaties, the Point Elliot Treaty with the Suquamish, and congressional jurisdiction legislation. Utilizing its recently modified rule of Indian treaty and statutory construction[102] -- that "treaty and statutory provisions which are not clear on their face may

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102 / DeCouteau v. District Cty. Ct., 420 U.S. 425, 444 (1975)

'be clear from the surrounding circumstances and legislative history'" -- the Court determined that collectively the treaties and statutes imply the absence of tribal criminal jurisdiction over non-Indians.

The Court's second basis for reversal was its modification of tribal dependency status as formulated by Chief Justice Marshall in Johnson v. M'Intosh,[103/] Cherokee Nation v. Georgia,[104/] and Worcester v. Georgia.[105/] The act of entering into a political relationship with the United States limited the sovereignty retained by the tribes. The early cases had focused on the loss of external sovereignty. Oliphant recognizes a new element--tribes lose the sovereign right to govern non-Indians. To support this proposition, dicta in a concurring opinion in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810), a case concerning land title, is cited. The rationale for the Court's ruling is found in its discussion of the competing interests of the United States as protector of Indian rights and as protector of the interests of non-Indians:

103/ 21 U.S. (8 Wheat.) 543 (1823).

104/ 30 U.S. (5 Pet.) 1 (1831).

105/ 31 U.S. (6 Pet.) 515 (1832).

> But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.... By submitting to the overriding sovereignty of the United States, Indian tribes 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/ competent tribunals of justice." /Citation omitted./ It should be no less obvious today, even though present Indian tribal courts embody dramatic advances over their historical antecedents.

Mr. Justice Marshall joined by Chief Justice Burger dissented in a brief one-paragraph opinion which simply adopted the view of the Ninth Circuit Court of Appeals.

The majority in Oliphant acknowledge "the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians." The justice system contemplated by the Court and already existing on most reservations is that the United States and in some situations the states are responsible for law enforcement with respect to non-Indians. Tribal complaints and dissatisfaction with these systems was what led to Tribal Courts to assert jurisdicion over non-Indians. Since the tribal solution to this justice problem has been disallowed, a serious problem of law enforcement could exist.

3. Public Law 280 in South Dakota

During the 83rd Congress in 1953, a statute commonly known as Public Law 280 was passed.[106/] Public Law 83-280 divided states into three basic categories with specific sections as to how they might assume jurisdiction over Indian tribes within their borders. Under Section 2 and 4 six states were directly ceded civil and criminal jurisdiction but for the exception of a few enumerated tribes.[107/] Under section 6, eight states which specifically had constitutional disclaimers concerning jurisdiction over Indian land including the State of South Dakota were empowered to assume civil or criminal or both jurisdictions upon enactment of appropriate legislation after amending of their constitutional disclaimers.[108/] Under section 7, states without constitutional disclaimers of jurisdiction over Indian land were permitted to assume civil or criminal or both jurisdictions upon enactment of enabling state legislation.

106/ 67 Stat. 588.

107/ Alaska, (upon achieving statehood) California, Oregon, Minnesota, Nebraska and Wisconsin.

108/ The eight states covered under Section 6 are: Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Washington. Section 6 states in pertinent part:

> ...provided that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction...until the people...have appropriately amended their state constitution or statutes....

Congress did, however, retain specific areas of Federal jurisdiction. Areas specifically excluded from state control included alienating, taxing or probating trust property, and infringement upon hunting, fishing, and trapping rights. Interestingly, in no state was Tribal consent required by Congress before implementation of Public Law 280. In fact, several Tribes did object, but only a few did manage to get themselves excluded on the basis of "Tribal law enforcement systems that functioned in a reasonably satisfactory manner."

Because South Dakota was one of the eight states included in Section 6 which contained a disclaimer of jurisdiction in its constitution,[109] it was anticipated that it would have to amend its constitution before it could exercise jurisdiction over Indian reservations within its borders.

On three occasions, the State of South Dakota attempted to assume jurisdiction. None was successful. In 1957, the State legislature assumed and accepted both criminal and civil jurisdiction but with two provisos that were never met.[110]

109/ Article 22 of the South Dakota State Constitution states:

> /T/he people inhabiting the State of South Dakota do agree and declare that we forever disclaim all right and title to...all lands lying within said (State) owned or held by any Indian or Indian tribe; and that until the title there to shall have been extinguished by the United States, the same shall remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congres of the United States.

110/ 1957 Session Laws, chap. 319

First, the county commissioners of any county containing Indian country had to approve the transfer. Second, the tribes affected would have to approve by referendum the State assumption of jurisdiction. In 1959, the South Dakota Supreme Court noted that the conditions imposed had not been accepted.[111/]

The South Dakota Legislature made its second attempt at assuming jurisdiction in 1961.[112/] Neither the various tribes nor the county commissioners had to approve the transfer of authority although the counties were permitted to negotiate with the Bureau of Indian Affairs regarding reimbursement for higher administrative expenses. The assumption was only contingent on a proclamation from the Governor once he was satisfied that the United States would reimburse the State for increased costs of administration the State and the counties would encounter by the change in jurisdiction. The proclamation was never issued.

The third legislative attempt came in 1963 when the assumption of jurisdiction was contingent only on the affirmative vote of the people of South Dakota.[113/] The votes cast during

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111/ In re High Pine's Petition, 99 N.W.2d 38.

112/ 1961 Session Laws, chap. 464.

113/ 1963 Session Laws, chap. 467.

the 1964 general election for assumption were 58,289; those against were 201,389.[114] With the passage of the Indian Civil Rights Act in 1968,[115] the State can only assume jurisdiction over Indian country with the permission of the Indian tribes, something that South Dakota has not done.

White v. Califano

It was because of the fact that South Dakota has been unable to assume jurisdiction over the civil and criminal actions of Indians on reservations that the U.S. District Court ruled in White that it was the duty of the Federal government and not the State of South Dakota to provide for the involuntary mental commitment of an Indian resident of the Pine Ridge Reservation.[116] The case is presently on appeal before the Eighth Circuit Court of Appeals which heard oral arguments in May 1978.

One of the White plaintiffs, who is an indigent member of the Oglala Sioux Tribe, was determined in 1976 to be mentally ill by a psychiatric social worker of the Indian

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114/ 82 Stat. 78.

115/ Codified at 25 U.S.C. §§ 1321-1326.

116/ 437 F.Supp. 543(1977).

Health Service. When the Indian Health Service requested that Fall River County provide for the immediate commitment of the plaintiff at the State Human Services Center in Yankton, the county commissioners stated that they had no jurisdiction over an Indian living on a reservation.

In filing the law suit, the plaintiff contended that, since she is a citizen of South Dakota, Fall River County is denying her equal protection by not committing her to the State facility. The court held, however, that the application of the involuntary commitment process to an Indian living on a reservation would be a "severe intrusion into the tribe's vestigial sovereignty..."[117/] "which cannot be assumed as an inherent power of a state...."[118/] The court further held that in order for the State to act in a manner consistent with due process in making an involuntary commitment, the State would have to be involved in reservation affairs to a significant degree.[119/]

The court did find, however, that the Federal government has a duty to provide for the involuntary commitment of Indians living on a reservation. This is true even though the Federal government decided in 1971 to become what the

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117/ 437 F.Supp. at 549.

118/ 437 F.Supp. at 550.

119/ 437 F.Supp. at 550.

Court called the "residual" supplier of particular health services such as inpatient mental health.[120/] The Court's opinion was that "there is no rational way to reconcile the Federal defendants' position with Congress's declaration of policy. We think that Congress (in enacting Public L. 94-437 providing health care for Indians) has unambiguously declared that the Federal government has a legal responsibility to provide health care to Indians."[121/] In closing, the Court reiterated that only the Federal government and not the State has jurisdiction to provide such care because to hold otherwise would destroy the vestiges of tribal sovereignty and obilerate the Federal responsibilities over Indians and the limits imposed on the State.[122/]

120/ 437 F.Supp. at 553.

121/ 437 F.Supp. at 555.

122/ 437 F.Supp. at 559.

4. Voting Rights

Little Thunder v. State of South Dakota

By statute, the State of South Dakota is divided into 67 counties, three of which are unorganized.[123] The three are Shannon, Washabaugh and Todd Counties.[124] The first two are solely within the confines of the Pine Ridge Indian Reservation and the third comprises the diminished Rosebud Reservation. For purposes of county administration, each unorganized county is attached to an organized county. Todd is attached to Tripp, Washabaugh is attached to Jackson and Shannon is attached to Fall River.

Each organized county is composed of elected officials such as county Commissioners, Judges, clerk of court, auditor, treasurer, coroner and attorney. The residents of the unorganized county, however, have been not permitted, to vote for the organized county officials who administered their affairs.[125] They could only vote for highway officials, school board members and all state and national office holders.

123/ S.D.C.L. § 7-1-2 through 7-1-68(1967).

124/ S.D.C.L. § 7-17-1(1967).

125/ S.D.C.L. § 12-23-2(1975).

As a result of the South Dakota law preventing them from voting for county officials, residents of the three unorganized counties brought suit against the State. The plaintiffs contended that they were being denied equal protection because they were not able to vote in county elections. The U.S. District Court found that the State was justified in denying the right to vote to residents of unorganized counties. In 1975, the Eight Circuit Court of Appeals reversed.[126/]

Relying on a decision of the U.S. Supreme Court, Hill v. Stone, 421 U.S. 289(1975), the Court of Appeals held that there was no compelling state interest which could deny the plaintiffs' right to vote. Since their affairs are governed by the officals of the organized counties, the plaintiffs do possess a substantial interest in who is elected. As the Court of Appeals wrote:

> We think it obvious the requirement of residency in the organized county places a special qualification on the right to vote which, in its application to residents of the attached unorganized counties, fails to result from a substantial difference in their interests in the election of county officials.[127/]

126/ 518 F.2d 1253(1975).

127/ 518 F.2d at 1256.

In addition, South Dakota law requires the elected officials to perform the same duties for residents of the unorganized as they do for the organized county.[128] The Court added that the fact that plaintiffs are American Indians who live on an Indian reservation makes no difference. Both Indians and non-Indians pay taxes, as set by the county commissioners, on deeded land[129] and the county sheriff must appoint a deputy to patrol in the unorganized county.[130]

Although residents of an unorganized county can petition to join with or become their own organized county, the Court held that "this eventuality does not vitiate their present interest in their present county government."[131] In addition, the Court noted that the possibility of Indians living on trust lands being able to qualify under South Dakota law as an organized county is quite small. The law requires that at least one half of the voters must be land owners.[132]

128/ S.D.C.L. §§ 7-17-3(1967) and 7-17-5(1974).

129/ S.D.C.L. § 10-12-10(1967).

130/ S.D.C.L. §§ 7-17-6(1967).

131/ 518 F.2d at 1258.

132/ S.D.C.L. § 7-4-2(1967).

County of Tripp v. State of South Dakota

As a result of the Little Thunder decision in 1975, the U.S. District Court ordered that Todd County residents be allowed to vote in the 1976 Tripp County elections. The Court ordered that Todd and Tripp County votes be kept separate, and that Todd County residents be able to vote for commissioners in all three Tripp County districts. In 1976, one commissioner was elected from Tripp's third district by the combined vote of the residents in that district and in Todd County. Had only the votes of the residents in the Tripp County district been counted, the opponent would have won.

The County of Tripp and its county commissioners elected prior to 1976 sued the State alleging that the attachment of Todd to Tripp County was illegal because the two counties were consolidated in violation of South Dakota law without the consent of the residents.[133/] The trial Court held in December 1976 that the attachment of Todd to Tripp for governing purposes was constitutional and also ordered that the commissioner elected from both Tripp and Todd Counties be certified although the election process was unconstitutional.[134/]

133/ 264 N.W.2d 213,215; see S.D. Const. Art. IX, §§ 1.

134/ 264 N.W.2d at 216.

The case was appealed to the South Dakota Supreme Court which affirmed the portion of the trial court judgment finding the statute[135/] providing for the attachment of unorganized counties constitutional. The court held that the attachment "might cause residents inconvenience, but the statutory scheme is still a valid exercise of legislative authority."[136/] The county commissioners also alleged that Tripp County was inadequately compensated for the services that it was providing Todd County. The court found that Tripp County was providing the same services to Todd County that it provides to Tripp County and that by statute the county had the power to tax Todd County for its services.[137/] In addition, Tripp had not been taxing Todd County residents at the maximum rate permitted by law.

After Little Thunder, the residents of Todd County could vote for all three Tripp County commissioners while Tripp County voters could vote only for the commissioner from their own district. The Supreme Court held that there is no basis for such a scheme which allows Tripp residents to vote

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135/ S.D.C.L. § 7-17-1(1967).

136/ 264 N.W.2d at 217.

137/ 264 N.W.2d at 218 and S.D.C.L. § 7-17-11(1967).

for only one commissioner and Todd residents three. According to the court, the simplest solution to the problem would be to redistrict the counties.[138/] The South Dakota legislature alleviated the Todd/Tripp commissioner problem when it passed a law in 1977 calling for the redistricting of organized and unorganized commission districts based on their population.[139/] As far as the seating of a commissioner elected in 1976, the State Supreme Court held that neither candidate could be certified and that the vacancy would be filled at the 1978 general election.[140/]

The court also found that the two counties had never been consolidated into one unit. Each county has its own budget and books. According to the court, "they are still two separate units which are merely attached for administrative purposes."[141/]

138/ 264 N.W.2d at 219.

139/ S.D.C.L. § 7-8-2.1(1977).

140/ 264 N.W.2d at 221.

141/ 264 F.2d at 220.

APPENDIX:

REPORT ON THE INVESTIGATION OF THE SOUTH DAKOTA STATE PENITENTIARY AT SIOUX FALLS

I. Complaints Made to the U.S. Commission on Civil Rights Concerning the South Dakota State Penitentiary in March 1978.

In the first week of March 1978, the Commission received calls from several sources indicating that there was a tense situation existing in the Sioux Falls Penitentiary. Callers included Indian activists, attorneys who had represented Indian defendants in criminal cases in South Dakota, and a human relations commission representative in Sioux Falls.

The calls related back to an incident occurring in mid-February 1978, during which an Indian inmate named "Bucky" Clark was stabbed, allegedly by a non-Indian inmate. The source of the reported tension was described not so much as the incident of the stabbing itself, but the allegation that the guards witnessed the stabbing incident, and permitted the non-Indian to retain his weapon for a two-day period, during which time he was able to threaten other Indian inmates with it. The alleged failure of prison officials to adequately respond to the situation added to the speculation that some form of violence could be expected within the institution. For example, it was also reported that during this time the warden was refusing admittance to the institution to attorneys and others who had assisted inmates connected with the American Indian Movement (AIM) or sympathetic to it.

In addition to the claims of impropriety involving the Clark case, widespread oppression and harassment of Indian inmates was alleged through such means as beating, and long-term incarcerations in the prison's adjustment center, also known as "the hole." The allegations were generally that Indian inmates are harassed and discriminated against, and members of AIM are singled out for particularly harsh treatment.

The Commission on Civil Rights does not normally respond directly to such allegations, but instead refers such complaints to agencies having a more direct civil rights enforcement role which may be geared to handle specific cases. In this case, however, the Commission had been planning to conduct a study on Indian/non-Indian relations in the State of South Dakota for which field work was to begin in April 1978. Thus, some staff time was allocated to an investigation of the penitentiary in conjunction with the boarder study.

A complete investigation of all allegations concerning this penal institution, however, was not done since the nature of many of the allegations, particularly with respect to the treatment of individuals, would require the formality of a trial proceeding to determine. The time spent by staff at the prison, however, enabled us to isolate may allegations of offical misconduct and to investigate some of them. The limited investigation

of the penitentiary involved listening to issues raised in interviews with persons inside and outside the walls of the institution and was then focused on an attempt to uncover patterns or practices of discrimination which can be found in the main through records investigation.

In the process, Commission staff spoke with inmates, attorneys representing inmates, former inmates, guards, prison officials, and concerned members of the community to obtain their views on Indian/non-Indian conflict at the penitentiary.

II. Prison Background.

The state penitentiary at Sioux Falls is a maximum security facility built in the 1800s. It is designed to house a capacity of 440 inmates, but at the time Commission staff first interviewed Warden Herman S. Solem, April 11, 1978, he said that it was then holding 561 inmates. Other facilities associated with the penitentiary include the women's prison at Yankton, a minimum security cottage attached to the facility and a minimum security prison farm. The Indian component of the prison population, according to the warden, varies from roughly 19 percent to 32 percent. On April 11, the warden said that the prison population was 24 percent Indian, far greater than the Indian percentage population of the State, which is approximately five percent Indian. Allegations of discrimination against Indian inmates are not new at this institution. The Native American Rights Fund (NARF) brought

a suit in Federal Court against the institution alleging discrimination against Indian inmates captioned Crowe v. Erickson, Civ. No. 72-4101 (D.S.D., filed May 4, 1972). A settlement agreement was entered into by the parties in May 1977. In it, the State agreed to take certain actions to satisfy the claims of the plaintiffs with respect to medical issues, religious and cultural rehabilitation programs, work release, employment, and accessible legal resource material.

In addition, protest involving treatment of Indians and non-Indians in the prison's adjustment center was raised in the fall of 1977 and was investigated by the Board of Charities and Corrections (the State agency in charge of the prison). Initial complaints made by inmates in the adjustment center had to do with such things as the failure of the heating system to provide adequate heat, problems with cold food, insects, etc. A claim was also made concerning the death of an inmate, Daniel J. Haggy, who was found in January 1977 hanging in his cell. In taking testimony, it was alleged by some lay observers who were permitted to watch the proceedings (Pliga Bordeaux and J.D. Thompson) that additional claims were made with respect to harassment of Indian inmates and brutality practiced on Indian inmates, but that the board failed to follow up on these allegations. The lay observers also questioned the procedure of the board in placing the

inmates under oath before they testified, but permitting the guards to testify without being sworn. Audio tapes of these proceedings are available.

III. Allegations of Discrimination Against Indians.[1]

This section provides a summary of the allegations that have been made to Commission staff concerning the Sioux Falls Penitentiary. It must be remembered that these are only allegations which have neither been proved nor disproved. Evidence collected which bears on these allegations is presented in subsequent sections of this document.

A. Harassment

1. Indian inmates

The complaints about harassment of Indian inmates range from disparaging remarks made by guards to Indian prisoners, to the physical beating of Indian inmates. They include

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[1] In May 1978 the National Minority Advisory Council on Criminal Justice of the Law Enforcement Assistance Administration held a hearing in Sioux Falls, South Dakota on the impact of crime and criminal justice on American Indians. Much of that hearing was devoted to testimony from citizens of the community who raised as issues many of the allegations noted in this section concerning the penitentiary. The South Dakota Attorney General and the Warden of the Penitentiary responded to many of the allegations at the hearing. A transcript is available from the Law Enforcement Assistance Administration.

charges of blatant disrespect for Indian religious beliefs, sometimes demonstrated through callous handling of religious symbols such as medicine pouches or sacred pipes. Charges extend to racial differentiation in the application of the disciplinary process, and in the withholding of small privileges to Indian inmates that are commonly granted to non-Indian inmates. The net effect of this allegedly differential treatment is to create a climate of racial tension between Indians and non-Indians with a potential for violence.

2. Indian employees

Indian employees, particularly guards, are in the difficult position of being identified with the authority in charge of the prison as well as being American Indians. Thus, it is alleged that they encounter racial stereotyping or outright prejudice from other employees of the institution. It is alleged that because they are Indian, their conduct will be less than professional and that they will be unreliable. It is also alleged that they are not supported by their superiors in cases where they are subjected to anti-Indian verbal abuse by other employees or by inmates. Finally, some Indian employees say that they have not been paid for some overtime hours they were required to work, although white guards have been paid for working similar overtime duty, and that they have been terminated without just cause, and in derogation of affirmative action principles.

The atmosphere generated by these conditions is alleged to make any job at the penitentiary a trying experience for minority group employees.

B. Discipline

It is alleged that whites and Indians are not treated similarly in the disciplinary process. Several sources indicated that prisoners known to be affiliated with AIM are cited for infractions of rules or alleged infractions of rules that other prisoners may commit with impunity. For example, it is alleged that charges such as loitering or disobeying a direct order from a guard are applied directly to Indians in situations where a white inmate committing such infractions would not be disciplined, and that for similar offenses which result in discipline, whites and Indians receive dissimilar sentences to the adjustment center. It is also contended that references to AIM affiliations are made at disciplinary hearings and the severity of any punishment is increased by fact of AIM affiliation, and that certain Indian inmates are kept in the adjustment center for long periods of time before their charges are even brought before a disciplinary board for a hearing.

C. Differentiation for AIM members

It is alleged that persons who are known to be affilated with Aim are pointed out to the custodial staff and marked for different treatment during their stay at the institution. The harassment includes such things as verbal abuse, denial of simple privileges generally accorded other inmates, formal citations for minor rules infractions, provocation to conduct which will result in disciplinary action, greater discipline for these inmates than non-AIM members for similar rules

infractions, and in some cases physical abuse. It is also alleged that AIM members will suffer adverse impact at parole hearings due to that membership.

Out-of-state attorneys seeking to represent AIM member clients have had difficulty gaining access to the institution. One in particular, a licensed attorney from Colorado, has been completely barred from the institution. The institution claims he has broken several of its rules and gives that as the basis for his being refused admittance. Others claim it is because of his dedication in providing fair representation for Indian inmates in the institution. On another occasion an attorney from California had to obtain a court order to be admitted. Other persons who have provided assistance to AIM members and other Indian inmates have been barred from the prison or have had visiting privileges curtailed.

There is much disagreement over the extent of or reasons for curtailment of visiting privileges, but the policy of visitation restrictions is seen as being applied on a discretionary basis against those who wish to call attention to the allegedly discriminatory conditions existing at the institution.

D. Parole

It is alleged that statistics will show that Indians are rarely paroled, and that they "discharge" their time (serve entire sentences minus good time) much more than non-Indians.

It is alleged that Indians cannot get paroled to reservation areas and that of the few Indians who make parole none are released to the areas where there are family ties and

other opportunities are the greatest, i.e. to their homes on the reservations of the State. This allegation is made despite pacts between the institution and the Sisseton, Yankton, and Standing Rock Tribes, which provide for parole to the reservation of Indian inmates from those reservations.

E. Work release

It is alleged that Indians cannot obtain work release. Even where they are classified as being eligible for work release they are unable to obtain placement which means that the work release classification becomes meaningless, and that Indian prisoners do not participate in this program.

It is alleged that the failure to obtain work release adversely impacts on parole opportunities for Indians since a good work release record can form a substantial part of the basis for a decision to parole an inmate.

F. Prison industries

It is alleged that there is disparate representation of Indians in prison industries. Claims are that Indians constitute 25 to 30 percent of the prison population, but only about two percent of those who are involved in prison industries.

For those Indians who do obtain jobs within the prison, it is alleged that Indians, with very limited exceptions, cannot obtain the better paying, more useful prison industry jobs. Instead, they will be found in such areas as license plates manufacture or the laundry.

G. Miscellaneous

It is alleged that some of the worst discrimination against Indians occurs in the criminal justice system before they get

to prison. It is alleged that Indians are convicted as felons for such acts as stealing a pack of cigarettes.

Much of an inmate's life in prison is controlled by decisions made by a classifications board. It is alleged that there is not a single Indian in a position to even sit on the revolving membership classification board, and that this failure to be represented constitutes a significant denial of opportunity for Indian inmates.

IV. Statistical Records

Penitentiary officials have been cooperative in supplying the Commission with requested data. Warden Herman Solem assigned his administrative assistant, Walter Leapley, to produce records requested. Records supplied have been placed into Commission files, and some of them have been summarized. A list of the documents provided as of April 26, 1978, is appended to this report.

A. Population analysis

Population data was provided from June 1977, the close of the last fiscal year, up to February 1978. According to the records, at the end of the fiscal year 1977, there were a

Indians. For example, as of February 28, 1978, 61 percent of whites at the penitentiary were first-time offenders while 49 percent of Indian inmates were in that category. This difference is likely to be reflected in other statistics, for example, parole and work release eligibility are tied to the number of felony convictions an inmate has had.

B. Parole

Parole from the institution is not controlled by the administration of the South Dakota Penitentiary, but is under the jurisdiction of the Board of Pardons and Parole of the State of South Dakota. That board is composed of three members plus an executive director. The current executive director is Arthur L. Canary, who has been in that position for 23 years.

A major complaint made by Indian inmates is that the parole system discriminates against Indians. In order to better understand the data supplied on this a brief explanation about the parole process is necessary.

Parole eligibility is largely controlled by statute. Chapter 23-60 of the South Dakota Code establishes varying parole eligibility depending on the age of the offender and the number of felony convictions that offender has accumulated. The eligibility time is computed as a fixed percentage of the sentence, or in the case of an indeterminate sentence a fixed percentage of the earliest possible release date less a standardized calculation for good behavior time. Thus, it is possible to establish an inmate's first parole date when he arrives at the institution. When an inmate comes before the

parole board it has three options. It may either parole the inmate, deny parole, or continue the hearing for any period of time not to exceed seven months. Every eighth month the inmate is automatically entitled to a new parole hearing.

Statistics were supplied to the Commission dating back to January 1977, broken down into three racial categories, white, Indian, and other. For each month, the number of each race of inmates appearing before the parole board is listed, and of those who appeared the number actually paroled is also given. Percentages of the number paroled in each racial group compared to the number who appeared is also calculated. The chart is continued on a monthly basis to March 1978. Statistical totals for the period January 1977 through March 1978, indicate that a total of 37 percent of inmates generally appearing before the parole board are paroled. Of the Indians who appeared before the parole board 33 percent were paroled while of the white inmates appearing before the parole board 39 percent were paroled. Of the 283 paroles granted during that period of time, 65, or 24 percent were granted to Indian inmates. Of the total number of 764 appearances made by inmates before the parole board during this same time period, 198 or 26 percent of the appearances were Indian. These figures are comparable to the prison population by race.

The parole summary by race prepared by Mr. Leapley was apparently derived from the files of the Parole Board. Those records show the names of inmates appearing before the Parole

Board each month and the disposition in each case. Indians are identified with an "I," and for purposes of this study, that designation was accepted without further verification.

With respect to the claim that Indians cannot be paroled to reservation areas, Mr. Canary stated that there are some difficulties arising in this area due to the possibility that tribes may assert their jurisdiction to prevent a parole violator from being returned to the penitentiary. He added, however, that the warden had made arrangements with some of the tribes to allow parole to reservation areas, and that where such agreements existed they were being utilized. There were no readily available statistics on the number of Indians paroled to reservations.

C. Work release

Statistics were presented on the relative numbers and percentages of Indians and other inmates on work release on an annual basis dating back to 1968. For each year the percentage of Indians on work release was calculated. The total number of inmates who have participated in the work release program is 471. Of these, 108, or a total of 22.9 percent are Indians. The lowest percentage for any year during this ten-year period is 6 percent, and the highest is 46 percent Indians. In the last five years the percentage has been relatively constant, varying from a low of 19.8 percent in 1977 to 23.3 percent in 1974.

The work release program is administered by Mr. R.E. McConahie. According to Mr. McConahie, an inmate interested in work release must first be awarded trusty status by the

classification board. This status will allow the inmate to leave the institution for specified purposes, and return to the penitentiary or some other holding facility over night. There are other eligibility criteria as well. First offenders can be granted work release within six months of their first parole eligibility date. A multiple offender must have either had a parole hearing and been granted a continuance (usually a sign that the parole board expects to grant parole at the next hearing) or be within six months of his release date. An inmate who meets these eligibility criteria may submit an application for work release which will be reviewed by a six-person committee. The committee includes the deputy warden, assitant deputy warden, the programs administrator, the executive director of the parole board, Mr. McConahie, and his assistant. None are Indian.

An application may be approved by this group or denied. If denied, no reasons are give. The granting of a work release application does not end the process, but placement must be found for an approved work release inmate. According to Mr. McConahie, most work release is in the Sioux Falls area, although it is possible, and frequently the case that inmates are placed on work release elsewhere in the State. Since work release is designed as a measure to be utilized just prior to parole or release of an inmate, the istitution finds it advisable to release going after they have served their sentence. Mr. McConahie noted that arrangements had been made with the Sisseton, Yankton,

and Standing Rock tribes within the last two years to place work release inmates on reservations where possible. He did admit that this accounted for very few inmate releases (perhaps 10). He said that a great source of work release jobs is through the National Alliance of Businessmen, and these are generally in the Sioux Falls area. He said that work release arrangements with other tribes have not been made yet, but might be. Such arrangements are totally within the discretion of the warden, and the major considerations is the possibility of having an inmate returned if the inmate does not perform successfully in the work release program. The institution does not want to go through the trouble of a court proceeding in order to retrieve an inmate from a tribal authority reluctant to give him up. He said that so far there had been no such problems under the work release agreements made by the warden with the three above-mentioned tribes.

Work release opportunities not only are provided through the institution, but if an inmate can provide an opening into which he can be placed, the institution will use that placement if there are no other complications, such as a job setting inconsistent with the conviction of the inmate. In addition, however, Mr. McConahie readily admitted that if an employer does not want a certain type of inmate, the institution will provide that type of inmate for work release. This may include a request from an employer that a man convicted of a violent crime not be provided to him as a candidate for work release. It may also include racial restrictions. Mr. McConahie's view is that since the

institution is begging for these positions in the first place it is hardly in a position to tell an employer who doesn't want Indians that an Indian, must be taken or a black, or any other inmate the employer may not want. Mr. McConahie said that kind of racial discrimination does occur, but it is very infrequent, especially compared to discrimination based on the type of offense committed.

Mr. McConahie keeps hand-written work release records in his office. He has a journal of work release data which in chronological order names the inmates placed on work release since 1968, identifies the race of that inmate, and indicates how that work release ended, either through parole, discharge, or removal from the program for violations of work release rules. Indian work release participants are designated with the letter "I." Again, no verification was done to determine whether those names marked "I" for Indian actually were Indian, but according to Mr. McConahie that designation is taken directly from papers filled out when the inmate is initially admitted to the institution. Other files kept by Mr. McConahie show the names of inmates who have had their applications granted, including where they were employed, and their gross and net earnings while on work release. There is also a separate file of applications turned down, but with no reasons given. Records on the geographical locations of work release placement are not kept by him, but could be developed. He indicated that work release was limited to the State of South Dakota. The work release program also includes study release to a school, and if that type of

release is granted it would be indicated in the card file.

Mr. McConahie indicated that all wages paid are supposed to be at the going rate for whatever job the inmate is performing on work release, and that all jobs must be full-time because an inmate on work release is required to pay his own way, i.e., the institution will not provide money for clothes, tools, or room and board. An inmate living at the penitentiary while on work release, for example, must pay $3.50 per day for room and board.

D. Discipline

The disciplinary officer for the penitentiary is Captain Benjamin Dearduff. He is in charge of the process through which inmates charged with violations of institutional rules are afforded hearings and prescribed punishment. The hearings are before a disciplinary board consisting of Captain Dearduff, a member of the "treatment" staff, and a member of the corrections staff who is a least a lieutenant in rank. There is no Indian on staff in a position to serve on the disciplinary board.

The most severe punishment is through incarceration in the adjustment center (the "hole") which consists of three levels of individual cells segregated from the general inmate population. The three levels are physically similar, but with each goes a different group of privileges. "Isolation" is the lowest level physically, and it affords those confined to it only the barest necessities of life. The other levels are called "third grade" and finally "top lock."

Sentences for "major" violations typically involve five days in isolation, 15 days in third grade, and an indefinite period in top lock.

The disciplinary board is supposed to review records of those in top lock every 15 days to determine when inmates should be returned to the general population. As of January 1978, prison policy is that no inmate will serve more than 90 days in the hole on any one charge. Prior to this time, sentences to the hole could be and often were for longer periods of time.

Although segregation is the most often used punishment for major rules infractions, reprimands, recreation loss, pay loss, and loss of trusty status are other possibilities. In fiscal year 1977, there were 258 findings of major rules infractions with 202 of those resulting in segretation. Minor infractions are much more frequent. There were 1386 such violations reported by the penitentiary in FY 1977 with 1234 resulting in either a reprimand or a loss of recreation privileges. Major and minor rules violations are listed in prison regulations, but Captain Dearduff explained that he decides whether an alleged infraction is to be treated as major or minor. Factors upon which the determination are made vary, but include such elements as how long the inmate has been in the institution, the severity of the conduct alleged, and the inmate's past record.

Disciplinary records do not include any indication of race. At the request of Commission staff, however, the institution prepared a summary of inmates in the adjustment center from March 1, 1977 to April 18, 1978, broken down by race. In that period there were 336 separate incarcerations involving 136 inmates. Indians were 38 percent of the 136 people and accounted for 41 percent of the number of incarcerations over that period of time. Unfortunately, the statistic does not include information on the comparative lengths of time served by Indians and whites for similar rules infractions, but, with assistance from prison staff, such a statistic could be derived.

Disciplinary proceedings are tape recorded and the tapes are filed by inmate name. Commission staff listened to two disciplinary proceedings involving one inmate known to be associated with the American Indian Movement who had been involved in many disciplinary proceedings. Hearings held in December 1976 and February 1978 for this inmate demonstrated use of a procedure having some similarity to a court of law with evidentiary rules greatly relaxed. The inmate was offered a right to an attorney at his own expense which was not utilized at the 1976 proceeding, and which was withdrawn at the 1978 proceeding after the inmate's attorney, through another member of the bar, requested a third continuance of the case. In the second case, a prison counselor was substituted to represent the inmate. The officer making the accusation in each instance was required

to testify and was subjected to cross-examination. Captain Dearduff assumed the roles of prosecutor and chief judge at the hearing. At one point in the second hearing, he raised his voice at the inmate expressing obvious irritation at the infractions the inmate was alleged to have committed. This include a lecture to the Indian inmate on the meaning of the Indian way of life and what being a "good Indian" should mean in the context of the institution. The tone of this lecture could be compared to that of an irate parent scolding a child.

Punishment in the second case consisted of the usual 5-day isolation, 15 day third grade, indefinite top lock sentence. The sentence for the 1976 infraction was 5 days isolation and 15 days in third grade, but was made to run concurrently with a previous 5-day isolation sentence that had not yet been served. In addition, the inmate's record indicates that even part of this sentence was suspended on the condition that there be no further infractions for 13 days.

General conclusions are not warranted on the basis of this one example. It is possible to say, however, that with respect to this particular inmate the second hearing, including the lecture from a white officer on the meaning of being Indian was demeaning on a cultural basis. AIM affiliation was not directly mentioned in either hearing, but Captain Dearduff volunteered the view, similar to that expressed by the warden, that AIM is seen as a threat to the institution because it organizes Indians within the walls of the penitentiary, and because it keeps the institution under pressure from the outside. These statements tend to lend credence to the view that Indians who are known to be AIM members are subject to particularly close scrutiny by prison authorities. The extent to which discriminatory treatment results in the disciplinary process from this anti-AIM view would, however, require a more thorough study to determine.

E. Employment

The interview with Warden Solem on April 11, 1978, revealed that the prison staff consists of approximately 200 persons, 90 of whom are correctional officers. Mr. Leapley prepared a chart showing the names of Indian employees at the institution occupying full-time positions for the period 1973 through May 1978. According to the chart, a total of 27 minority and female employees have been hired since 1973. Of these, 14 have been Indian, and of the 14 Indian employees, four were on staff when the chart was prepared. The 14 Indians held positions as follows: 2 counselors, 10 correctional officers, 1 maintenance person, and 1 clerk typist. One of the correctional officers who had been employed for four years, the longest continuous period for any Indian, recently quit. The prepared record shows that the next longest period of employment for an Indian is a counselor who lasted two years. Besides these two, only two other Indian employees have stayed for a year or more.

The affirmative action plan for the penitentiary has been supplied to Commission staff. It states as a policy that the penitentiary is an equal opportunity employer, but it says very little about plans to increase minority representation among prison staff. For example, there are no goals or timetables for minoirty hiring expressed in the document. Recruitment of minorities is supposed to be accomplished through "listing of job openings with the South Dakota Employment Agency" and through "letters...to organizations

such as the United Sioux Tribes to encourage...potential employees [to apply]." Dean Hinders, programs adminstrator for the penitentiary,said that institutional representatives have spoken with representatives of the Unties Sioux Tribes, the Dakotah Yapaha Club, and the American Indian Services Organization to encourage Indian recruitment. Representatives of the latter two organizations claim that the recruitment effort could not be sincere since they have never received notifications of job openings at the penitentiary. A representative of United Sioux Tribes, which has supplied CETA slots to the institution,remarked that the penitentiary has failed to place these employees on the State payroll when their CETA funding period expired despite the fact that permanent jobs were available.

The rapid turnover among minority employees at the penitentiary is attributed by the warden to their inability to "take the heat." Program Administrator Hinders indicated that the "heat" for Indian employees comes from Indian inmates who seek special treatment from them which they cannot honor under institutional rules, and cannot turn down without severe criticism form the inmates. A guard who was terminated indicated in affidavits that the pressure came from other correctional officers who harassed him because he was Indian. The futility of his attempts to get the prison adminstration to stop this harassment forms part of the basis for a discrimination complaint he has filed. This is one of three discrimination complaints currently on file with the Sioux Falls Human Relations Commission. The others have been brought by a black

and a woman. Together they indicate that there is at least a perception of institutional discrimination which should be addressed.

F. Other Areas

Other inmate data which was not further checked includes the number and percentage of Native American inmates participating in academic programs as of March 27, 1978 (of the 107 participants, 44 are listed as Native Americans for a percentage of 41 percent); inmates assigned to work in prison industries from the period of February 25, to March 24, 1978 (this record indicates that 84 of the 331 inmates assigned to prison industries, or 25 percent, are Indian, but no breakdown of jobs they hold is provided); percentages of medical appointments for Native Americans are shown broken down by doctor, eye doctor, dental. No further check was done on these statistics.

Preliminary Conclusions

Employment

Employment of minority individuals is key to making inroads into perceptions of institutional discrimination. Employment of minority individuals makes possible minority representation on such bodies as the classification board and the disciplinary board. It would also result in a staff with more cutural understanding of minority inmates that in turn could greatly lessen racial tension within the inmate population. Evidence indicates that the penitentiary has not made a serious attempt to hire or maintain minority staff members. The small number of minority individuals hired; the

rapid turnover; the fact that no Indian custodial officer has ever reached the rank of sergeant; the non-receipt of job opening announcements by Indian organizations; the failure to turn CETA employees into full-time State employees; and the alleged failure to protect minority employees from harassment by other employees all point to this conclusion.

If the institution is to eradicate the impressions, widely held by inmates, that it does not treat Indians fairly it will have to assume an affirmative policy toward hiring and keeping minority employees.

Discipline

Though complaints are legion, insufficient examination of the disciplinary process prevents reaching any conclusion as to whether it operates in a racially discriminatory manner. Complaints of harassment and the disproportionately high numbers of Indian adjustment center incarcerations provide a basis for concluding that this process should be subjected to further independent examination.

Work Release

The statistics supplied by the penitentiary say that Indian inmates do obtain a fair share of work release placements. The practice of acceding to employer conditions requiring racially discriminatory placements should be abandoned as obviously illegal, and because it is a State sanctioning of a congressionally outlawed employment practice which may justify employment discrimination in the civilian job market in the mind of an employer participant.

Visitation

Although Commission staff has been offered complete access to the penitentiary, the same cannot be said for other individuals in the community. Although the warden has opened prison doors for tribal feast days and ceremonies, some Indian spiritual leaders, and others, it appears that many who have dared to criticize prison policy have been cut from visiting rolls or have had privileges curtailed. Preventing the local community from critically reviewing the institution exacerbates fears that violations of inmates rights are occurring. In this community, in which many such fears have been expressed to Commission staff, such outside input should be encouraged so that the institution can prove that it does not discriminate if that is, in fact, the case. Limiting attorney access to the penitentiary to members of the South Dakota bar or making access more difficult for out of state attorneys is at best a poor policy, and in some cases could constitute a denial of a right to effective legal representation.

ATTACHMENT

RECORDS SUPPLIED TO THE COMMISSION ON CIVIL RIGHTS

APRIL 25, 1978

Monthly Analysis of Population

Deputy's Report

Work Release Statistics

Chronology of Native American Programming

Adjustment Center - Roster

Institution Guide to Living

Disciplinary Board Forms

Trusty Statistics

Staff Training Curriculum

National Alliance of Business Awareness

Humanities Program

Institutional Work and Educational Program Data

Medical, Dental and Optometrist Statistics

Parole Statistics

GPO 931 449